

# THE CASE FOR AN OPEN BAR: WHY THE SUPREME COURT MUST ESTABLISH A PUBLIC BAR MEMBERSHIP ROLL

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INTRODUCTION

The Bar of the Supreme Court of the United States (“Supreme Court Bar”) consists of a largely unorganized group of attorneys licensed to argue cases before the highest court in the land. However, if it is any consolation, the ramshackle nature of this entity appears to have existed since the beginning of our republic. Under the Articles of Confederation, there was no Supreme Court, let alone a Supreme Court Bar.<sup>1</sup> Instead, the Congress of the Confederation or its designees were authorized to settle high-level legal disputes.<sup>2</sup> The Constitution changed this structure by establishing the U.S. Supreme Court,<sup>3</sup> which met for the first time at “The Exchange” in New York City in 1790<sup>4</sup> and admitted Elias Boudinot as the first individual licensed to practice before the Court during its first days of existence.<sup>5</sup> The Court moved to

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1. ARTICLES OF CONFEDERATION of 1781, art. IX (“The united states in congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states . . . .”); see also Christine Sellers, *The Articles of Confederation: The First Constitution of the United States*, LIB. OF CONG. (Sept. 16, 2011) (“The Articles provided for no permanent national judiciary, although the Congress was given sole jurisdiction in matters of boundary disputes between states . . . .”), <https://blogs.loc.gov/law/2011/09/the-articles-of-confederation-the-first-constitution-of-the-united-states/> [<https://perma.cc/WBQ8-ZVNV>]; AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 210 (2005) (“Here, the Constitution broke with prior English and American practice.”); David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 464–65 (1991) (contrasting the Ninth Randolph Resolution offered at the Constitutional Convention with the Articles of Confederation, “which authorized no permanent judiciary at all”). See generally Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST. 253 (1967) (discussing judicial systems of the Pre-Revolutionary Era).

2. ARTICLES OF CONFEDERATION of 1781, art. IX.

3. U.S. CONST. art. III, § 1.

4. U.A.L., *The Supreme Court—Its Homes Past and Present*, 27 A.B.A. J. 283, 283 (1941); *Homes of the United States Supreme Court*, SUP. CT. HIST. SOC’Y, <https://supremecourthistory.org/homes-of-the-supreme-court/> [<https://perma.cc/6FVG-Y7BF>].

5. Erwin C. Surrency, *The Minutes of the Supreme Court of the United States 1789–1806*, 5 AM. J. LEGAL HIST. 67, 71 (1961); see also James R. Perry & James M. Buchanan, *Admission to the Supreme Court Bar*,

Philadelphia in 1791 and then to the District of Columbia in 1801.<sup>6</sup> It met regularly, though not exclusively, in various spaces within the U.S. Capitol Building between 1801 and 1935, at which point the Court gained its own permanent building in Washington, D.C. where it has remained ever since.<sup>7</sup> The first words publicly uttered in the new courtroom were reportedly those of Chief Justice Charles Evans Hughes, who ostensibly began the Court's first sitting in its present location by asking "Are there any admissions?"<sup>8</sup>

If the Supreme Court may be considered one of a series of afterthoughts in American governmental design, then the Supreme Court Bar is still very much in formation. It does not hold general membership meetings, nor does it possess governance rules.<sup>9</sup> The Supreme Court Bar has no formal leadership structure, ongoing dues, or events.<sup>10</sup> It also lacks independent continuing legal education requirements, its own building, website, and bar association.<sup>11</sup> The Bar's first member was admitted in 1790,<sup>12</sup> its first black member in 1865,<sup>13</sup> and its first female member in 1879.<sup>14</sup>

*1790–1800: A Case Study of Institutional Change*, 1983 YEARBOOK: SUP. CT. HIST. SOC'Y 10, 11–12 (discussing the first rules and procedures established for admitting members to the Supreme Court Bar in addition to the fact that the entire first class of admitted attorneys practiced in New York City); Boudinot, Elias, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/People/Detail/9640> [<https://perma.cc/SEU5-DGZE>] (noting Boudinot's role as President of the Confederation Congress, a member of the First, Second, and Third Congresses, and Director of the U.S. Mint from 1795 until 1805).

6. U.A.L., *supra* note 4, at 286–87; *see also* Act of Feb. 27, 1801, ch. 15, 2 Stat. 103 (permitting the inference that the Supreme Court met in modern-day Washington, D.C. for the first time just prior to the jurisdiction being placed under congressional control); U.S. CONST. art. I, § 8, cl. 17.

7. U.A.L., *supra* note 4, at 289; Catherine Hetos Skefos, *The Supreme Court Gets a Home*, 1976 YEARBOOK: SUP. CT. HIST. SOC'Y 25, 29.

8. Erwin N. Griswold, *Supreme Court Bar*, in 5 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2610, 2613 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

9. *See* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 20.1 (19th ed. 2019); *cf.* DISTRICT OF COLUMBIA BAR BYLAWS § 2.01 (2022) (demonstrating how a strong, self-governing bar can be structured).

10. *See* SHAPIRO ET AL., *supra* note 9, § 20.1 ("There is no permanent organization or formal leadership.").

11. *See, e.g., Supreme Court Bar*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/filingandrules/supremecourtbar.aspx> [<https://perma.cc/8QS6-985F>]; *see also* SHAPIRO ET AL., *supra* note 9, § 20.1; *cf. The Society's Mission*, SUP. CT. HIST. SOC'Y, <https://supremecourthistory.org/supreme-court-historical-society-mission/> [<https://perma.cc/BT73-82WV>] (showcasing that the nearby Supreme Court Historical Society boasts officers, staff, a building, dues, and events).

12. Perry & Buchanan, *supra* note 5, at 11.

13. Clarence G. Contee, *The Supreme Court Bar's First Black Member*, 1976 YEARBOOK: SUP. CT. HIST. SOC'Y 1976 82, 82 (detailing the incredible story of Dr. John S. Rock, a teacher, dentist, doctor, and lawyer who waited for Chief Justice Roger B. Taney to die so that he could be admitted to the Supreme Court Bar on Senator Charles Sumner's motion in the last one-hundred days of the Civil War, prior to being arrested on his way back to Boston, and who died less than two years later, listing his Supreme Court Bar admission on his tombstone).

14. Mary L. Clark, *The First Women Members of the Supreme Court Bar, 1879-1900*, 36 SAN DIEGO L. REV. 87, 87 (1999) (detailing how Belva A. Lockwood, who later became the first constitutionally eligible woman to run for president, gained admission to the Supreme Court Bar on her second motion only after successfully lobbying Congress to pass a law allowing women to join said bar); *see also* Julie Silverbrook, *A Brief History of Women Advocates at the U.S. Supreme Court*, 39 APP. PRAC. 1 (2020) (discussing early antecedents

Yet, despite more than two centuries of existence and a history that mirrors that of our great nation, the Supreme Court Bar barely exists in practice, outside of an unorganized group of attorneys licensed by the Supreme Court to argue cases before that hallowed body.

While there is no formal leadership structure to the Supreme Court Bar, there nonetheless exists a select group of attorneys who argue a disproportionately large number of cases before the Court each term.<sup>15</sup> Elite cliques within the Supreme Court Bar have existed in decades past<sup>16</sup> and sitting Members of Congress themselves used to regularly argue cases to supplement their income.<sup>17</sup> However, for many years the only parties capable of maintaining a Supreme Court practice were the Office of the Solicitor General along with a few notable New York law firms and public interest practitioners.<sup>18</sup> This led to a situation in which Supreme Court expertise was generally lacking and obscure. In fact, by the mid-1980s Chief Justice William Rehnquist was so distraught with the advocates before him that he proclaimed, “there is no such Supreme Court bar at the present time.”<sup>19</sup>

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to female Supreme Court advocates); Tammy A. Sarver, Erin B. Kaheny & John J. Szmer, *The Attorney Gender Gap in U.S. Supreme Court Litigation*, 91 JUDICATURE 238 (2008) (noting that Arabella A. Mansfield, the first woman granted a law license in the United States, only accomplished this feat in 1869); Stephen M. Shapiro, *Rebels at the Supreme Court*, 15 LITIGATION 45 (1989) (discussing the first black, female, and former Confederate members of the Supreme Court Bar); Marlene Trestman, *Willebrandt, Carlross, Margolin and Rosenberg: Four 20th Century Superstars of the Supreme Court Bar*, 101 WOMEN L.J. 19 (2016) (focusing on the impact of four specific female advocates); Clare Cushman, *Women Advocates before the Supreme Court*, 26 J. SUP. CT. HIST. 67 (2001) (recounting several historic female firsts and presenting compelling data on female representation).

15. H.W. Perry, Jr., *The Elitification of the U.S. Supreme Court and Appellate Lawyering*, 72 S.C. L. REV. 245, 247 (2020) (“[A] small elite group of lawyers has come to dominate advocacy before the Court.”); Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA L. REV. 1901, 1915–16 (2016) (“Although there are technically over 262,000 members of the Supreme Court Bar, the vast majority of cases now feature a select group of fewer than 100 lawyers who are repeat players at the Court.”); Yvette Borja, *How Elite Lawyers Took Over the Supreme Court’s Docket*, BALLS & STRIKES (Feb. 2, 2022), <https://ballsandstrikes.org/legal-culture/elite-supreme-court-lawyers-docket-takeover/> [<https://perma.cc/9876-XRXL>] (“[A]lthough this group of lawyers submits less than 1 percent of petitions the Court considers, they end up participating in nearly half the cases the Court takes up.”); Adam Liptak, *Specialists’ Help at Court Can Come with a Catch*, N.Y. TIMES (Oct. 9, 2010), <https://www.nytimes.com/2010/10/10/us/10lawyers.html> [<https://web.archive.org/web/20220315171114/https://www.nytimes.com/2010/10/10/us/10lawyers.html>].

16. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1491–92 (2008).

17. Kedar S. Bhatia, *Top Supreme Court Advocates of the Twenty-First Century*, 2 J.L. 561, 564 (2012).

18. Lazarus, *supra* note 16, at 1497; *see also* Seth P. Waxman, *Solic. Gen. of the U.S., Presenting the Case of the United States as It Should Be: The Solicitor General in Historical Context* (June 1, 1998) (describing the history of the Office of Solicitor General, which was only founded in 1870) (<https://perma.cc/R79E-ARVX>); Matthew L. Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59, 70 (2010).

19. Lazarus, *supra* note 16, at 1497; *see also* John G. Roberts Jr., *Oral Advocacy and the Re-Emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 78 (2005) (recounting the disappointed reaction of numerous Justices to the caliber of the Supreme Court Bar); Bhatia, *supra* note 17, at 565 (quoting future Associate Justice Felix Frankfurter who expressed similar sentiments in the 1930s, to wit, “Since the litigation before the Court is now conducted not by a specialized Supreme Court bar, the Court during the last few years has been engaged in educating inexperienced lawyers in the mysteries of federal jurisdiction.”); Felix Frankfurter & James M.

Ironically, the highly specialized group of Supreme Court practitioners that dominates today's arguments was forming at the very time that Rehnquist uttered this remark.<sup>20</sup> As Professor Richard J. Lazarus makes clear in his seminal work on the subject, the modern re-emergence of a professional Supreme Court Bar in the mid-1980s was primarily due to industry groups attacking government regulation as well as the Court's diminishing caseload.<sup>21</sup> The Chamber of Commerce's strategy of challenging "anti-business" laws through its affiliates was, if not the actual brainchild of future Justice Lewis Powell, at the very least consistent with his ultra-conservative 1971 memorandum to the Chamber entitled "Attack on American Free Enterprise System."<sup>22</sup> Similarly, during this time the Supreme Court began dramatically reducing its caseload due to Congress passing the Supreme Court Case Selections Act and the departure of Justice Byron White, who consistently pushed the Court to hear more cases, among other reasons.<sup>23</sup> The newfound role of private industry in Supreme Court litigation and the Court's diminishing caseload were both in keeping with the Reaganist ideal of economic deregulation.

These twin factors created incentives for large law firms to develop specialized Supreme Court practices in the mid-1980s in large measure to attract and retain

Landis, *The Business of the Supreme Court at October Term, 1930*, 45 HARV. L. REV. 271, 280 (1931) (quoted by Bhatia).

20. Roberts, *supra* note 19, at 68 ("Over the past generation, roughly the period since 1980, there has been a discernible professionalization among the advocates before the Supreme Court, to the extent that one can speak of the emergence of a real Supreme Court bar."); Jeremy Pilaar, *The Making of the Modern Supreme Court Bar: How Business Created a Solicitor General for the Private Sector*, 117 MICH. L. REV. ONLINE 75, 75 (2018), [https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1023&context=mlr\\_online](https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1023&context=mlr_online) [<https://perma.cc/N5ZP-YGYJ>] ("Since 1985, a small cadre of private attorneys has come to dominate Court advocacy."); Tom Goldstein, *The Expansion of the "Supreme Court Bar"*, SCOTUSBLOG (Mar. 2, 2006, 11:32 AM), <https://www.scotusblog.com/2006/03/the-expansion-of-the-supreme-court-bar/> [<https://perma.cc/C4GY-FLFP>] ("It has seemed to me for some time that a specialized Supreme Court bar has been rapidly emerging.").

