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Colorblind and Color Mute: Words Unspoken in U.S. Supreme Court Oral Arguments

Chris Chambers Goodman

Pepperdine University Caruso School of Law, christine.goodman@pepperdine.edu

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Colorblind and Color Mute: Words Unspoken in U.S. Supreme Court Oral Arguments

Chris Chambers Goodman*

Abstract

The U.S. Supreme Court holds oral arguments on 70 to 80 cases each year, with fewer than a dozen most years involving issues around race or ethnicity. When the salience of race is clear, Supreme Court observers would expect to hear racial terms used in the arguments by counsel, as well as in the Justice's questions.

Surprisingly, this research study demonstrates that is not the case. These racial terms - such as color, discriminate, minority, race, and its various related terms like racial, racially, racist, as well as combinations like race-neutral, and race-blind - only sparsely appear in oral argument transcripts of cases implicating racial issues. In one case involving racial discrimination against a black postal worker, the term "black" was used only three times in the court opinion and not at all in the oral argument.

The research methodology began with creating a list of U.S. Supreme Court cases in which issues of race, ethnicity, tribal, or national origin discrimination were raised in petitions heard in 2018–22. The specific manifestations ranged from gerrymandering

* Professor of Law, Pepperdine Caruso School of Law, Member, American Law Institute. A.B. cum laude, Harvard College. J.D. Stanford Law School. The author would like to extend gratitude to the many professors who helped to workshop this paper in its early stages, including at the Loyola University Chicago Con Law Colloquium in November 2022, at the Western People of Color/CAPALF Conference at LMU Loyola Law School, Los Angeles in June 2023, and at the 9th Biennial Applied Legal Storytelling Conference, City College, London, UK, in July 2023. The draft benefited greatly from their feedback and questions. I could not have completed this article without the diligent work of my dedicated research assistant Jordan Washington, and the meticulous eyes of the editors of the Washington and Lee Journal of Civil Rights and Social Justice. I dedicate this article to past, present, and future Supreme Court law clerks.

and redistricting, peremptory strikes, employment discrimination, disparaging trademarks, travel bans and Deferred Action for Childhood Arrivals, as well as affirmative action.

The initial research led to three main findings: (1) how infrequently these terms were used during the course of oral arguments in these race-specific cases; (2) that when these words were used, it was usually by the attorneys arguing the cases, not the justices; and (3) some justices almost never mention these terms. The next step involved analyzing how often these terms appeared in the eventual court decisions, which also led to some surprising results. An analysis of the 2022–23 term’s oral arguments and Court opinions yielded results more consistent with expectations about the frequency of RETNO terms used in cases involving RETNO issues, perhaps attributable to the investiture of a third justice of color on the Court, which could constitute a critical mass. The final section also provides a roadmap for forthcoming additional research based on these preliminary findings.

JUSTICE ALITO: Justice Jackson’s example of the -- the Santa in the mall who doesn’t want his picture taken with Black children. So, if there’s a -- a Black Santa at the other end of the mall and he doesn’t want to have his picture taken with a child who’s dressed up in a Ku Klux Klan outfit, that -- that Black Santa has to do that?

MR. OLSON: No, because Ku Klux Klan outfits are not protected characteristics under public accommodation laws.

JUSTICE KAGAN: And, presumably, that would be the same Ku Klux Klan outfit regardless whether the child was black or white or any other characteristic.

JUSTICE ALITO: You do see -- you do see a lot of black children in Ku Klux Klan outfits, right? All the -- all the time. Suppose that -- I mean -- . . . ¹

1. See Transcript of Oral Argument at 75–76, 303 Creative, LLC v. Elenis, 600 U.S. 570 (2023) (No. 21-476) (addressing the limits of accommodation for retailers who open themselves up for public business, yet wish to assert their religious/moral preferences in determining which of the public they serve).

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I. Introduction

Many people feel awkward when speaking about racial issues or even just identifying the race of an individual when trying to

provide a description.² When they try to make a joke, of sorts, as we see Justice Alito attempt above, the awkwardness only increases. There are many reasons why people have a difficult time talking about race and having cross-racial conversations. This article considers the words used in oral arguments at the United States Supreme Court through the lens of racial anxiety and describes how different manifestations of anxiety in different groups can impede cross-cultural communications.