21. Lazarus, *supra* note 16, at 1503; *see also* Pilaar, *supra* note 20, at 88; Michael Heise et al., *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1568 (2020) (depicting the Court's diminishing caseload between 1940 and 2017).

22. Lazarus, *supra* note 16, at 1505; *see also* Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Dep't of Educ. (Aug. 23, 1971) (available at <https://perma.cc/Z3P6-XSFQ>).

23. Lazarus, *supra* note 16, at 1508; Roberts, *supra* note 19, at 75 ("I think the phenomenon is largely explained by the abolition of the Court's mandatory appellate jurisdiction in 1988, and perhaps by the departure from the Court of Justice Byron R. White [who] constantly advocated having the Court hear more cases . . ."); *see also* Stephen M. Shapiro, *Certiorari Practice: The Supreme Court's Shrinking Docket*, 24 LITIGATION 25, 25 (1998) ("[M]ost restrictive period known to a generation of lawyers."); Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, N.Y. TIMES (Dec. 7, 2006), <https://www.nytimes.com/2006/12/07/washington/07scotus.html> [<https://web.archive.org/web/20220712053205/https://www.nytimes.com/2006/12/07/washington/07scotus.html>] (showing that 2006 term had lowest number of signed opinions since 1953 and fewer than half the number of decisions as the mid-1980s); Oliver Roeder, *The Supreme Court's Caseload Is On Track To Be The Lightest in 70 Years*, FIVETHIRTYEIGHT (May 17, 2016, 9:00 AM), [https://perma.cc/ST2Q-9AGW](https://fivethirtyeight.com/features/the-supreme-courts-caseload-is-on-track-to-be-the-lightest-in-70-years/)] (illustrating dramatic decline in cases beginning in the 1980s); Supreme Court Case Selections Act, Pub. L. No. 100-352, 102 Stat. 662 (1988) (codified in scattered titles of U.S.C.).

industry clients.<sup>24</sup> As Lazarus argues, the Court hearing fewer cases increased the value of individuals who could make expert arguments against granting certiorari in addition to raising the bar for those petitions that were granted.<sup>25</sup> This led large law firms that often represented big business to compete for former Supreme Court law clerks and litigators from the Office of Solicitor General in order to charge heftier fees and enhance their own prestige.<sup>26</sup> The demand for lawyers from these particular backgrounds strengthened the homogeneity of the Supreme Court Bar's most valued members,<sup>27</sup> leading many commentators to complain about letterhead bias,<sup>28</sup> docket capture,<sup>29</sup> and lack of diversity within the upper echelons of the Supreme Court Bar, if not within the Supreme Court Bar as a whole.<sup>30</sup>

One ramification of the Supreme Court Bar's *laissez faire* condition is lack of adequate information as to the composition of the Supreme Court Bar. Unlike most federal appellate bars, more than twenty federal district bars, and nearly every state bar, the Supreme Court Bar does not maintain a centralized, public, and easy-to-use database or roll of its bar membership.<sup>31</sup> This creates the possibility that the Supreme

24. Lazarus, *supra* note 16, at 1503; *see also* Pilaar, *supra* note 20, at 88; Larsen & Devins, *supra* note 15 (demonstrating the role that law firms play in generating *amicus* briefs and the economics behind such actions).

25. Lazarus, *supra* note 16, at 1510–12.

26. *Id.* at 1498–99 (discussing how former Reagan Solicitor General Rex Lee joining Sidley Austin in 1985 started this arms race); Sundquist, *supra* note 18, at 69; Goldstein, *supra* note 20 (“In roughly the 6 years since 1999, an extraordinary 15 additional firms have attempted to establish a Supreme Court practice, a dramatic expansion . . . .”); Pilaar, *supra* note 20, at 88 (“Once in motion, the elite bar took on a life of its own . . . . Much of this expansion was driven by prestige.”); *cf.* Lazarus, *supra* note 16, at 1497 (describing similar, albeit more scaled down dynamics pertaining to numerous former Solicitors General joining New York firms in the early twentieth century).

27. *See, e.g.*, Lazarus, *supra* note 16, at 1554 n. 282 (expressing concern for the impact of a business-oriented Supreme Court Bar on diversity); Sarver et al., *supra* note 14, at 250 (“Women are significantly less likely to participate in Supreme Court litigation as justices, clerks, and litigators.”); Tony Mauro, *At the Supreme Court, Where Are the Women Advocates?*, THE NAT’LLJ. (Oct. 2, 2019, 12:10 PM), <https://www.law.com/nationallajournal/2019/10/02/at-the-supreme-court-where-are-the-women-advocates/>.

28. Craig Becker, Comment Letter to the Presidential Commission on the Supreme Court of the United States (July 16, 2021), [https://downloads.regulations.gov/PCSCOTUS-2021-0001-0267/attachment\\_1.pdf](https://downloads.regulations.gov/PCSCOTUS-2021-0001-0267/attachment_1.pdf) [<https://perma.cc/F7HX-LURF>]; *see also* Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J. ONLINE 89 (2009), <https://www.yalelawjournal.org/forum/docket-capture-at-the-high-court> [<https://perma.cc/4KWS-6GSJ>] (“[F]or no reason more than the appearance of the name of the advocate on the cover of the brief, their petitions will receive more attention and respect. This is not an incidental advantage.”).

29. Lazarus, *supra* note 28.

30. KEVIN T. MCGUIRE, THE SUPREME COURT BAR: LEGAL ELITES IN THE WASHINGTON COMMUNITY 29 (Kermit Hall & David O’Brien eds., 1993) (“The typical Supreme Court lawyer is a forty-five-year-old, Harvard-educated private practitioner, based in New York, Washington, or Chicago. He specializes in appellate litigation and has at least a half dozen Supreme Court cases to his credit. He is a liberal white Protestant, with strong attachment to the Democratic party.”); Austin Carsh, *Riddled with Exclusivity: The Homogeneity of the Supreme Court Bar in the Roberts Court*, in OPEN JUDICIAL POLITICS 4 (2d ed. 2021).

31. Harry William Baumgarten, *Open the Bar: Toward Greater Supreme Court Transparency*, GEO. PUB. POL’Y REV. ONLINE (2020), <https://gppreview.com/2020/11/28/open-bar-toward-greater-supreme-court-transparency> [<https://perma.cc/Y2MS-K59D>] (while technical differences may exist between a roster and roll, this article treats the two forms of listing names in the same manner, since either would be preferable to the status quo).

Court Bar's membership records may be inaccurate or else inequitably skewed in favor of demographic trends that are hidden from proper scrutiny.<sup>32</sup> Lack of transparency also makes it difficult for the Supreme Court Bar to establish a bar association capable of serving as an internal check on the Supreme Court itself and members of its bar.<sup>33</sup> Yet, the lack of transparency as to the Supreme Court Bar's composition may be easily solved at minimal cost through congressional or judicial action with the support of the Executive Branch and civil society organizations.<sup>34</sup>

This Article examines the Supreme Court Bar's membership disclosure policy. Part I describes the Supreme Court's method of publishing its bar membership. Part II examines how comparable institutions disclose their membership rolls. Part III contemplates the potential effects of the Supreme Court Bar's transparency deficit. Part IV considers reasons for this lack of transparency. Part V highlights concerns about the Supreme Court Bar that were expressed by and before the Presidential Commission on the Supreme Court of the United States. Part VI offers solutions to the Supreme Court Bar's inability to create a public membership roll. Finally, the Conclusion summarizes the concerns expressed in this Article and offers hope for the future.

## I. THE SUPREME COURT BAR'S PRESENT FAILED SYSTEM

For most of its members, admission to the Supreme Court Bar is a status symbol, rather than a strong element of their practices.<sup>35</sup> This is because it is relatively easy to gain entry to the Supreme Court Bar, low cost, and the benefits are attractive.<sup>36</sup>

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32. Leah M. Litman, Melissa Murray, & Katherine Shaw, *A Podcast of One's Own*, 28 MICH. J. GENDER & L. 51, 58 (2021) (discussing the demographic skew of the Supreme Court Bar); see also Griswold, *supra* note 8, at 2611 ("There is no published list of the members of the bar of the Supreme Court. *Indeed, no one knows how many members there are.*" (emphasis added)).

33. See, e.g., *Mission & Vision: The Federal Circuit Bar Association Charitable and Educational Fund*, FED. CIR. BAR ASS'N, <https://fedcirbar.org/About-FCBA/Who-We-Are/Mission-Vision> [<https://perma.cc/64T6-6MBD>] (demonstrating the role of a high-level bar association).

34. See *infra* Part VI.

35. Lazarus, *supra* note 16, at 1491 ("Strictly speaking, to be a member of the Supreme Court Bar today is not a big deal. Although attorneys routinely tout their membership in the Bar as a meaningful credential of distinction, the Supreme Court Bar is one of the least discerning clubs."); Liptak, *supra* note 15 ("Lots of lawyers are members of the Supreme Court bar in a nominal way."); Adam Feldman, *Who Wins in the Supreme Court? An Examination of Attorney and Law Firm Influence*, 100 MARQ. L. REV. 429, 430 n.3 (2016) ("The Supreme Court Bar of experienced attorneys is distinguishable from the Bar of the Supreme Court which has thousands of members and which has minimal criteria to join."); see also Matthew Reid Krell, *Raising the Bar: Elite Advocacy in Supreme Court Public Interest Litigation*, 34 J. LEGAL PRO. 275, 282 (2010) (going so far as to discount Supreme Court Bar members who have argued fewer than ten cases from constituting members of the Bar).

36. Lazarus, *supra* note 16, at 1491; see also Kimberly Strawbridge Robinson, *Supreme Court Bar Admission Has Its Perks*, BLOOMBERG L. (May 18, 2016), <https://news.bloomberglaw.com/business-and-practice/supreme-court-bar-admission-has-its-perks/>; Sahr A.M. Brima, *Admission to U.S. Supreme Court Bar*, AM. BAR ASS'N (Feb. 26, 2020), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practic>

However, once admitted, members have no clear manner with which to become substantively engaged in the Bar or meet fellow members, other than to litigate cases before the Court. Much of this void could be addressed through the creation of a formal Supreme Court Bar Association. Yet, the Supreme Court's failure to establish a public membership database or roll makes forming a Supreme Court Bar Association more difficult than necessary and deters the Court from being checked in a more meaningful way by those licensed to argue before it.

### A. Admission to Practice

Gaining admission to the Supreme Court Bar is a relatively straightforward matter. Applicants must first meet the requirements of Supreme Court Rule 5.<sup>37</sup> This rule possesses the following three prongs: (1) an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; (2) an applicant must not have been the subject of any adverse disciplinary action pronounced or in effect during that three-year period; and (3) an applicant must appear to the Court to be of good moral and professional character.<sup>38</sup> To substantiate these measures, applicants must file with the Clerk a certificate of good standing from the relevant qualifying judicial body and an application for admission to practice containing a personal statement, statement of two sponsors, and oath of admission, among other sections.<sup>39</sup> Applicants are further required to pay a one-time \$200 admission fee that is applied toward the purchase of a certificate of admission to the Supreme Court Bar.<sup>40</sup> The entire application is only two pages.<sup>41</sup>

Notwithstanding the simplicity of these admission requirements, alternatives for limited practice before the Supreme Court nonetheless exist. For example, Rule 6 allows attorneys to argue particular matters before the Court on a *pro hac vice* basis if they have been admitted to the highest court of a qualifying entity for less than three years and appear to be of good moral and professional character.<sup>42</sup> This rule also permits *pro hac vice* representation for attorneys licensed in foreign states.<sup>43</sup> Moreover, Rule 9 waives the admission requirement for attorneys appointed under federal statutes, such as those representing indigent clients accused of criminal

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e/2020/admission-to-us-supreme-court-bar/ [https://perma.cc/B4F7-7YXJ].

37. SUP. CT. R. 5; see also SHAPIRO ET AL., *supra* note 9, § 20.

38. Sup. Ct. R. 5.1.

39. *Id.* r. 5.2; see also CHARLES HENRY BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT OF THE UNITED STATES, at vii–viii, 114–23 (1942) (recounting the evolution and formalization of Supreme Court Bar admission procedures during the early 20th century); Pery & Buchanan, *supra* note 5 (discussing the creation of the Supreme Court Bar and the first questions it faced).

40. Sup. Ct. R. 5.5.

41. SUP. CT. OF THE U.S., CLER-0079-5-07, APPLICATION FOR ADMISSION TO PRACTICE (n.d.), https://www.supremecourt.gov/bar/barapplication.pdf [https://perma.cc/747A-QD4Z].

42. SUP. CT. R. 6.1; see also *id.* r. 6.3 (requiring *pro hac vice* representation on counsel of record's motion).

43. *Id.* r. 6.2.



conduct.<sup>44</sup>

The Supreme Court Bar's admission requirements compare strikingly favorably to those of other federal courts. On the permissive side of the spectrum, the Third Circuit Court of Appeals allows for any attorney licensed in the United States to request the court clerk's sponsorship to its bar.<sup>45</sup> The Third Circuit imposes no practice duration requirement on admission, even as it requires an official signature on the application form.<sup>46</sup> On the more restrictive side of the spectrum, the U.S. District Court for the Eastern District of Pennsylvania only admits attorneys licensed to practice law in Pennsylvania, unless they work for the federal government.<sup>47</sup> Somewhere in the middle of this spectrum is the U.S. District Court for the Southern District of New York, which only requires that an applicant be licensed to practice law in at least one of the enumerated jurisdictions, has the backing of one sponsor, and submits a notarized application.<sup>48</sup> Admission to the Supreme Court Bar is most akin to this middle-of-the-road approach.

### *B. Benefits of Membership*

Once admitted, Supreme Court Bar members benefit from a number of privileges. First and foremost, members of the Supreme Court Bar are licensed to practice before the Court.<sup>49</sup> Second, Supreme Court Bar members obtain certificates of admission that they may hang in their homes or offices.<sup>50</sup> Third, such members need not wait in the public line to attend oral arguments and may utilize the Supreme Court Library.<sup>51</sup> Fourth, Supreme Court Bar members may be able to charge higher fees, obtain promotions, or else enhance their prestige as a result of their membership in said bar.<sup>52</sup>

Yet, perhaps more notable than what the Supreme Court Bar offers is what it does not offer. In contrast to many other bars, the Supreme Court Bar does not meet as a group, nor does it self-govern.<sup>53</sup> It has no formal leadership structure, ongoing

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44. Sup. Ct. R. 9.1.

45. U.S. CT. OF APPEALS FOR THE THIRD CIR., OFF. OF THE CLERK, INSTRUCTIONS FOR ADMISSION (n.d.), <https://www2.ca3.uscourts.gov/legacyfiles/ADMISSIO.pdf> [<https://perma.cc/9MPY-9BY3>]; see also 3D CIR. R. 46.1.

46. U.S. CT. OF APPEALS FOR THE THIRD CIR., OFF. OF THE CLERK, *supra* note 45.

47. E.D. Pa. R. 83.5.

48. S.D.N.Y. R. 1.3(a).

49. Robinson, *supra* note 36; see also SHAPIRO ET AL., *supra* note 9, at § 20.1.

50. Brima, *supra* note 36.

51. *Id.*

52. Casey C. Sullivan, *How Much Do Top Supreme Court Lawyers Make? An Absurd Amount*, FINDLAW (Aug. 25, 2015), <https://www.findlaw.com/legalblogs/supreme-court/how-much-do-top-supreme-court-lawyer-s-make-an-absurd-amount/> [<https://perma.cc/5M4E-QSP2>].

53. See sources cited *supra* note 9.

dues, or events.<sup>54</sup> It also has no independent continuing legal education requirement, building of its own, newsletter, website, or bar association.<sup>55</sup> Supreme Court Bar membership is therefore more akin to holding a driver's license than being part of an organized group of elite practitioners or having a meaningful say in the standards of the Supreme Court.

### C. Recordation of Members

Despite the Supreme Court Bar having operated for centuries—or perhaps because of this fact—the Supreme Court Bar's membership roll remains highly elusive, if even existent. No public centralized list of Supreme Court Bar members appears to have ever been published.<sup>56</sup> Instead, the Supreme Court lists new and disciplined members of its bar each October in the *Journal of the Supreme Court of the United States*, with regular, though not daily, updates throughout the year.<sup>57</sup> This annual publication is generally 500 to 1,000 pages long and catalogues all of the Supreme Court's actions from the prior year in chronological order.<sup>58</sup> Among these events are attorney admissions and disciplinary actions in accordance with other events that transpired in any given day.<sup>59</sup> The *Journal* is therefore more similar to the *Congressional Record*, than the public attorney membership rolls or searchable databases maintained by other courts throughout the country.

Most importantly, the *Journal* does not list all attorneys presently admitted to the Supreme Court Bar.<sup>60</sup> Rather, it only lists new attorney admissions and disciplinary actions from a specifically defined twelve-month timeframe.<sup>61</sup> Furthermore, it does not account for attorney retirements or deaths.<sup>62</sup>

To obtain something approaching a complete list of attorneys presently admitted to the Supreme Court Bar, one would have to go page-by-page through dozens of editions of the *Journal*, adding and subtracting new and disbarred members until one arrived at a list of attorneys that matched the presumed official roll of the Supreme

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54. *Id.*

55. *Id.*

56. *See, e.g.*, Griswold, *supra* note 8, at 2611 (“There is no published list of the members of the bar of the Supreme Court. Indeed, no one knows how many members there are.”).

57. *Journal*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/orders/journal.aspx> [<https://perma.cc/GT66-9-RPKU>] (“New Journal entries are posted on this website about two weeks after the event.”).

58. *Id.* (discernible by opening and examining the featured journals).

59. *Id.*

60. *See id.*

61. *Id.*

62. *Id.*, *see also* Griswold, *supra* note 8, at 2611 (“[T]here is no record of those who have died or retired from active practice (though the list does record 800 names of lawyers who have been disbarred).”); SHAPIRO ET AL., *supra* note 9, § 20.1 (“[T]he rolls of the Court give no clue as to how many Bar members have died, retired, resigned, or otherwise ceased to be engaged in any form of active practice before the Court.”); MCGUIRE, *supra* note 30, at 30 (“Unfortunately, though, the Court does not purge its rolls. Thus, the size of its actual current membership cannot be established, although it is unquestionably smaller than these figures suggest.”).

Court Bar.<sup>63</sup> This task would no doubt prove time-consuming and laborious, while also failing to provide a verifiably accurate membership roll, since even the present number of admitted attorneys is difficult to obtain and not public.<sup>64</sup> This also would not even account for retired and deceased members who should be removed from the roll.<sup>65</sup>

A reasonable reader might think that the Court could at least provide a membership roll to researchers upon request. Yet, this author has been advised in writing by the Supreme Court Public Information Office that “there is no Bar membership roll to provide.”<sup>66</sup> This response was issued even after this author self-identified as a member of the Bar of the Supreme Court of the United States whose academic article on the subject was already accepted for publication.<sup>67</sup> The lack of a membership roll seemed unlikely and was contradicted by a subsequent self-initiated correspondence with the Supreme Court Admissions Office which stated instead that the “Court’s full membership roll is not public information” and that the total number of presently admitted members of the Supreme Court Bar stands at 316,425 attorneys.<sup>68</sup> If accurate, this would mean that roughly twenty-four percent of American lawyers are presently members of the Supreme Court Bar,<sup>69</sup> which seems implausible and is more likely the result of inaccurate rolls that include a sizeable number of retired and deceased members.<sup>70</sup>

The Supreme Court’s existing method of publishing its bar membership is therefore opaque and piecemeal. It shields the Supreme Court Bar from public scrutiny and inhibits members of the Bar from organizing themselves into a cohesive body capable of serving as an internal check upon the Supreme Court itself. This is not in keeping with the democratic ethos of transparency which the Supreme Court should seek to promote, rather than circumvent. The Supreme Court Bar’s opacity also likely helps perpetuate systems of inequality that impede people from diverse

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63. See *Journal*, *supra* note 57.

64. See *id.*, see also Griswold, *supra* note 8, at 2611 (“[N]o one knows how many members there are.”); E-mail from Terry Royal, Assistant Admissions Officer, U.S. Sup. Ct., Admissions Off. (Aug. 3, 2022) (on file with author) (“The Court’s full membership roll is not public information.”).

65. Griswold, *supra* note 8, at 2611; E-mail from Terry Royal, *supra* note 64 (indicating that the Court relies upon private email notifications sent to PTadmit@supremecourt.gov to notify the Court of deceased bar members); MCGUIRE, *supra* note 30, at 30.

66. Email from U.S. Sup. Ct., Pub. Info. Off. (Apr. 20, 2022) (on file with author).

67. *Id.*

68. E-mail from Terry Royal, *supra* note 64.

69. See AM. BAR ASS’N, ABA NATIONAL LAWYER POPULATION SURVEY (2022), [https://www.americanbar.org/content/dam/aba/administrative/market\\_research/2022-national-lawyer-population-survey.pdf](https://www.americanbar.org/content/dam/aba/administrative/market_research/2022-national-lawyer-population-survey.pdf) [https://perma.cc/3ELV-928U] (providing denominator for equation).

Whatever the actual ratio of expert Supreme Court practitioners is to all Supreme Court Bar members, it would be fruitful for future researchers to consider how such ratio compares to its analogues in other U.S. and foreign legal bars. The same holds true for the ratio of retired and deceased members to living practitioner members.

70. Griswold, *supra* note 8, at 2611; MCGUIRE, *supra* note 30, at 30.

backgrounds from fully participating in the Bar.<sup>71</sup>

## II. HOW COMPARABLE INSTITUTIONS DISCLOSE THEIR MEMBERSHIP ROLLS—IF AT ALL

The Supreme Court's practice of concealing its bar membership roll is certainly not consistent with the ideals of a democratic branch of government. However, it is also out of step with numerous other American courts, foreign high courts, and elite practitioner groups. Close to one hundred American bars across the country and at every level disclose their memberships, even when administered directly by federal appellate courts.<sup>72</sup> The high courts of France, India, Germany, Israel, Canada, Mexico, and the United Kingdom either disclose their membership rolls or else allow licensed parties to practice before them without special certification.<sup>73</sup> Furthermore, the country's top hospitals and numerous elite practitioner groups disclose their membership rolls.<sup>74</sup> The Supreme Court's continued policy of concealing its bar membership roll is therefore contrary to the policy of numerous American courts, the high courts of at least seven allied countries, and several elite practitioner groups across professional fields.

### A. Survey of U.S. Bar Membership Disclosure Policies

While the Supreme Court has failed to publicize its full bar membership roll, other courts have opted for a more transparent approach toward their bar memberships. Most federal appellate courts, more than twenty federal district courts, and nearly every state bar maintains a public membership database or roll.<sup>75</sup> At the appellate level, the First, Second, Third, Fourth, Sixth, Eighth, and Federal Circuits each maintain some form of public attorney database or roll.<sup>76</sup> Similarly, the U.S. District Courts for the Districts of Arizona, Colorado, the District of Columbia, Kansas, Maryland, Massachusetts, and Utah; the Northern Districts of California and New York; the Southern Districts of Florida, Indiana, Iowa, and Texas; the Eastern Districts of California, Missouri, and Wisconsin; the Western Districts of Texas and Wisconsin; the Central District of California; and the Middle Districts of Florida and North Carolina all maintain public attorney databases or rolls.<sup>77</sup> Finally, every qualifying state-

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71. See, e.g., Stephanie Mencimer, *A Black Woman Is Arguing a Big Supreme Court Case Today. That Shouldn't Be Unusual. But It Is.*, MOTHER JONES (Oct. 5, 2016), <https://www.motherjones.com/politics/2016/10/buck-v-davis-christina-swarns/> [<https://perma.cc/5R2H-AG9L>] (“[T]he number of African-American female lawyers who’ve ever made a Supreme Court oral argument is shockingly small—almost small enough to count on two hands.”).

72. See *infra* Section II.A.

73. See *infra* Section II.B.

74. See *infra* Section II.C.

75. Baumgarten, *supra* note 31.

76. *Id.*

77. *Id.*

level judicial authority, other than those of New Hampshire and South Dakota, maintains a public attorney database or roll.<sup>78</sup> These courts demonstrate a clear emerging American norm toward publishing bar membership information which the Supreme Court would be wise to follow.

### B. *Select Foreign High Court Bar Membership Disclosure Policies*

The bar membership disclosure policies of high courts in peer countries suggest that the U.S. Supreme Court is already far behind global best practices. The French Council of State and Court of Cassation appear to set the gold standard in this matter by publishing the names, pictures, and contact information for every member of their bar.<sup>79</sup> They also publish a PDF version of the same information organized by date of admission with the leadership structure of the bar at the bottom.<sup>80</sup> The Supreme Court of India publishes a searchable list<sup>81</sup> and roll<sup>82</sup> of its bar members in addition to their contact information. Similarly, the German Federal Court of Justice publishes a list of the thirty-eight lawyers licensed to practice before it, which includes their contact information.<sup>83</sup>

Many high courts surveyed allow lawyers to practice before them without the need for a separate court-specific admission. In these cases, licensing is essentially left to outside bodies, which appear relatively transparent. For example, all Israeli lawyers are licensed by law to practice before any judicial or quasi-judicial body in Israel, including its Supreme Court.<sup>84</sup> The clunky Israel Bar Association searchable database is therefore the equivalent of a Supreme Court of Israel searchable database.<sup>85</sup> Similarly, by law, any Canadian barrister, advocate, attorney, or solicitor in a province may represent a client before the Supreme Court of Canada.<sup>86</sup> The

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78. *Id.*

79. *Annuaire*, ORDRE DES AVOCATS AU CONSEIL D'ÉTAT ET À LA COUR DE CASSATION, <https://www.ordre-avocats-cassation.fr/annuaire/b> (last visited June 19, 2022).