First, some historical background on oral arguments. The early Supreme Court did not place any time limits on oral arguments, perhaps because there were no written briefs required at that time,³ and the justices needed the lawyers to explain the facts and applicable law. Argument sessions lasted multiple hours and could be heard over the course of several days or even a week, with the justices doing much more listening than asking questions.⁴ Printed briefs first became a requirement in 1829.⁵ Those written submissions provided the justices with the details of case, and thus they could ask more informed and useful questions.⁶

The Court imposed time limits in 1871 of two hours per side, and “began questioning advocates more aggressively to get straight to the essentials.”⁷ In 1918, the Court further limited the

2. For a funny illustration of this concept, I am indebted to boxing fan Professor David Straub, as highlighted in his article, *Post-Racialism and the End of Strict Scrutiny*, 92 IND. L. J. 599, 643 n. 254 (2017) (explaining how one commentator at a boxing match had trouble when both boxers were wearing the same color trunks and sought to distinguish them by the colors of other items of clothing, until his colleague chimes in with, “He’s also the Black guy”).

3. See CLARE CUSHMAN, SUP. CT. HIST. SOC’Y, A PICTORIAL HISTORY OF ORAL ARGUMENT 1 (2021) (detailing how the Supreme Court did not impose time constraints on oral arguments during 1818–1835) [perma.cc/6HUU-ZS4K]; see also John Yang & Alex D’Elia, *Looking Back at a Year of Supreme Court Cases Tried Over the Phone*, PBS NEWS HOUR (May 4, 2021, 6:30 PM) (noting how the COVID-19 pandemic forced advocates to deliver their arguments by phone or video) [perma.cc/P52V-HSLX].

4. See CUSHMAN, *supra* note 3, at 1 (explaining how oral arguments could once lasted hours, days, or even a week).

5. *Id.* at 2.

6. *Id.*

7. *Id.* at 4.

time for advocates to 60 minutes per side,⁸ and in 1970 the Court restricted time to the current limitation of 30 minutes per side.⁹

Currently, the United States Supreme Court holds oral arguments in approximately 70 to 80 cases per year,¹⁰ and the arguments are typically scheduled for 60 minutes, though some cases receive additional time when a party seeks it.¹¹ Nonparties who have filed amicus briefs may also see to argue on the side of the party with that party's consent.¹² If after reviewing the briefs, fewer than four justices believe the case warrants oral argument, then they will not schedule any.¹³

There are several primary purposes for oral argument. One important purpose, both for the Justices and for the litigants, is clarification, of the record, of the substance or scope of the claims, as well as their logic and practical impacts.¹⁴ Experienced Supreme Court litigators also consider tactics, which are also important to both the justices and the litigants.¹⁵ These tactics include simplifying information in a way that can help motivate the justices to decide the case in a way favorable to one's clients, as well as providing rebuttals to counter-arguments that justices leaning in favor of one's clients can use in conference with their colleagues.¹⁶ An overarching purpose for litigants, of course, is to

8. *Id.* at 7.

9. *Id.* at 8.

10. *Oral Arguments*, SUP. CT. U.S. [perma.cc/J6PF-ZDEM].

11. *See* SUP. CT. R. 28, 21 (allotting thirty minutes to each side for oral argument, and while “[a]dditional time is rarely accorded,” parties can file a motion requesting it).

12. *Id.* at 37.

13. *See Researching US Supreme Court Cases: Oral Arguments*, TRICOLLEGE LIBRS. RSCH. GUIDES (Apr. 4, 2023, 10:58 AM) (noting that after reviewing the parties' preliminary briefs, the Court is more likely to invite oral arguments if the case involves interpreting federal law and/or the Constitution) [perma.cc/7EAG-DBEX].

14. Stephen M. Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 CATH. U. L. REV. 529, 530 (1984).

15. *Id.* at 531.

16. *See id.* at 531–32 (listing objectives for a litigator at the Supreme Court, including clarifying the record, “motivating the Justices to view the case sympathetically,” and “laying to rest concerns or difficulties that the Justices express”).

win the case, and persuading the justices depends upon demonstrating how “counsel’s legal theory is beneficial to the public, administratively feasible, and consistent with the teaching of past experience.”¹⁷

Some limited research confirms that “what transpires at oral arguments affects justices’ final votes on the merits,” and “these elite decision makers can be influenced by those presenting arguments to them.”¹⁸ This study also established that the justices are seeking information that can “help them reach policy outcomes consistent with their preferences,”¹⁹ and that oral arguments “matter to the decision in a case.”²⁰

Another purpose of oral argument, at least for some justices, is to be able to demonstrate how their opinions are following precedent and that their decisions are consistent with past established law.²¹ More recently, establishing that the decision is not motivated by politics or pre-conceived notions and ideas, but rather is based on the facts as presented by the litigants and the law as reasonably interpreted has become important to avoid further erosion in perceptions of the legitimacy of the Court.²²

There is also a public purpose to oral arguments, particularly in the aftermath of the COVID-19 crisis and the telephonic oral arguments that expanded real-time access to the general public in

17. See *id.* at 531 (explaining how litigants must make these demonstrations to the Court because the Court’s decisions, if erroneous, are difficult to correct through the legislative process).

18. Timothy R. Johnson, et al., *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POLI. SCI. REV. 99, 111 (2006). The study was limited to the Justice Blackmun Court. *Id.*

19. *Id.*

20. *Id.*

21. See Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958-60 and 2010-12*, 2015 UTAH L. REV. 1005, 1037 (2015) (“Although substantial parts of the earlier oral arguments may have taken on the character of monologues, the interactions that did occur seemed more like conversations between counsel and the Court, whereby precedents were examined, theories tested, and legal and factual points clarified.”).

22. See *id.* at 1012 (examining the importance of hearing that is impartial in fact and appearance).

an accessible way.²³ Now, the television channel C-SPAN carries the audio of oral arguments in cases of general interest, with photos of each speaker almost like video-mute in a Zoom meeting.²⁴

Recognizing that the public is listening may also have an impact on the justice's questions, hypotheticals, and attempts at jokes. Television news commentators sometimes play excerpts of the oral argument to illustrate political points.²⁵ Racial anxiety and its ramifications (discussed in Part III, *infra*), may also be exacerbated as the justices know that others are listening, and still others (as has been possible since the 1950s)²⁶ can listen to the recordings or review the transcripts over and over again in the future.²⁷ The general public may have their own impressions of the justices, and the merits or faults with a particular case after hearing these excerpts or listening to entire arguments.

Part II evaluates the transcripts from Supreme Court cases that involved racial, ethnic, tribal or national origin (hereinafter "RETNO") discrimination. It briefly describes the research methodology, case selection process, and how the search terms were generated. It then explains the preliminary findings on the

23. See Pierre H. Bergeron, *COVID-19, Zoom, and Appellate Oral Argument: is the Future Virtual?*, 21 J. APP. PRAC. & PROCESS 193, 200–02 (describing the popularity of oral arguments conducted via Zoom during the pandemic).

24. See, e.g., *Students for Fair Admissions v. University of North Carolina Oral Argument*, (C-SPAN television broadcast Oct. 31, 2022) (broadcasting the audio of an oral argument); *Students for Fair Admission v. President & Fellows of Harvard College Oral Argument* (C-SPAN television broadcast Oct. 31, 2022) (same); *Haaland v. Bracken Consolidated Oral Argument* (C-SPAN television broadcast Nov. 9, 2022) (same).

25. See, e.g., Joan Biskupic, *Supreme Court Oral Arguments Are Taking Forever. The Justices Dissent – and Then Keep Talking*, CNN POLITICS (Nov. 18, 2022, 5:00 AM) (analyzing the justices' politics and thought processes based on their comments and questions during oral arguments) [perma.cc/LLP9-PQ9Y]; *Supreme Court hears Mississippi Abortion Case that Could Overturn Roe v. Wade: LIVE UPDATES* (FOX News television broadcast Dec. 1, 2021) (discussing oral arguments in *Roe v. Wade*) (broadcasting updates and commentary on oral arguments) [perma.cc/J37M-XLVH].

26. See *Argument Audio*, SUP. CT. U.S. (noting that the Court started audio recording oral arguments in 1955) [perma.cc/S3LG-YNDX].