80. LE TABLEAU DE L'ORDRE, ORDRE DES AVOCATS AU CONSEIL D'ÉTAT ET À LA COUR DE CASSATION (2023), [https://www.ordre-avocats-cassation.fr/sites/default/files/fichiers\\_blocs/tableau\\_2023\\_SITE.pdf](https://www.ordre-avocats-cassation.fr/sites/default/files/fichiers_blocs/tableau_2023_SITE.pdf) [<https://perma.cc/P3NZ-GLHC>].

81. *Advocates*, SUP. CT. OF INDIA, <https://main.sci.gov.in/advocates> (last visited June 19, 2022).

82. *Advocates List*, SUP. CT. OF INDIA, [https://main.sci.gov.in/php/navigation/get\\_records.php?Str=name&str1=](https://main.sci.gov.in/php/navigation/get_records.php?Str=name&str1=) (last visited June 19, 2022); *see also* LIST OF ADVOCATES-ON-RECORD (AS ON 17.09.2021), SUP. CT. OF INDIA, [https://main.sci.gov.in/pdf/other/aor\\_list\\_17092021.pdf](https://main.sci.gov.in/pdf/other/aor_list_17092021.pdf) [<https://perma.cc/L85C-BZ9R>].

83. *Verzeichnis der BGH-Anwälte*, RECHTSANWALTSKAMMER BEIM BUNDESGERICHTSHOF, <https://www.ra-k-bgh.de/verzeichnis/> (last visited June 19, 2022).

84. § 20(1), Chamber of Advocates Law, 5721–1961, LSI 15 196 (1960–61), as amended (Isr.); *see also* E-mail from Masua Sagiv, Koret Visiting Assistant Professor, U.C. Berkeley School of Law (Mar. 7, 2023, 02:43 EST) (on file with author).

85. *Lawyer List*, ISR. BAR ASS'N, [https://israelbar.org.il/lawyer\\_list.asp?1=1&menu=3](https://israelbar.org.il/lawyer_list.asp?1=1&menu=3) (last visited June 19, 2022) (despite its name, the Israel Bar Association is more akin to a national bar than a bar association).

86. Supreme Court Act, R.S.C. 1985, c S-26, §§ 22–23 (Can.).

Canadian provincial society attorney rolls, which are publicly accessible online, therefore collectively identify all individuals licensed to practice before the Supreme Court of Canada.<sup>87</sup> Likewise, any Mexican lawyer licensed to practice by the Secretariat of Public Education has their name added to a national public database and is permitted to practice before the Supreme Court of Justice of the Nation.<sup>88</sup>

The United Kingdom follows a comparable, albeit bifurcated approach. Its Bar Standards Board offers both a searchable database and downloadable file of all licensed barristers.<sup>89</sup> The United Kingdom's Solicitors Regulation Authority further provides a searchable database of all licensed solicitors, including those with rights of audience before the higher courts.<sup>90</sup>

In each of these seven cases, the foreign high courts surveyed demonstrated far greater transparency with regard to their bar membership rolls than that exhibited by the U.S. Supreme Court.

### C. Private U.S. Institution Membership Disclosure Policies

Private organizations also employ a plethora of membership disclosure policies that range between complete transparency and complete opacity. The Council on Foreign Relations publishes its full membership roll online.<sup>91</sup> The Bilderberg Group has done the same, in recent years at least, in addition to publishing its topics for discussion.<sup>92</sup> The American Philosophical Society, founded by Benjamin Franklin, publishes its membership roll online,<sup>93</sup> in addition to offering a searchable database, albeit through dated methods.<sup>94</sup> Of the top three hospitals in the country, each offers a sophisticated search function to sort among affiliated physicians, even as these hospitals lack full public rolls.<sup>95</sup> These elite practitioner groups score highly in terms of

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87. See, e.g., *Our Members: Canada's Law Societies*, FED'N OF L. SOC'YS OF CAN., <https://flsc.ca/about-us/> (last visited June 19, 2022) (providing access to each provincial law society website).

88. See *Registro Nacional de Profesionistas*, GOBIERNO DE MÉX., <https://www.cedulaprofesional.sep.gob.mx/cedula/presidencia/indexAvanzada.action> (last visited June 19, 2022) (allowing access to list of licensed Mexican lawyers).

89. *The Barristers' Register*, BAR STANDARDS BD., <https://www.barstandardsboard.org.uk/for-the-public/search-a-barristers-record/the-barristers-register.html> (last visited June 19, 2022).

90. *Solicitors Register*, SOLIC. REGUL. AUTH., <https://www.sra.org.uk/consumers/register/> (last visited June 19, 2022).

91. *Membership Roster*, COUNCIL ON FOREIGN RELS., <https://www.cfr.org/membership/roster> (last visited June 19, 2022).

92. *Bilderberg Meeting 2022*, BILDERBERG MEETINGS, <https://www.bilderbergmeetings.org/press/press-release/press-release> [<https://perma.cc/JY3P-9HPB>] (participant list available by clicking "Participants").

93. *Member History*, AM. PHIL. SOC'Y, <https://search.amphilsoc.org/memhist/search?browse-all=yes;sort=creator> (last visited July 23, 2022).

94. *Id.*

95. *America's Best Hospitals: the 2021-22 Honor Roll and Overview*, U.S. NEWS & WORLD REP. (July 26, 2022, 12:01 AM), <https://health.usnews.com/health-care/best-hospitals/articles/best-hospitals-honor-roll-and-overview> [<https://perma.cc/UZJ8-RBQC>]; *Doctors and Medical Staff*, MAYO CLINIC, <https://www.mayoclinic.org/appointments/find-a-doctor> (last visited July 23, 2022); *Find a Doctor*, CLEV. CLINIC, <https://my.clevelandclinic.org/staff> (last visited July 23, 2022); *Provider Search Results*, UCLA HEALTH, <https://www.uclahealth.org/pr>

their membership disclosure policies.

In contrast to these practitioner groups, many other private organizations hold their membership rolls close to the vest. For example, private clubs, such as the Union Club of New York,<sup>96</sup> Cosmos Club,<sup>97</sup> University Club of Washington, D.C.,<sup>98</sup> Bohemian Club,<sup>99</sup> Harvard Club of New York,<sup>100</sup> National Democratic Club,<sup>101</sup> and Capitol Hill Club<sup>102</sup> all fail to list their membership rolls online, if not also making them completely off limits to the general public. Hereditary organizations function in a similar manner, with the Daughters of the American Revolution,<sup>103</sup> Sons of the American Revolution,<sup>104</sup> Society of Colonial Dames,<sup>105</sup> and Society of the Cincinnati<sup>106</sup> all concealing their membership rolls. Secret societies at elite universities function in much the same manner, which is central to their operation and appeal.<sup>107</sup>

The Supreme Court Bar's membership disclosure policy occupies an unhappy medium. It is more transparent than the policies of elite private clubs, hereditary organizations, and secret societies to which many Justices themselves have historically belonged.<sup>108</sup> Yet, it is less transparent than the policies of elite practitioner groups. While the names of individuals admitted to the Supreme Court Bar since

oiders/search?f%5B0%5D=%20primary-care%3A1 (last visited July 23, 2022).

96. See UNION CLUB OF THE CITY OF N.Y., <https://theunionclub.com/> (last visited July 23, 2022).

97. See COSMOS CLUB, <https://www.cosmosclub.org/> (last visited July 23, 2022); see also Karina Elwood, *The Exclusive D.C. Social Club of Ketanji Brown Jackson Explained*, WASH. POST (Mar. 27, 2022, 6:00 AM), <https://www.washingtonpost.com/dc-md-va/2022/03/27/cosmos-club-ketanji-brown-jackson/> [<https://web.archive.org/web/20220329201932/https://www.washingtonpost.com/dc-md-va/2022/03/27/cosmos-club-ketanji-brown-jackson/>]; Peter Overby, *Joining the Club Proves Difficult for Lobbyist*, NPR (July 7, 2005, 12:00 AM), <https://www.npr.org/2005/07/07/4734647/joining-the-club-proves-difficult-for-lobbyist> [<https://perma.cc/7YQF-HBVM>].

98. See THE UNIV. CLUB, <http://www.universityclub.ua.edu/> (last visited July 23, 2022).

99. See BOHEMIAN CLUB, <https://www.bohemianclub.com> (last visited July 23, 2022).

100. See HARV. CLUB OF N.Y. CITY, <https://www.hcny.com> (last visited July 23, 2022).

101. See THE NAT'L DEM. CLUB, <https://www.natdemclub.org/> (last visited July 23, 2022).

102. See CAPITOL HILL CLUB, <https://www.capitolhillclub.org/Home.aspx> (last visited July 23, 2022).

103. See DAUGHTERS OF THE AM. REVOLUTION, <https://www.dar.org/> (last visited July 23, 2022).

104. See NAT'L SOC'Y OF THE SONS OF THE AM. REVOLUTION, <https://www.sar.org/> (last visited July 23, 2022).

105. See THE NAT'L SOC'Y OF THE COL. DAMES OF AM., <https://nscda.org/> (last visited July 23, 2022).

106. See THE SOC'Y OF THE CIN., <https://www.societyofthecincinnati.org/> (last visited July 23, 2022).

107. Josh Moody, *What to Know About College Secret Societies*, U.S. NEWS & WORLD REP. (Mar. 4, 2020, 10:56 AM), <https://www.usnews.com/education/best-colleges/articles/what-to-know-about-college-secret-societies> [<https://perma.cc/4CE3-GD3A>]; see also THE SKULLS (Original Film 1980) (depicting a fictionalized version of life in Yale University's secretive Skull and Bones society).

108. See, e.g., Elwood, *supra* note 97; see also Abby Jackson and Christina Sterbenz, *The 13 Most Powerful Members of 'Skull and Bones'*, BUS. INSIDER (Dec. 6, 2015, 10:50 AM), <https://www.businessinsider.com/the-13-most-powerful-members-of-skull-and-bones-2015-12> [<https://perma.cc/WF6C-6DGY>] (listing Chief Justice William Howard Taft and Associate Justice Potter Stewart as members of the Skull and Bones); BUTLER, *supra* note 39, at 119 (comparing the procedure for joining the Supreme Court Bar to that of joining a social club).

1889 may technically be public through the *Journal of the Supreme Court of the United States*, they are not easily accessible. The Supreme Court Bar’s membership disclosure policy may therefore be thought of as a step above the policies of elite private clubs and hereditary societies, yet less transparent than the membership rolls of elite practitioner groups, and certainly not as easily accessible as befits the highest practitioner group of a core democratic institution.

### III. ASSESSING THE IMPACT OF THE SUPREME COURT BAR’S TRANSPARENCY DEFICIT

The Supreme Court Bar’s lack of transparency presents numerous potential problems. First, lack of transparency raises the specter of an inaccurate or even non-existent roll that is shielded from public scrutiny.<sup>109</sup> Second, the inability to meaningfully review the Supreme Court Bar’s composition heightens the possibility of a demographically inequitable distribution of members.<sup>110</sup> Third, lack of transparency creates the conditions for fear and distrust to fester.<sup>111</sup> Finally, the Supreme Court’s failure to publicize its bar membership roll in a meaningful manner sets a bad example for courts across the country and the world.<sup>112</sup>

#### A. *Raises the Specter of an Inaccurate Membership Roll*

Without the ability to readily verify the full roll of Supreme Court Bar members, it is entirely possible that the Supreme Court is not maintaining an accurate record of attorneys licensed to practice before that judicial body. It could be that retired, long-deceased, or even some disbarred attorneys are listed as being in good standing with the Supreme Court Bar—as one former Solicitor General who previously served as the Dean of Harvard Law School has asserted.<sup>113</sup> There is also a clear lag time for the public to view newly-added or disciplined attorneys.<sup>114</sup> With perennial calls to audit the Federal Reserve<sup>115</sup> and scrutinize voter rolls<sup>116</sup> despite the dearth of evidence of misconduct,<sup>117</sup> it may be time to instead apply sunlight to the Supreme Court Bar’s

109. See *infra* Section III.A.

110. See *infra* Section III.B.

111. See *infra* Section III.C.

112. See *infra* Section III.D.

113. Griswold, *supra* note 8, at 2611.

114. *Journal*, *supra* note 57 (posted each October and updated every few weeks).

115. See, e.g., Dr. Rand Paul Reintroduces “Audit the Fed” 2021, DR. RAND PAUL (Mar. 3, 2021), <https://www.paul.senate.gov/news-dr-rand-paul-reintroduces-audit-fed-2021/> [<https://perma.cc/6NTL-KA2S>].

116. JONATHAN BRATER, KEVIN MORRIS, MYRNA PERÉZ & CHRISTOPHER DELUZIO, BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE (2018), <https://www.brennancenter.org/media/235/download> [<https://perma.cc/GB23-EDLD>].