27. See, e.g., *Transcripts and Recordings of Oral Arguments*, SUP. CT. U.S. (Mar. 2018) (demonstrating the accessibility of oral argument transcripts) [perma.cc/G7ED-DUHF].

infrequency of the use of these terms in most cases, and particularly by the justices themselves. After explaining the concept of “racial anxiety, part three explores how racial anxiety impacts communications, and alters or amends the stories that we tell, and the ways in which we tell them. Part IV concludes the article, highlighting the emerging trend with the presence of three justices of color on the Court simultaneously, and providing a roadmap for the next steps in this ongoing research project. The next installment involves gathering additional evidence to consider questions about the broader ramifications of racial anxiety for attorneys as well as the justices conducting oral arguments.

II. Analyzing Oral Argument Transcripts: Preliminary Findings

A. Research Methodology

This research project began with a hypothesis that even though people have difficulty having conversations and discussions about racial issues, especially when the participants are people of different races, the demands of vigorous representation of clients and searching judicial inquiry would overcome such reticence in cases that explicitly have RETNO issues at the center of the questions presented.

Beginning with a five-year span from 2018–22, the author reviewed case summaries and descriptions on SCOTUSblog to compile a list of cases that seemed to implicate RETNO issues. Checking the questions presented revealed that the RETNO issue is not always explicit in the question presented, so a review of the briefs helped assign cases to be included in this study.

The next step was reading the oral argument transcripts of all cases, and developing of a list of RETNO words—words that one might expect to see in cases involving these RETNO issues. The list of words follows, using the early Westlaw search language extender (!) to signify words of any length beginning with the letters indicated:²⁸ African-American(s), Alien(s), Asian(s),

28. For instance, in the early days of Westlaw terms and conditions searches, the exclamation point symbol substituted for any letters or letters following those

Black(s), bias!, bigot!, ethnic!, Caucasian(s), Color!, Discriminat!, Ethnic!, Hawaiian(s), Hispanic(s), Indian(s), Latin!, Minorit!, Native American(s), Preferen!, Puerto Ric!, Prejudic!, Privileg!, Race!, and its various related terms like Racial, Racially, Racist, as well as combinations like Race-neutral, and Race-blind, Segregat!, Slave!, Trib!, and White(s).

The third step was to test the hypothesis that given the subject matter of the litigation, the listed terms would be used frequently in the oral arguments. However, the oral argument transcripts showed that the listed words were used substantially less frequently than expected. Expanding the timeframe to earlier and later cases provided more data and some additional words to add to the list. The case list now includes cases from the 2009–10 to 2022–23 terms.

Appendix A is a table listing the cases considered, the year of the oral argument, the issues addressed, the list of terms found in the transcripts, and in the eventual opinions, along with the frequency, identified by justice.

B. Preliminary Findings

There were three preliminary findings based on the initial research. First, RETNO words did not appear frequently in the transcripts of the oral arguments in the selected cases. Second, when the terms were used, they were usually and most often used by counsel rather than the justices. Third, most justices rarely use RETNO terms in their questions or in their hypotheticals during oral argument.

1. Dataset Cases Where Justices Made Little or No Mention of RETNO Terms

There were surprising cases where RETNO was explicitly at issue and yet there were no mentions of the expected RETNO words. For instance, in *Green v. Brennan*, a Black postal worker

preceding the exclamation point, so searching for text by “rac!” would locate the related words race, racial, and racist, as well as raccoon and raclette.

claimed discrimination, and there were zero mentions of the words race, Black, or African American in the oral argument.²⁹ A review of the resulting court opinion shows only three mentions of these words in the final opinion.³⁰ *Trump v. Hawaii* involved a travel ban on people from predominantly Muslim countries,³¹ and the oral argument transcript’s only mention of the words “race” or “Africa!” are not by the justices, and only two references are by counsel;³² the word “Muslim” was mentioned by justices only twelve times (and fourteen by counsel) for a total of twenty-six times.³³ In *US v. Texas*, which involved deferred removal of non-citizen parents of citizens, the oral arguments have no mention of the words of “race,” “ethnicity,” “Latino,” or “Hispanic.”³⁴ Similarly, in *Berger v. North Carolina*,³⁵ a case addressing allegations of race-based redistricting, there were no mentions of “race” during the oral arguments.

Other cases involving the RETNO issues identified above used these terms sparingly, including: *Department of Commerce* (Hispanics, race, statutory list of races and ethnicities);³⁶ *Denezpi*

29. 578 U.S. 547, 550–52 (2016).

30. Justice Sotomayor only mentioned the words “race,” “Black,” or “African American” in the first four paragraphs her written opinion with the word “race” appearing twice and the word “Black” appearing once. *Id.* at 549–50.

31. See 585 U.S. 667, 687–88 (2018) (concluding that President Trump lawfully exercised the broad discretion granted to him under the Immigration and Nationality Act (INA) to issue a proclamation that suspended the entry of aliens into the United States).

32. Transcript of Oral Argument at 25, 65, *Trump v. Haw.*, 585 U.S. 667 (2018) (No. 17-965).

33. “Muslim” was used 28 times total, 16 times by counsel and 12 times by the following justices: Justice Kagan at 27:15, Justice Roberts at 49:1, 49:16, 50:6 Justice Alito at 64:10, 64:12, 66:14, 64:16, 64:17, 64:21, 65:30, and 66:30). *Id.* at 3–81.

34. This case mentions race zero times. Transcript of Oral Argument, *U.S. v. Tex.*, 579 U.S. 547 (2016) (No. 15-674).

35. See *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 184 (2022) (demonstrating that North Carolina’s legislative leaders had a right to intervene to defend a state voter-ID law).

36. The term “Hispanic” was used four times total, three times by counsel and one time by Justice Sotomayor at 92:20; “Race” was used three times total, twice by counsel and once by Justice Breyer at 61:15; “Ethnicity” was used one time total by Justice Breyer at 61:16. Transcript of Oral Argument, *Dep’t of Com. v. N.Y.*, 139 S. Ct. 2551 (2019) (No. 18-966).

(Navajo, racial, no mention of Indian);³⁷ *Evenwel* (racial, alien);³⁸ *Harris* (race three times);³⁹ *Johnson* (racial, alien three times);⁴⁰ *Tam* (Asian, racial, minority three times);⁴¹ *US v. Texas* (aliens five times).⁴²

Of the cases where there was no mention of race in oral argument, there was slight mention of them in the written opinions. In *Green v. Brennan*, “discrimination” is mentioned several times throughout the entire opinion.⁴³ “Rac!” is mentioned six times total, twice in the majority opinion by Justice Sotomayor, three times in the concurrence by Justice Alito, and once in the dissent by Justice Thomas.⁴⁴ “Black” is mentioned two times total, once in the majority and once in the concurrence.⁴⁵ “Bias” is

37. The term “Navajo” was used four times total, two times by counsel and two times by the following justices: Justice Sotomayor at 8:12, Justice Alito at 66:18; the word “racial” was used three times total, twice by counsel and once by Justice Alito at 16:16. Transcript of Oral Argument, *Denezpi v. U.S.*, 596 U.S. 591 (2022) (No. 20-7622).

38. “Rac!” was used four times total because counsel said “racial” three times and “race” one time, while “Alien” was used two times total by Justice Alito at 43:25 and 44:40. Transcript of Oral Argument, *Evenwel v. Abbott*, 578 U.S. 54 (2016) (No. 14-940).

39. The term “race” was used three times total, twice by counsel and once by Justice Alito at 33:50. Transcript of Oral Argument, *Harris v. Ariz. Indep. Redistricting Comm’n*, 578 U.S. 253 (2016) (No. 14-232).

40. The word “racial” was used one time total by Justice Sotomayor at 13:10; “alien” was used thirteen times total: nine times by counsel and four times by the following justices: Justice Kagan at 9:24, Justice Breyer at 27:8, 27:9, and Justice Sotomayor at 32:15. Transcript of Oral Argument, *Johnson v. Arteaga-Martinez*, 596 U.S. 573 (2022) (No. 19-896).

41. The term “Asian” was used seven times total, all by counsel. The term “racial” was used five times total: four times by counsel and once by Justice Ginsburg at 39:19. The word “minority” two times total: once by counsel and once by Justice Breyer at 7:20. Transcript of Oral Argument, *Matal v. Tam*, 582 U.S. 218 (2017) (No. 15-1293).