117. See Robin I. Mordfin, *What Economists Think About ‘Audit the Fed,’* CHI. BOOTH REV. (Nov. 13, 2013), <https://www.chicagobooth.edu/review/what-economists-think-about-audit-the-fed> [<https://perma.cc/6SCS-LM V9>]; see also Ben S. Bernanke, “Audit the Fed” Is Not About Auditing the Fed, BROOKINGS INST. (Jan. 11, 2016), <https://www.brookings.edu/blog/ben-bernanke/2016/01/11/audit-the-fed-is-not-about-auditing-the-fed/>



membership roll to ensure its accuracy. If the roll were found to exist and be accurate, then there would assuredly be no need for the Court to continue hiding anything. However, if the roll were found to be non-existent or inaccurate, this could be a sign of other forms of institutional decay in need of oversight and reform.

### B. Heightens the Possibility of Inequitable Bar Membership

Another concern is that the Supreme Court Bar is inequitably stratified along gender, racial, ethnic, religious, professional, and economic lines without guardrails or means of correction.<sup>118</sup> This raises the very real prospect that those licensed to argue cases before the highest court in the land represent only a select group of interests to the exclusion of other voices. Such an imbalance among advocates could ultimately impact the parties represented, cases brought, arguments made, and precedents established.<sup>119</sup> It could also impact the distribution of litigation fees paid to lawyers at the highest appellate level in the country.<sup>120</sup>

Numerous studies indicate that women are underrepresented at oral argument,<sup>121</sup>

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[<https://perma.cc/8BHY-XALQ>]; Paul M. Smith, “Use It or Lose It”: The Problem of Purges from the Registration Rolls of Voters Who Don’t Vote Regularly, 45 HUM. RTS., Feb. 2020, at 6.

118. See, e.g., Deepak Gupta, Comment Letter to the Presidential Commission on the Supreme Court of the United States, at 6 (June 30, 2021), [https://downloads.regulations.gov/PCSCOTUS-2021-0001-0129/attachment\\_1.pdf](https://downloads.regulations.gov/PCSCOTUS-2021-0001-0129/attachment_1.pdf) [<https://perma.cc/79YU-DG5C>] (“[T]he entire ecosystem surrounding the Court looks a lot less like the American public than we might hope.”); see also Bhatia, *supra* note 17, at 572 (“[E]lite advocates are overwhelmingly male and Caucasian.”); Perry, *supra* note 15, at 292 (“[T]here are very few black lawyers that have ever argued before the Court, especially after the Civil Rights movement.”); Sarver et al., *supra* note 14, at 250; Marlene Trestman, *Women Advocates Before the Supreme Court*, SUP. CT. HIST. SOC’Y (June 7, 2022), <https://supremecourthistory.org/oral-arguments/women-advocates-before-the-supreme-court> [<https://perma.cc/3VM2-A7GF>] (“During October Term 2021, only the second time women advocates reached a maximum of 40 arguments, men argued 123 times.”); Tony Mauro, *Why Are There So Few Women SCOTUS Advocates?*, SUP. CT. BRIEF (Nov. 1, 2017, 4:12 PM), <https://www.law.com/supremecourtbrief/2017/10/25/why-are-there-so-few-fe-male-scotus-advocates/> (highlighting that women constituted only thirteen percent of oral advocates between 2012 and 2017); MCGUIRE, *supra* note 30, at 41 (“[T]he Supreme Court Bar consists almost entirely of whites—98 percent in fact.”).

119. Litman et al., *supra* note 32, at 64; Gupta, *supra* note 118; Becker, *supra* note 28; Lazarus, *supra* note 16, at 1554 n. 282 (expressing concern for the impact of a business-oriented Supreme Court Bar on diversity); Perry, *supra* note 15, at 293 (“It would be a mistake to conclude that the scales are even though.”); Krell, *supra* note 35, at 300 (“[T]he Court is not only influenced by the arguments marshaled before it, but as much—if not more—by those who make the argument.”). But see BUTLER, *supra* note 39, at 114 (“The Supreme Court of the United States is not influenced by the prominence or standing of counsel presenting the cases of their clients.”).

120. See Perry, *supra* note 15, at 280; Sullivan, *supra* note 52.

121. Trestman, *supra* note 118 (demonstrating that as of April 27, 2022, only 783 women had ever presented argument before the Court); Sarver et al., *supra* note 14, at 250 (“Women are significantly less likely to participate in Supreme Court litigation as justices, clerks, and litigators.”); Kimberly Strawbridge Robinson, *An Uphill Climb for Women Supreme Court Advocates Gets Steeper*, BLOOMBERG L. (May 15, 2020, 4:54 AM), <https://news.bloomberglaw.com/us-law-week/an-uphill-climb-for-women-supreme-court-advocates-gets-steeper> (showing that women argued only thirteen percent of cases during the 2019 Term).

even as woman seem to have a higher winning percentage than men.<sup>122</sup> At the same time, there is a paucity of reliable racial, LGBTQIA, foreign born, state of origin, age, religion, and sector data concerning Supreme Court practitioners.<sup>123</sup> There furthermore exists a structural problem where researchers have focused their efforts almost entirely on analyzing those who practice before the Court, rather than the broader Supreme Court Bar or the relation between the full bar and those who argue before the Court.<sup>124</sup> This is no doubt attributable to the Supreme Court Bar’s membership disclosure policy, which hides meaningful numbers from proper scrutiny. It is therefore hard to say what trends may truly exist in the broader dataset of bar members. However, in an age where we have already witnessed the first black President, first black and first female Vice President, first black female Justice, and numerous other historic firsts, the time has also come to ensure that our institutions better represent the American public, particularly those institutions with the greatest ability to influence the course of the nation.

### C. *Exacerbates Distrust in the Supreme Court*

The Supreme Court’s failure to adequately publish its bar membership roll may also exacerbate the public’s lack of trust in the Supreme Court.<sup>125</sup> The Court already consists of unelected officials who serve lifetime terms,<sup>126</sup> hold unfiled proceedings,<sup>127</sup> are not bound by the Code of Conduct for United States Judges,<sup>128</sup> make life

122. Adam Feldman, *A Dearth of Female Attorneys at Supreme Court Oral Arguments*, EMPIRICAL SCOTUS (Oct. 22, 2017), <https://empiricalscotus.com/2017/10/22/dearth-female-args/> [<https://perma.cc/P558-AU7Q>] (“[T]he statistics actually point to women performing better than men during these years.”).

123. See, e.g., Perry, *supra* note 15, at 292 (“It is difficult to determine the race of lawyers who have argued before the Court . . .”). See generally Carsh, *supra* note 30 (excluding these demographic factors from consideration).

124. E.g., Joseph W. Swanson, *Experience Matters: The Rise of a Supreme Court Bar and Its Effect on Certiorari*, 9 J. APP. PRAC. & PROCESS 175, 176 (2007); Perry, *supra* note 15, at 249–258; Roberts, *supra* note 19, at 77 (repeatedly conflating throughout his article the rise of an elite Supreme Court practice group within the Supreme Court Bar with the rise of a Supreme Court Bar).

125. See, e.g., *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> [<https://perma.cc/KQH8-SFZC>]; Yvonne Wingett Sanchez et al., *Trust in Supreme Court Falters After Roe Decision*, WASH. POST (July 3, 2022, 9:52 AM), <https://www.washingtonpost.com/politics/2022/07/03/supreme-court-trust/> [<https://web.archive.org/web/20220704101235/https://www.washingtonpost.com/politics/2022/07/03/supreme-court-trust/>]; Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), <https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx> [<https://perma.cc/Z7TN-SAT9>].

126. U.S. CONST. art. III, § 1.

127. Erwin Chemerinsky & Eric J. Segall, *Cameras Belong in the Supreme Court*, 101 JUDICATURE 14, 15 (2017); Lysette Romero Córdova, *Will SCOTUS Continue to Livestream Oral Arguments and Are Cameras Next? Let’s Hope So.*, A.B.A.: APP. ISSUES (Aug. 24, 2021), [https://www.americanbar.org/groups/judicial/publications/appellate\\_issues/2021/summer/will-scotus-continue-to-livestream-oral-arguments-and-are-cameras-next/](https://www.americanbar.org/groups/judicial/publications/appellate_issues/2021/summer/will-scotus-continue-to-livestream-oral-arguments-and-are-cameras-next/) [<https://perma.cc/T8G3-H36X>].

128. Joanna R. Lampe, Cong. Rsch. Serv., LSB10255, *A Code of Conduct for the Supreme Court? Legal Questions and Considerations* (2022); Scott Bomboy, *Why the Supreme Court Isn’t Compelled to Follow a Conduct Code*, Nat’l Const. Ctr.: Const. Daily Blog (July 15, 2016), <https://constitutioncenter.org/blog/why->

and death decisions,<sup>129</sup> yet have at times been linked to highly questionable activities.<sup>130</sup> The Court has also been politicized in recent decades as the result of nomination fights,<sup>131</sup> controversial opinions,<sup>132</sup> and eroding public trust.<sup>133</sup> The Court's decision to keep its bar membership largely shielded from public view unnecessarily adds to these transparency and legitimacy deficits.

#### D. Sets Bad Example for Other Courts Around the World

Lastly, the Supreme Court's failure to meaningfully publish its bar membership sets a bad example for the rest of the judiciary and government. There is an emerging norm for courts at all levels across the country to publish their bar memberships through public databases or rolls.<sup>134</sup> The elected branches already set the standard for transparency by conducting their proceedings on film in real time,<sup>135</sup> holding regular press conferences,<sup>136</sup> and disseminating views on pressing matters as they transpire.<sup>137</sup> In contrast, the Supreme Court engages in minimal comparable conduct.<sup>138</sup>

the-supreme-court-isnt-compelled-to-follow-a-conduct-code/ [https://perma.cc/Z2CS-L2RH].

129. *Cases - Death Penalty*, OYEZ, <https://www.oyez.org/issues/204> (last visited July 23, 2022).

130. *See, e.g.*, Jacqueline Alemany et al., *Ginni Thomas Corresponded with John Eastman, Sources in Jan. 6 House Investigation Say*, WASH. POST (June 15, 2022), <https://www.washingtonpost.com/national-security/2022/06/15/ginni-thomas-john-eastman-emails/> [https://web.archive.org/web/20230114225908/https://www.washingtonpost.com/national-security/2022/06/15/ginni-thomas-john-eastman-emails/]; Lydia Wheeler, *Kavanaugh's Holiday Party Appearance Renews Supreme Court Ethics Questions*, BLOOMBERG (Dec. 12, 2022, 4:35 PM), <https://www.bloomberg.com/news/articles/2022-12-12/kavanaugh-holiday-party-appearance-raises-more-ethics-questions#xj4y7vzkg>; Jeremy Stahl, *Who Leaked Samuel Alito's Draft Opinion Striking Down Roe v. Wade—and Why?*, SLATE (May 3, 2022, 1:53 AM); <https://slate.com/news-and-politics/2022/05/supreme-court-alito-abortion-opinion-leaker-identity-theory.html>; *see also* Andrew Glass, *Abe Fortas Resigns from Supreme Court, May 15, 1969*, POLITICO (May 14, 2017, 11:43 PM), <https://www.politico.com/story/2017/05/14/abe-fortas-resigns-from-supreme-court-may-15-1969-238228> [https://perma.cc/XTA3-UMUG].

131. Erin Kelly & William Cummings, *7 Contentious Supreme Court Confirmation Battles*, USA TODAY (Sept. 18, 2018, 12:05 PM), <https://www.usatoday.com/story/news/politics/2018/09/17/7-contentious-supreme-court-confirmation-battles/1336766002/> [https://perma.cc/62TW-P5MG]; *see also* John Kruzell, *How Supreme Court Fights Turned into Warfare: A Timeline*, THE HILL (Apr. 7, 2022, 6:04 AM), <https://thehill.com/regulation/court-battles/3261094-how-supreme-court-fights-turned-into-warfare-a-timeline/> [https://perma.cc/5QH2-U536].

132. *Top 10 Controversial Supreme Court Cases*, TIME, <http://content.time.com/time/specials/packages/comp/lelelist/0,29569,2036448,00.html> [https://perma.cc/66FU-6W4G] (three of the Court's ten most controversial cases have occurred since 2000).

133. *See* Jones, *supra* note 125.

134. *See supra* Section II.A; *see also* Baumgarten, *supra* note 31.

135. *Live*, THE WHITE HOUSE, <https://www.whitehouse.gov/live/> (last visited July 23, 2022); *Floor Proceedings*, U.S. SENATE, <https://www.senate.gov/floor/index.htm> (last visited July 23, 2022); *House FloorCast*, CLERK: U.S. HOUSE OF REPRESENTATIVES, <https://live.house.gov/> (last visited July 23, 2022).

136. *Briefing Room*, THE WHITE HOUSE, <https://www.whitehouse.gov/briefing-room/> (last visited July 23, 2022); KEVIN MCCARTHY: SPEAKER OF THE HOUSE, <https://www.speaker.gov> (last visited July 23, 2022); *Latest News*, SENATE DEMOCRATS, <https://www.democrats.senate.gov/newsroom> (last visited July 23, 2022).

137. *See, e.g.*, @POTUS, TWITTER, <https://twitter.com/POTUS> (last visited July 23, 2022).

138. *See, e.g.*, *Press Releases*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/publicinfo/press/pressrel>

The Supreme Court should embrace transparency, particularly because of this gap, by making its bar membership roll easy for all to access, rather than lag behind lower courts, foreign high courts, and co-equal branches of government.

#### IV. EXPLAINING THE SUPREME COURT BAR'S TRANSPARENCY DEFICIT

At first blush, it seems difficult to understand why the Supreme Court has failed to publish its bar membership in a complete, up-to-date, and easily accessible manner. However, upon closer examination, there appear to be numerous possible causal factors. These include inertia,<sup>139</sup> elitism,<sup>140</sup> lack of resources,<sup>141</sup> and privacy concerns.<sup>142</sup> None of these are fully convincing in their own right. However, they offer plausible explanations for the Supreme Court's failure to fully disclose its bar membership when considered in combination with one another.

##### A. *Inertia*

The most plausible explanation for the Supreme Court's failure to establish a meaningful public roll of its bar membership is inert path dependence. The Supreme Court does not appear to have ever had a public roll,<sup>143</sup> publishing its full membership roll has never been a salient issue,<sup>144</sup> there does not appear to have been outside pressure to establish a full public roll,<sup>145</sup> and reformers have been concerned with other measures.<sup>146</sup> The Court is also already spread thin when it comes to reviewing cert petitions and other substantive materials, leaving even less room for addressing seemingly minor administrative matters.<sup>147</sup> Accordingly, the Supreme Court has maintained the status quo with regard to its bar membership disclosure policy at little to no real cost.

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eases.aspx (last visited July 23, 2022).

139. See *infra* Section IV.A.

140. See *infra* Section IV.B.

141. See *infra* Section IV.C.

142. See *infra* Section IV.D.

143. Griswold, *supra* note 8 (“There is no published list of the members of the bar of the Supreme Court. Indeed, no one knows how many members there are.”).

144. See PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., FINAL REPORT 263–74 (2021) [hereinafter FINAL REPORT], <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [<https://perma.cc/MV8Q-XXFD>].

145. See Griswold, *supra* note 8.

146. See, e.g., *The Fixes*, FIX THE CT., <https://fixthecourt.com/> (last visited July 23, 2022) (listing numerous other reform proposals).

147. Lazarus, *supra* note 16, at 1523 (“If . . . one accounts for all of the other pressing activities in which Justices routinely engage in deciding on cases granted plenary review, the number of minutes each Justice could in theory commit to each petition on average quickly dwindles to about one or two minutes, if not fewer than sixty seconds.”).

### B. Elitism

Another possible explanation for the Supreme Court's failure to meaningfully publicize its bar membership is the potential desire to shroud the Court's bar membership in secrecy to enhance its prestige. This would be in keeping with the precedent of other private groups such as the Cosmos Club, Society of the Cincinnati, National Society of the Colonial Dames of America, and numerous secret societies at top universities.<sup>148</sup> Under this theory, Supreme Court Bar membership may be a license, but it also functions as a key into elite spaces.<sup>149</sup> The refined course of action is therefore to downplay such status, rather than blatantly flaunt it or allow it to be accessed at ease by the public.<sup>150</sup> While there may be some truth to this values-based rationale, it is undercut to some degree by the Supreme Court's publication of the names of admitted attorneys in the *Journal of the Supreme Court of the United States*, which is updated regularly, though not daily, throughout the year.<sup>151</sup>

### C. Lack of Funds

It may even seem plausible that the Supreme Court has failed to publish its bar membership roll due to lack of funds. After all, it takes time from trained professionals to verify the membership roll, develop a platform for publishing it, and ensure that it is regularly updated. However, the likely cost of publishing the full roll is, at most, in the thousands of dollars,<sup>152</sup> which is insignificant for an institution that receives nearly one hundred million dollars each year.<sup>153</sup> Lack of funds is therefore likely not a plausible explanation for this defect, particularly since the cost, if any,

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148. See *supra* Section II.C.

149. See Special Report, *Echo Chamber: A Small Group of Lawyers and Its Outsized Influence at the U.S. Supreme Court*, REUTERS: INVESTIGATES (Dec. 8, 2014, 10:30 AM), <https://www.reuters.com/investigates/special-report/scotus/> [<https://perma.cc/R3FB-KDCX>].

150. See Holly Peterson, *The Secret Code of Poor Mouth: Why the Rich and Powerful Spend So Much Time Pleading Poverty*, TOWN & COUNTRY (July 20, 2017), <https://www.townandcountrymag.com/society/money-and-power/a10295555/poor-mouth/> [<https://perma.cc/TY3G-TFLD>]. But cf. CADY HUFFMAN ET AL., *When You Got It, Flaunt It*, THE PRODUCERS (ORIGINAL BROADWAY CAST RECORDING) (Masterworks Broadway 2005) (arguing for the virtue of ostentatiousness).

151. *Journal*, *supra* note 57.

152. See Lucy Carney, *How Much Does a Website Cost in 2022? (Full Breakdown)*, WEBSITEBUILDEREXPERT, (July 13, 2022) <https://www.websitebuilderexpert.com/building-websites/how-much-should-a-website-cost/> [<https://perma.cc/T8V9-THE3>].

153. Congress authorized the Chief Justice to obligate nearly \$100 million in fiscal years 2021 and 2022 for necessary and discretionary expenses unrelated to the building and grounds, in addition to over \$9 million in additional security assistance funds. Judiciary Appropriations Act, 2022, Pub. L. No. 117-203, 136 Stat. 258, 258 (authorizing the Chief Justice to obligate up to \$98.34 million); Judiciary Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1397, 1397 (authorizing the Chief Justice to obligate up to \$94.69 million); Supreme Court Security Funding Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366, 1757 (providing an additional \$9.1 million to address threats against the Supreme Court).

would be low and the problem is better explained by inert path dependence.

#### D. Privacy Concerns

Lastly, it is possible that the Supreme Court has failed to meaningfully publicize its bar membership roll out of concern for the privacy of its bar members. However, this too seems implausible as the Justices are far from shrinking violets<sup>154</sup> and there is ample precedent for lower courts publishing their bar memberships without issue.<sup>155</sup> Likewise, even if there were a desire to safeguard the privacy of bar members, their names are technically already public,<sup>156</sup> and this interest could easily be protected through an opt-out feature as it pertains to contact information, if any were to be published.<sup>157</sup>

For these reasons, it seems most likely that the Supreme Court has failed to publish its full bar membership roll due to inertia and perhaps concern for preserving the prestige of the Supreme Court Bar rather than lack of funds, privacy concerns, or other factors. None of these, however, outweigh the public interest in an easily accessible, complete, and accurate roll of Supreme Court Bar members. Sadly, the Presidential Commission on the Supreme Court failed to meaningfully address this issue in its hearings or final report.<sup>158</sup>

#### V. THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT'S VIEWS ON THE SUPREME COURT BAR

In 2021, President Joseph R. Biden formed a blue ribbon commission of scholars and practitioners to explore Supreme Court reform options in response to the Senate's controversial refusal to hold a confirmation hearing for then-Chief Judge Merrick Garland and President Trump's subsequent nomination of three Justices to the Supreme Court in just one presidential term.<sup>159</sup> The Commission heard testimony on an array of issues, particularly the ideas of adding Justices to the Court, imposing term limits, curtailing the Court's jurisdiction, and restructuring various procedures.<sup>160</sup> Several of the Commission's witnesses and public comments also addressed lack of equity and transparency within the Supreme Court Bar.<sup>161</sup> Yet, the Commission's Final Report barely noted these concerns and provided no justification for

154. Clarence Thomas, Assoc. Just., Sup. Ct. of the U.S., Remarks at the American Enterprise Institute Annual Dinner (Feb. 13, 2021) (available at <https://perma.cc/MTJ3-PR69>).

155. Baumgarten, *supra* note 31.

156. *Journal*, *supra* note 57.

157. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (discussing the importance of smart default rules that allow participants to opt out of recommended choices).

158. See *infra* Part V.

159. See *infra* Section V.A.

160. See *infra* Section V.B.

161. See *infra* Sections V.B, V.C.

largely overlooking the Supreme Court Bar.<sup>162</sup>

### A. *Overview of Commission*

The past few years have been particularly acrimonious in terms of Supreme Court nominations. Following the death of Justice Antonin Scalia, President Obama nominated Merrick Garland, then-Chief Judge of the D.C. Circuit, to the Supreme Court.<sup>163</sup> Senate Leader Mitch McConnell responded by refusing to even hold a hearing for Garland, citing what he referred to as the “Biden Rule” against holding confirmation hearings for Supreme Court nominees during presidential election years.<sup>164</sup> President Trump subsequently nominated three jurists to fill vacancies on the Supreme Court, including one during an election year.<sup>165</sup> Faced with growing pressure to expand the number of Justices on the Supreme Court, President Biden, who possesses more Supreme Court nominations experience than any other President in American history at a comparable point in their tenure,<sup>166</sup> instead created a commission to study reform proposals.<sup>167</sup>

The Presidential Commission on the Supreme Court of the United States consisted of thirty-four Commissioners, after accounting for two resignations.<sup>168</sup> It was formed by Executive Order 14023, which provided the Commission 180 days to produce a report addressing the debate over the role and operation of the Supreme Court in our constitutional system, historical reform efforts, and an analysis of the benefits and detriments of Supreme Court reform proposals.<sup>169</sup> The Commission met six times from May through December 2021.<sup>170</sup> It heard from witnesses during two of

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162. See *infra* Section V.D; see also FINAL REPORT, *supra* note 144.

163. Ron Elving, *What Happened With Merrick Garland In 2016 And Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [https://perma.cc/P726-8UJC].

164. *Id.*

165. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/> [https://perma.cc/6TQ6-MMUL].

166. Harry William Baumgarten, Opinion, *Justice Breyer’s Retirement Showcases Biden’s Limited Ability to Reshape Supreme Court*, THE HILL (Jan. 31, 2022, 2:30 PM), <https://thehill.com/opinion/judiciary/592059-justice-breyers-retirement-showcases-bidens-limited-ability-to-reshape/?rd=1643642442> [https://perma.cc/QVQ8-WSF3].

167. Amy Howe, *Biden to Create Bipartisan Commission on Supreme Court Reform*, SCOTUSBLOG (Apr. 9, 2021, 1:27 PM), <https://www.scotusblog.com/2021/04/biden-to-create-bipartisan-commission-on-supreme-court-reform/> [https://perma.cc/2NC9-RRBJ].

168. Madison Alder and Kimberly Strawbridge Robinson, *Biden’s Supreme Court Commission Loses Two Conservatives*, BLOOMBERG L. (Oct. 15, 2021, 5:11 PM), <https://news.bloomberglaw.com/us-law-week/bidens-supreme-court-commission-loses-two-conservatives>.

169. Exec. Order No. 14023, 86 Fed. Reg. 19569 (Apr. 9, 2021).

170. PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., MAY 19, 2021 MEETING MINUTES (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/08/PCSCOTUS-Public-Meeting-1-Minutes-FINAL..p>

these meetings before releasing its nearly 300-page report.<sup>171</sup> The report was ultimately heavy on history and did not make any recommendations,<sup>172</sup> leading many commentators to regard it as milquetoast and ineffectual.<sup>173</sup> Sadly, the Commission only noted issues with the Supreme Court Bar at the very end of its report, despite evidence on the record of inequities within the Supreme Court Bar.<sup>174</sup>

### B. Witness Testimony

The Commission heard testimony from forty-four witnesses and received more than 7,000 written public comments.<sup>175</sup> Seven of these witnesses—Deepak Gupta,<sup>176</sup>

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df [https://perma.cc/B4BA-HA3S]; PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., JUNE 30, 2021 MEETING MINUTES (2021) [hereinafter MEETING #2 TRANSCRIPT], https://www.whitehouse.gov/wp-content/uploads/2021/09/PCSCOTUS-Public-Meeting-2-Meeting-Notes.pdf [https://perma.cc/AB8Z-2BF9]; PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., JULY 20, 2021 MEETING MINUTES (2021) [hereinafter MEETING #3 TRANSCRIPT], https://www.whitehouse.gov/wp-content/uploads/2021/10/PCSCOTUS-Public-Meeting-3-Meeting-notes\_v3.Final\_.pdf [https://perma.cc/2XXK-X737]; PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., OCTOBER 15, 2021 MEETING MINUTES (2021), https://www.whitehouse.gov/wp-content/uploads/2022/01/PCSCOTUS-Public-Meeting-4-Meeting-notes-FINAL.pdf [https://perma.cc/4FV3-JD99]; PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., NOVEMBER 19, 2021 MEETING MINUTES (2021), https://www.whitehouse.gov/wp-content/uploads/2022/01/PCSCOTUS-Public-Meeting-5-Meeting-notes-FINAL.pdf [https://perma.cc/B44J-2CW2]; PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., DECEMBER 7, 2021 MEETING MINUTES (2021), https://www.whitehouse.gov/wp-content/uploads/2022/01/PCSCOTUS-Public-Meeting-6-Meeting-Notes-FINAL-1.pdf [https://perma.cc/KPE8-HDJZ].