42. The word “alien” was used twenty-six times total: eighteen times by counsel and eight times by the following justices: Justice Sotomayor at 8:13, 46:18, 77:10; Justice Kagan at 10:19, 84:9; Chief Justice Roberts at 19:24, 27:1; Justice Ginsburg at 25:2. Transcript of Oral Argument, *United States v. Texas*, 579 U.S. 547 (2016) (No. 15-674).

43. See generally *Green v. Brennan*, 578 U.S. 547 (2016) (using the word “discrimination” twenty-five times in the majority opinion).

44. *Id.*

45. *Id.*

mentioned two times total, once in the concurrence and once in the dissent.⁴⁶

In *Trump v. Hawaii*, the word “Muslim” is used throughout the entire opinion.⁴⁷ However, “race” is only used twice, both times in the majority opinion by Justice Roberts.⁴⁸ It is not mentioned at all in either of the concurrences by Justices Kennedy and Thomas, nor is it used in either of the dissents authored by Justices Breyer and Sotomayor.⁴⁹ In *Berger v. North Carolina NAACP*, the words “Latino” and “Black” are used only once each in the dissent authored by Justice Sotomayor.⁵⁰ They are not mentioned at all in the majority opinion by Justice Gorsuch.⁵¹

Of the cases where “race” was mentioned a few times within oral argument, those terms were also used a few times in the final decision. In *Department of Commerce v. New York*, the word “Hispanic” was used six times in the concurrence by Justice Breyer.⁵² It was not used at all in either of the other concurrences authored by Justices Thomas and Alito, but was used once in the majority opinion by Justice Roberts.⁵³ In *Denezpi v. United States*, “Indian” was used throughout the majority opinion by Justice Barrett and dissent by Justice Gorsuch, but only as a descriptor or in titles and quotation marks.⁵⁴

In *Evenwel v. Abbott*, “discrimination” is mentioned only in the concurrence by Justice Thomas.⁵⁵ “Race” is mentioned once in the concurrence by Justice Thomas.⁵⁶ “Alien” is mentioned twice in the

46. *Id.*

47. *See generally* *Trump v. Hawaii*, 585 U.S. 667 (2018) (using the word “Muslim” eighty-seven times throughout the opinion).

48. *Id.*

49. *Id.*

50. 597 U.S. 179, 201 (2022) (Sotomayor, J., dissenting).

51. *See generally id.*

52. 139 S. Ct. 2551, 2584–95 (2019) (Breyer, J., concurring in part and dissenting in part).

53. *Id.* at 2562.

54. 596 U.S. 591, 594–605 (2022); *id.* at 605–18 (Gorsuch, J., dissenting).

55. 578 U.S. 54, 75–91 (2016) (Thomas, J., concurring); *id.* at 91–103 (Alito, J., concurring).

56. *Id.* at 75–91 (Thomas, J., concurring).

concurrence by Justice Alito.⁵⁷ Importantly, *none of the terms are mentioned in the majority opinion by the late Justice Ginsburg.*⁵⁸

In *Harris v. Arizona Independent Redistricting Commission*, “race” is not mentioned at all in the opinion authored by Justice Breyer.⁵⁹ In *Johnson v. Arteaga-Martinez*, the word “alien” was used three times in the majority opinion by Justice Sotomayor, nine times in the concurrence by Justice Thomas, and eleven times in the concurrence in part and dissent in part by Justice Breyer.⁶⁰ None of the other terms were used in the concurrence by Justice Breyer, nor the majority opinion by Justice Sotomayor.⁶¹ In *Matal v. Tam*, “Asia!” was used six times total, four times in the majority opinion by Justice Alito and twice in the concurrence by Justice Kennedy.⁶² “Rac!” was used eight times total, seven times in the majority and once in the concurrence.⁶³

Given the RETNO subject matter of these cases, the low numbers are quite surprising.

2. Cases with More Frequent Use of RETNO terms by Justices 2014-2022

In some oral argument transcripts the terms appeared more frequently, such as:

- a. *AL Legis. Black Caucus*: African, Black, Hispanic, rac!⁶⁴

57. *Id.* at 93–103 (Alito, J., concurring).

58. *Id.* at 54–75.

59. 578 U.S. 253 (2016).