171. See MEETING #2 TRANSCRIPT, *supra* note 170; MEETING #3 TRANSCRIPT, *supra* note 170.

172. FINAL REPORT, *supra* note 144, at 1 (“The Executive Order does not call for the Commission to issue recommendations, but the Report does provide a critical appraisal of arguments in the reform debate.”).

173. *E.g.*, Scott Douglas Gerber, Opinion, *The Presidential Commission on the Supreme Court Failed the President*, THE HILL (Dec. 16, 2021, 12:01 PM), https://thehill.com/opinion/white-house/585893-the-presidential-commission-on-the-supreme-court-failed-the-president/ [https://perma.cc/FG6Q-64A3]; Nina Totenberg, *Biden’s Supreme Court Commission Steers Clear of Controversial Issues in Draft Report*, NPR (Dec. 6, 2021, 8:24 PM), https://www.npr.org/2021/12/06/1061959400/bidens-supreme-court-commission-releases-draft-report [https://perma.cc/859Z-3YR3]; Thomas Jipping, *Biden’s Supreme Court Commission Does What He Intended: Nothing*, THE HERITAGE FOUND. (Dec. 7, 2021), https://www.heritage.org/courts/commentary/bidens-supreme-court-commission-does-what-he-intended-nothing [https://perma.cc/C23Z-2B7N]; Dahlia Lithwick & Mark Joseph Stern, *Biden’s Supreme Court Commission Walked Straight Into the Legitimacy Trap*, SLATE (Oct. 15, 2021, 4:02 PM), https://slate.com/news-and-politics/2021/10/president-bidens-supreme-court-commission-offers-no-solutions-for-the-courts-legitimacy-crisis.html [https://perma.cc/JJ5D-JTJT]; Austin Sarat, *Why Did Biden’s Supreme Court Commission Fail So Completely?*, SLATE (Dec. 9, 2021, 12:21 PM), https://slate.com/news-and-politics/2021/12/bidens-scotus-commission-was-a-failure-from-the-start.html [https://perma.cc/9597-ATJE]; Ian Milhiser, *Biden’s Supreme Court Reform Commission Won’t Fix Anything*, VOX (Apr. 10, 2021, 8:30 AM), https://www.vox.com/2021/4/10/22375792/supreme-court-biden-commission-reform-court-packing-federalist-society [https://perma.cc/M796-PRPC]; *Biden’s Supreme Court Commission Releases Milquetoast Report*, POGO (Dec. 7, 2021), https://www.pogo.org/press/release/2021/bidens-supreme-court-commission-releases-milquetoast-report [https://perma.cc/4LHQ-BASM].

174. FINAL REPORT, *supra* note 144, App. D, at 263.

175. *Id.* at 20.

176. MEETING #2 TRANSCRIPT, *supra* note 170, at 280–85, 306–310, 313–15, 318–20; see also Gupta, *supra* note 118 (written testimony).



Professor Allison Orr Larsen,<sup>177</sup> Professor Judith Resnik,<sup>178</sup> Kenneth Geller,<sup>179</sup> Maureen Mahoney,<sup>180</sup> Craig Becker,<sup>181</sup> and Professor Randy Barnett<sup>182</sup>—explicitly addressed matters pertaining to the Supreme Court Bar. However, they differed in their reasons for mentioning the Bar and in their ultimate recommendations, if any.<sup>183</sup>

Deepak Gupta gave the most full-throated argument that the Supreme Court Bar lacks diversity.<sup>184</sup> Gupta’s written remarks noted that practice before the Court is overwhelmingly done by white, male, former judicial clerks who represent a relatively small group of wealthy clients at large law firms, which has led to “docket capture.”<sup>185</sup> To remedy this imbalance, Gupta recommended prioritizing diversity when both hiring clerks and appointing amici counsel, developing a strong plaintiff-side appellate bar, and increasing Supreme Court transparency on a number of procedural matters.<sup>186</sup> However, he stopped short of calling for the Supreme Court to publish its full roll of bar members.<sup>187</sup>

Professor Allison Orr Larsen testified about the influence of amicus briefs on judicial outcomes and the manner by which parties before the Supreme Court orchestrate favorable amicus briefs.<sup>188</sup> In so doing, Professor Larsen’s written remarks discussed the role that disclosure rules against anonymously-funded briefs would likely have on judicial fact-finding.<sup>189</sup> Larsen’s argument relied on the idea that disclosing all amicus identities and funding would deter Supreme Court Bar members from supporting unmeritorious arguments for fear of how the Justices would view bar

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177. MEETING #2 TRANSCRIPT, *supra* note 170, at 289–94, 314–17, 328–33; *see also* Allison Orr Larsen, Comment Letter to the Presidential Commission on the Supreme Court of the United States, (June 30, 2021) [https://downloads.regulations.gov/PCSCOTUS-2021-0001-0207/attachment\\_1.pdf](https://downloads.regulations.gov/PCSCOTUS-2021-0001-0207/attachment_1.pdf) [<https://perma.cc/7T2K-M6GA>].

178. MEETING #2 TRANSCRIPT, *supra* note 170, at 294–99; *see also* Judith Resnik, Comment Letter to the Presidential Commission on the Supreme Court of the United States (June 30, 2021), [https://downloads.regulations.gov/PCSCOTUS-2021-0001-0208/attachment\\_1.pdf](https://downloads.regulations.gov/PCSCOTUS-2021-0001-0208/attachment_1.pdf) [<https://perma.cc/B545-39S9>].

179. MEETING #3 TRANSCRIPT, *supra* note 170, at 18–23, 55–59, 92–102; Kenneth Geller & Maureen Mahoney, Comment Letter to the Presidential Commission on the Supreme Court of the United States (July 16, 2021), [https://downloads.regulations.gov/PCSCOTUS-2021-0001-0259/attachment\\_1.pdf](https://downloads.regulations.gov/PCSCOTUS-2021-0001-0259/attachment_1.pdf) [<https://perma.cc/ZM4W-4YKU>].

180. MEETING #3 TRANSCRIPT, *supra* note 170, at 23–29, 62–63; *see also* Geller & Mahoney, *supra* note 179.

181. MEETING #3 TRANSCRIPT, *supra* note 170, at 187–94, 216–19, 233–38, 258–61; *see also* Becker, *supra* note 28.

182. MEETING #3 TRANSCRIPT, *supra* note 170, at 336–42, 382–89, 409–12; *see also* Randy E. Barnett Comment Letter to the Presidential Commission on the Supreme Court of the United States (July 20, 2021) [https://downloads.regulations.gov/PCSCOTUS-2021-0001-0274/attachment\\_1.pdf](https://downloads.regulations.gov/PCSCOTUS-2021-0001-0274/attachment_1.pdf) [<https://perma.cc/BS2Q-DBXZ>].

183. *Infra* text accompanying notes 183–214.

184. Gupta, *supra* note 118.

185. *Id.* at 6.

186. *Id.*

187. *Id.*

188. *See* Larsen, *supra* note 177.

189. *Id.* at 7.

members in future cases.<sup>190</sup> Professor Larsen's written testimony did not address greater issues within the Supreme Court Bar.<sup>191</sup> However, it nonetheless acknowledged the Supreme Court Bar's importance in lending credence to arguments.<sup>192</sup>

Professor Judith Resnik focused her written testimony on matters pertaining to accessing justice.<sup>193</sup> Professor Resnik's far-reaching testimony addressed lowering court fees in particular circumstances, the lack of a Supreme Court ethics code, and related issues.<sup>194</sup> Although not otherwise concerned with the Supreme Court Bar, Professor Resnik's testimony at one point suggested that the Supreme Court couple bar membership with public service, presumably pro bono representation of indigent clients.<sup>195</sup>

Kenneth Geller and Maureen Mahoney, who co-chaired the Supreme Court Practitioners' Committee, submitted joint written testimony in excess of one-hundred pages on behalf of themselves and fourteen other members of the Practitioners' Committee.<sup>196</sup> The testimony addressed eleven specific issues ranging from the Court's emergency docket to the size and composition of the Court.<sup>197</sup> When discussing representation and amicus procedures, the Practitioners' Committee testimony highlighted the lack of diversity among appointed amicus counsel and challenges that criminal defendants face before the Supreme Court.<sup>198</sup> The Committee members noted that since 1926, there have only been approximately seventy amicus appointments.<sup>199</sup> Those appointed amicus counsel have disproportionately been white male former Supreme Court law clerks, with only eleven having been women or people of color.<sup>200</sup> The Committee recommended that the Court look to specialty appellate bars, among other specified associations, when making amicus appointments.<sup>201</sup> The Committee also noted that criminal defendants lack adequate representation before the Supreme Court.<sup>202</sup> However, it recommended increased resources to develop state and federal public defenders with Supreme Court specializations, rather than establishing a standing committee or office to aid with criminal defense amicus representation as others have suggested.<sup>203</sup> Geller and Mahoney's testimony therefore touched upon inequities pertaining to Supreme Court representation, without delving

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190. *Id.*

191. *Id.*

192. *Id.*; see also Leo Cullum, Illustration ("This firm has a long history of bringing gravitas to frivolous lawsuits."), in *THE NEW YORKER*, July 23, 2001, at 76 (available at <https://perma.cc/9TPU-LDWA>).

193. See Resnik, *supra* note 178.

194. *Id.* at 12.

195. *Id.* at 16.

196. Geller & Mahoney, *supra* note 179.

197. *Id.* at ii.

198. *Id.* at 36.

199. *Id.*

200. *Id.* at 37.

201. *Id.*

202. *Id.* at 38.

203. *Id.* at 39.

into greater realities within the Supreme Court Bar itself.<sup>204</sup>

Craig Becker, General Counsel of the AFL-CIO, provided the most detailed account of docket capture, arguing that elite practitioners at large law firms have lured cases away from labor lawyers in particular, impacting the arguments that are made in labor cases before the Supreme Court.<sup>205</sup> Becker opined that “the Court hears argument from lawyers proficient with doctrinal analysis and accustomed to appearing before the Justices, but not from lawyers deeply knowledgeable about the doctrine’s implications for workers.”<sup>206</sup> The result, in his view, is law that does not serve labor interests and lawyers who are discouraged from practicing labor law.<sup>207</sup> To remedy these injuries, Becker advocates stripping petitions of identifiable authorship information at the certiorari stage to avoid letterhead bias and maximize the probability that cases are selected based upon merit, rather than the prestige of a party’s legal counsel.<sup>208</sup> While this proposal would not remedy the immediate demographic imbalance within the Supreme Court Bar, it would likely impact the composition of the Supreme Court Bar in the long term by prioritizing merit above prestige, at least when selecting cases heard by the Court.<sup>209</sup>

Finally, Professor Randy Barnett mentioned the Supreme Court Bar while weighing in against the idea of term limits for Justices.<sup>210</sup> In his written analysis, Barnett argued that term limits would likely affect judicial treatment of Supreme Court Bar members, even if duly enacted through a constitutional amendment.<sup>211</sup> He specifically contended that term limits were likely to create an incentive for the Justices to seek a payout from big law firms that appear before them at the completion of their terms, thus influencing judicial decisions toward parties with greater resources.<sup>212</sup> Barnett referred to this as a corrupting influence that could result from an otherwise well-intentioned reform proposal.<sup>213</sup> If Barnett is correct, term limits would strengthen the power of deep-pocketed members of the Supreme Court Bar at the expense of those with fewer resources—and justice more broadly.<sup>214</sup>

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204. *Id.*

205. Becker, *supra* note 28.

206. *Id.* at 8.

207. *Id.* at 9.

208. *Id.*

209. See Swanson, *supra* note 124, at 180 (concerning the ways in which reputation impacts certiorari grants).

210. Barnett, *supra* note 182, at 18.

211. *Id.*

212. *Id.*; see also Lazarus, *supra* note 16, at 1498–99 (describing the arms race for lawyers with substantive Supreme Court experience).

213. Barnett, *supra* note 182, at 18.

214. See Perry, *supra* note 15, at 254 (“Today, argument by private lawyers in the Court is dominated not only by an elite group of lawyers but also by relatively few powerful law firms . . .”).