60. 596 U.S. 573, 575–84 (2022).

61. *Id.*; *id.* at 587–90 (Breyer, J., concurring in part and dissenting in part).

62. 582 U.S. 218, 222–47 (2017); *id.* at 247–54 (Kennedy, J., concurring in part).

63. *Id.*

64. “Africa!” was used 13 times total, six times by counsel and seven times by the following justices: Justice Breyer at 12:25 and 13:7; Justice Kagan at 43:25, 44:1 and 45:7; Justice Alito at 48:2 and 60:25. “Black” was used 83 times total. “Hispanic” was used twice, both times by counsel. “Minorit!” was used 32 times total, seven times by counsel and 25 times by the following justices: Justice Roberts at 5:3, 5:5, 7:19, 7:20, 20:11 (twice), 21:24, 21:25, 40:18, 40:19; Justice Scalia at 8:7, 8:10; Justice Kennedy at 8:19, 8:20, 9:13, 9:14, 9:25, 10:1, 10:2, 10:15; Justice Kagan at 30:11, 36:14, 53:11, 53:14, 53:15. “Rac!” was used 104 times total.

- b. *Bethune*: African, Latino, Black, rac!⁶⁵
- c. *Comcast*: African, Black, rac!⁶⁶
- d. *Fisher II*: African, Black, Hispanic, Latino, minorit!, rac!⁶⁷
- e. *Foster*: African, Black, rac!⁶⁸

Transcript of Oral Argument, Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254 (2015) (No. 12-895).

65. “Africa!” was used 14 times total, 12 times by counsel and two times by the following justices: Justice Alito at 7:15 and Justice Kagan at 13:18. “Latino” was used two times total, one time by counsel and once by Justice Kennedy at 41:4. “Black” was used 14 times total, eight times by counsel and six times by the following justices: Justice Breyer at 9:4, 11:7, 11:9, 38:21, 39:8; and Justice Kennedy at 41:4. “Rac!” was used 68 times total. Transcript of Oral Argument, *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178 (2017) (No. 16-80).

66. “Africa!” was not used at all outside of the case name. “Black” was used seven times total, two times by counsel and 5 times by the following justices: Justice Breyer at 29:1, 29:4, 29:18, and 43:1; Justice Sotomayor at 40:2. “Rac!” was used 52 times total. Transcript of Oral Argument, *Comcast v. Nat’l Ass’n of Afr. Am.-Owned Media*, 589 U.S. 327 (2020) (No. 18-1171).

67. “African” was used 38 times total, 28 times by counsel and ten times by the following justices: Justice Breyer at 16:5; Justice Alito at 40:16, 41:8, 44:19, 44:23, 71:10, 71:22, 72:9, and 84:12; and Justice Scalia at 67:12. “Black” was used 17 times total, three times by counsel and 14 times by the following Justices: Justice Sotomayor at 8:22, 26:8, 26:10, 26:12, 92:19, 92:25, and 93:20; Justice Scalia at 25:4; Justice Alito at 42:21 and 45:4; and Justice Scalia at 67:17, 68:3, 68:4, and 68:7. “Hispanic” was used 32 times total, 16 times by counsel and 16 times by the following justices: Justice Sotomayor at 8:22, 26:7, 26:11, 26:13, and 92:25; Justice Breyer at 16:5; Justice Alito at 40:16, 41:8, 42:21, 44:20, 44:23, 45:4, 71:10, 71:22, 72:10, and 84:14. “Latino” was used one time total by counsel within the name of an organization. “Minorit!” was used 39 times total, 26 times by counsel and 13 times by the following justices: Justice Ginsburg at 9:20 and 10:20; Justice Breyer at 16:9; Justice Alito at 19:2 and 45:1; Justice Roberts at 24:11, 55:5, 55:17, and 55:21; Justice Scalia at 25:3; and Justice Sotomayor at 27:24, 28:15, and 28:18. “Rac!” was used 148 times total. Transcript of Oral Argument, *Fisher v. Univ. of Texas*, 579 U.S. 365 (2016) (No. 14-981),