### C. Public Comments

There were generally no public comments specifically addressing the Supreme Court Bar by parties not already discussed.<sup>215</sup> The notable exception was that of Janai S. Nelson, then-Associate Director-Counsel of the NAACP Legal Defense and Educational Fund.<sup>216</sup> Relying upon publicly available studies, Nelson wrote that the Court has an important role to play in encouraging diversity among “oralists,” collecting demographic data, and articulating an affirmative principle of diversity, equity, and inclusion.<sup>217</sup> Although Nelson did not address the Supreme Court Bar’s lack of transparency more broadly, she touched upon it while expressing strong concern for the Supreme Court Bar’s dearth of diversity.<sup>218</sup>

### D. Commission Report

The Presidential Commission on the Supreme Court of the United States’ Final Report did not substantively address problems with the Supreme Court Bar, despite an abundance of evidence before the Commission.<sup>219</sup> In over 240 pages, the Commission discussed its mission, history of reform debates, membership and size of the Court, term limits, the Court’s role in our constitutional system, as well as the Court’s procedures and practices.<sup>220</sup> Yet, nowhere in this discussion did the Commission see fit to analyze ways in which the Supreme Court Bar might merit reform.<sup>221</sup>

The Final Report nonetheless included five appendices, the last substantive one of which, entitled “Appendix D: Advocacy Before the Court,” contained excerpts from Deepak Gupta, Kenneth Geller, Maureen Mahoney, and Allison Orr Larsen’s testimonies concerning the Supreme Court Bar.<sup>222</sup> It is telling that this material was added to the very last appendix before the Commissioner biographies, and with little explanation, other than a brief introduction which noted that it would be “informative for the public discourse” if these materials were highlighted.<sup>223</sup> A thorough analysis of these materials would have called attention to the clear lack of transparency and diversity within the Supreme Court Bar. The Commission therefore had sufficient information before it to properly spotlight problems with the Supreme Court Bar, but

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215. Presidential Comm’n on the Sup. Ct. of the U.S., *PCSCOTUS Docket*, REGULATIONS.GOV, <https://www.regulations.gov/docket/PCSCOTUS-2021-0001/comments> (last visited July 23, 2022) (this Author’s comment to the Commission excluded from discussion, but largely duplicated through this article).

216. Janai S. Nelson, Comment Letter to the Presidential Commission on the Supreme Court of the United States (Sept. 1, 2021), [https://downloads.regulations.gov/PCSCOTUS-2021-0001-2957/attachment\\_1.pdf](https://downloads.regulations.gov/PCSCOTUS-2021-0001-2957/attachment_1.pdf) [<http://perma.cc/MD28-P3PA>].

217. *Id.* at 6.

218. *Id.*

219. *See* FINAL REPORT, *supra* note 144.

220. *Id.*

221. *See id.*

222. *Id.* at 263.

223. *Id.*

for whatever reason, chose to avoid this course of action.

## VI. HOW TO OPEN THE BAR

Despite centuries of bad practice, publishing the Supreme Court Bar's full membership roll need not be difficult. The Judicial Branch, Legislative Branch, Executive Branch, and even civil society groups each possess the power to undertake action in service of this desirable goal.<sup>224</sup> Publishing the Supreme Court Bar's full membership roll is also an issue that should animate individuals regardless of their partisan affiliation, since it is likely to improve the quality of our democracy at little to no cost.<sup>225</sup> Furthermore, continued failure to publish the Supreme Court Bar's full membership roll makes the United States look bad when compared to its peers.<sup>226</sup> All American citizens therefore have an interest in ensuring that the Supreme Court Bar's full membership is published, ideally through the more transparent form of a roll, rather than a searchable database, without further delay.

### *A. Judicial Branch Actions*

The Supreme Court itself is uniquely positioned to shine light upon its bar membership. It can act on its own initiative at any moment by directing its administrative staff to publish the Court's entire bar membership. Similarly, the Judicial Conference of the United States may have methods of persuading the Supreme Court to increase the transparency of its bar membership through letters, statements, hearings, and the like, even as it is headed by Chief Justice Roberts.<sup>227</sup> Pressure from peer federal judicial officers would likely serve as a potent critique of the Supreme Court's current bar membership disclosure practices capable of eventually nudging the Court in the right direction.

### *B. Legislative Branch Actions*

Absent judicial initiative to rectify the status quo, Congress possesses a broad array of tools to pressure, or even compel, the Court to publish its full bar membership. As an initial matter, Congress could send letters to the Chief Justice, Associate Justices, and judicial branch administrative officials requesting the Court disclose its full bar membership to the general public. Members of Congress could also give floor speeches and arrange special order hours to draw attention to the opacity of the Supreme Court Bar. Moreover, Congress could hold hearings on this matter to

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224. *See infra* Sections VI.A–VI.C.

225. *See supra* Section IV.C.

226. *See supra* Section II.B.

227. *See* 28 U.S.C. § 331 (2018).

pressure the Court to act on its own initiative. It could furthermore question judicial nominees about the Supreme Court's bar membership disclosure policy.

More potently, Congress could pass legislation to compel the Court to create a full, public, and regularly updated membership roll. While some may scoff at this idea as violating the separation of powers, it is not altogether different from Senator John Cornyn's bipartisan and recently enacted Courthouse Ethics and Transparency Act which requires online publication of judicial financial disclosure reports.<sup>228</sup> Similarly, Senator Sheldon Whitehouse's Supreme Court Ethics, Recusal, and Transparency Act of 2023 would provide the Court with 180 days to issue a code of conduct for Supreme Court Justices.<sup>229</sup> Likewise, the 1988 bipartisan Supreme Court Case Selections Act abolished as of right appeals from lower courts.<sup>230</sup> Finally, Belva Lockwood, the first female member of the Supreme Court Bar, only gained admission after successfully lobbying Congress over the course of three years to allow women to join the Supreme Court Bar.<sup>231</sup> There is therefore ample precedent for Congress legislating Supreme Court administrative policy.

Were Congress to pass legislation compelling the Supreme Court to disclose its full bar membership through a public roll, such legislation would be rather simple to write. The findings of fact could point toward the practice of most federal appellate courts, more than twenty federal district courts, and nearly every state bar,<sup>232</sup> in addition to the duty owed by the Court to the public and the negative ramifications of a homogenous bar shielded from proper scrutiny.<sup>233</sup> The operative language could simply provide the Court with 180 days to create a public roll of its bar membership.<sup>234</sup> No additional funding need be required, given how little this initiative would likely cost.<sup>235</sup> Congress would also be wise to require the Court to report back to relevant congressional leaders within thirty days of the creation of such a public roll.

The legislative formulation for an act to require the Supreme Court to establish a public database of its members could appear as follows:

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228. Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, 136 Stat. 1205 (2022) (codified at 5 U.S.C.A. app. §§ 103, 105, 107 (Westlaw through Pub. L. No. 117-262)).

229. Supreme Court Ethics, Recusal, and Transparency Act of 2023, S. 359, 118th Cong. (2023).

230. Supreme Court Case Selections Act, Pub. L. No. 100-352, 102 Stat. 662 (1988) (codified in 28 U.S.C. and elsewhere).

231. Clark, *supra* note 14, at 89–92.

232. *See supra* Section II.A.

233. *See supra* Part III.

234. *See, e.g.*, Baumgarten, *supra* note 31 (containing sample Supreme Court Bar transparency bill).

235. *See supra* Section IV.C.

## **An Act**

To require the Supreme Court of the United States to establish a public database of members admitted to its bar.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### **SECTION 1. SHORT TITLE**

This Act may be cited as “The Supreme Court Bar Transparency Act of 2023.”

### **SEC. 2. FINDINGS OF FACT**

(a) Whereas most Federal Courts of Appeal maintain public databases or lookup functions of their bar memberships.

(b) Whereas more than twenty Federal District Courts maintain public databases or lookup functions of their bar memberships.

(c) Whereas nearly every State Bar maintains a public database or lookup function of its bar membership.

(d) Whereas the U.S. Supreme Court does not currently maintain a public database or lookup function of its bar membership.

(e) Whereas the U.S. Supreme Court owes a duty to the country to enhance its transparency and ensure that its bar membership represents the full diversity of the legal profession.

### **SEC. 3. REQUIRING THE SUPREME COURT TO CREATE A PUBLIC DATABASE OF IT BAR MEMBERS**

(a) CREATION OF PUBLIC DATABASE.—The Supreme Court of the United States is hereby required to create a public electronic database containing the names of all active members of the Bar of the Supreme Court of the United States.

(b) DEADLINE.— Such database shall be completed in full within six months of enactment of this bill.

### **SEC. 4. FUNDING**

(a) APPROPRIATIONS.—No additional funds shall be appropriated to satisfy the objective required by this bill.

### **SEC. 5. REPORTING REQUIREMENT**

(a) REPORTING.—The Supreme Court of the United States, through such party as designated by the Chief Justice, shall transmit to the Speaker of the House of Representatives, Minority Leader of the House of Representatives, Majority Leader of the Senate, Minority Leader of the Senate, and the Chairs and Ranking Members of the House and Senate Judiciary Committees, confirmation of the establishment of a public database of Members of the Bar of the Supreme Court of the United States within thirty days of the creation of such database.

The same objectives could, of course, be achieved by tacking such language onto a larger bill as an amendment. Similarly, such a bill could be passed as part of the appropriations process. If all else fails, a congressional committee with relevant jurisdiction could always subpoena such information and place it in the public domain.<sup>236</sup> All that is needed is for Congress to make the Supreme Court Bar a priority.

### C. Executive Branch Actions

The President may paradoxically have both broad and limited ability to influence the Court to publicize its full bar membership through a public roll. The President could utilize his bully pulpit to bring light to the importance of this matter. However, even if the opacity of the Supreme Court Bar's membership were to gain salience, concern for the Supreme Court Bar is likely to fade from public concern quickly due to the importance of more pressing issues, such as foreign wars, budget crises, immigration reform, gun reform, and other matters.<sup>237</sup> The President also has the ability to issue executive orders, however it is hard to comprehend how that would be of use with this matter given the separation of powers.

Ultimately, the President's four most powerful means of compelling the Supreme Court to disclose its full bar membership roll are: (1) making this a budget priority; (2) nominating judicial candidates who are committed to Supreme Court Bar transparency; (3) urging the Solicitor General, as permitted, to formally request a public membership roll from the Supreme Court; and (4) asking congressional allies to address Supreme Court Bar transparency through substantive legislation. Absent these measures, the President is unlikely to play a role in creating a public roll of Supreme Court Bar members.

### D. Civil Society Actions

Interested federal actors are not the only parties capable of persuading the Supreme Court to establish a public roll of its bar membership. Rather, civil society groups have power to persuade the Court as well. Members of the Supreme Court Bar can write a joint letter to the Court asking that it create such a roll.<sup>238</sup> Similarly,

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236. See *Am. Fed'n Gov't Emps. v. United States*, 330 F.3d 513, 522 (D.C. Cir. 2003) (finding that Congress has broad discretion to regulate its internal proceedings); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 671 (1892) (recognizing extensive congressional authority over what may be entered into its journals); *McGrain v. Daugherty*, 273 U.S. 135, 161 (holding that Congress has the power "to secure needed information" in order to legislate); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (affording Congress broad latitude in its inquiries so long as they are "related to, and in furtherance of, a legitimate task of the Congress"); *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035–36 (2020) (articulating factors for resolving challenge to congressional subpoena of co-equal official).

237. See, e.g., Stef W. Kight, *The Relentless 2021 News Cycle in One Chart*, AXIOS (Dec. 30, 2021), <https://www.axios.com/2021/12/30/2021-relentless-news-cycles-chart-google-data> [<https://perma.cc/V42K-JS9X>] (demonstrating the speed with which public concern changes).

238. See Dahlia Lithwick, *Former Judge Resigns from the Supreme Court Bar*, SLATE (Mar. 13, 2020, 3:22



state bars and bar associations can do the same, as can state attorneys and solicitors general.<sup>239</sup> Journalists, academicians, and non-profits with an interest in judicial reform can also make this an issue that they discuss openly and for which they advocate.<sup>240</sup> Finally, organizations that host or come into contact with the Justices can raise this matter both publicly and privately until it is addressed.<sup>241</sup>

#### CONCLUSION

The Supreme Court Bar is an important, overlooked, and largely unregulated body within the federal judicial structure. It is the only group of lawyers authorized to argue cases before the Supreme Court without special permission. Yet, its membership remains extremely difficult to fully ascertain, in contrast to similar memberships in other domestic and international courts. This is a threat to both equity and transparency that may have far-reaching ramifications across Supreme Court caselaw. Rather than allow the status quo to persist, interested governmental and non-governmental actors should take note of these problems and use their power to pressure the Supreme Court to create a public roll of its bar membership without delay.

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PM), <https://slate.com/news-and-politics/2020/03/judge-james-dannenberg-supreme-court-bar-roberts-letter.html> [<https://perma.cc/CTT9-C928>] (showing how one retired judge and long-time member of the Supreme Court Bar was able to generate attention to his views of the Court's direction through a resignation letter to the Chief Justice); see also *Supreme Court Bench and Bar Honor Memory of Taft and Sanford*, 17 A.B.A. J. 423 (1931) (noting a rare meeting of Supreme Court Bar members to pass resolutions honoring the lives of the late Chief Justice William Howard Taft and Justice Edward Terry Sanford which were subsequently read in open court by Attorney General William D. Mitchell).

239. See *Bar Groups Endorse Letter to Supreme Court of Virginia*, THE VA BAR ASS'N (May 6, 2020), <https://www.vba.org/news/505900/Bar-Groups-Endorse-Letter-To-Supreme-Court-Of-Virginia.htm> [[perma.cc/6EKN-4VPT](https://perma.cc/6EKN-4VPT)].

240. See *The Fixes*, *supra* note 146.

241. See Ruth Bader Ginsburg, Associate Justice, Sup. Ct. of the U.S., Address at the Northern Virginia Technology Council Titans Breakfast Series Event (Dec. 17, 2013) (showcasing Justice Ginsburg's response to a question about Supreme Court term limits posed during a public conversation) (available at <https://perma.cc/44CM-UMWV>).