68. “African” was used ten times total, seven times by counsel and three times by the following justices: Justice Roberts at 17:2; Justice Kagan at 39:5; Justice Ginsburg at 45:4. “Black” was used 27 times total, 18 times by counsel and nine times by the following Justices: Justice Ginsburg at 14:17; Justice Sotomayor at 18:3, 18:5, and 18:15; Justice Kennedy at 24:4, 40:21, 40:22 (twice), and 43:23; and Justice Kagan at 50:4. “Rac!” was used 17 times total, 11 times by counsel and six times by the following justices: Justice Ginsburg at 14:20; Justice Roberts at 16:23; Justice Breyer at 43:10; Justice Kagan at 49:22 and 50:2; and Justice Breyer at 54:22. Transcript of Oral Argument, *Foster v. Chatman*, 578 U.S. 488 (2016) (No. 14-8349).

- f. Jennings: Alien⁶⁹
- g. *McCrorry*: African, Black, rac!⁷⁰
- h. *Pena-Rodriguez*: Bias, Bigot, Hispanic, rac!⁷¹

However, the vast majority of such uses were by counsel, rather than by the justices. Justices rarely use these terms in their questions to counsel in most of these sample cases. A comparison of the oral arguments with the resulting court opinions shows the following:

Bethune-Hill addressed redistricting in Virginia, a state with a larger African American population, and the terms “Black!” and “Africa!” were used only eight times in the oral arguments by four justices (Breyer and Kennedy used “Black!” and Alito and Kagan used “Africa!”).⁷² “Africa!” was not used at all in the opinions, but “rac!” appeared frequently.⁷³

In *Comcast*, a case involving alleged racial discrimination against African American owned media outlets under Section 1983, the term “Africa!” did not appear at all in oral arguments except for references to the name of the case and a party, the

69. “Alien” was used 54 times total, 49 times by counsel and five times by the following justices: Justice Sotomayor at 6:17, 8:11, and 29:21; and Justice Kagan at 13:15 and 24:10. Transcript of Oral Argument, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15-1204).

70. “African” was used 21 times total, 18 times by counsel and three times by the following Justices: Justice Kagan at 8:3 and 59:10; Justice Breyer at 36:4. “Black” was used nine times total, five times by counsel and four times by the following justices: Justice Kagan at 13:23 and 59:12; and Justice Breyer at 53:2 (twice). “Rac!” was used 110 times total. Transcript of Oral Argument, *Cooper v. Harris*, 581 U.S. 285 (2017) (No. 15-1262).

71. “Bigot” was used one time by Justice Roberts at 7:1. “Hispanic” was used four times total, twice by counsel and two times by the following justices: Justice Alito at 10:6 and Justice Ginsburg at 34:23. “Rac!” was used 139 times total. Transcript of Oral Argument, *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017) (15-606).

72. 580 U.S. 178, 181–83 (2017); Transcript of Oral Argument, *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178 (2017) (No. 15-680).

73. In the *Bethune-Hill* reported decision, “Black” was used 18 times total, six times in the majority opinion by Justice Kennedy and 12 times in Justice Thomas’s concurrence. “Africa” and “Latino” were not used in the decision at all. 580 U.S. 148.

National Association of African American Media.⁷⁴ The term did appear five times in the opinions (four in Justice Gorsuch’s majority and once in the late Justice Ginsburg’s concurrence).⁷⁵ “Black!” was mentioned only five times in oral argument, and four times in the concurrence.⁷⁶ “Rac!” appeared frequently in oral argument, and a total of twenty-five times in the opinions (sixteen in the majority and nine in the concurrence).⁷⁷

In *Fisher II*,⁷⁸ addressing affirmative action programs in Texas higher education, Justice Alito used the term “Africa!” eight times in the oral argument, and numerous times in his dissent.⁷⁹ While Justice Kennedy did not use the term at all in oral argument, he used it nine times in his majority opinion.⁸⁰ The term “Black!” was used a total of fourteen times in oral argument by Justices Sotomayor (seven), Alito (two) and the late Justice Scalia (five).⁸¹ While the term “discrim!” was used only twice in oral

74. Transcript of Oral Argument, *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 589 U.S. 327 (2020).

75. In the *Comcast* reported decision, “Africa!” was used five times total, four times in the majority opinion by Justice Gorsuch and once in the concurrence by Justice Ginsburg. *Comcast v. Nat’l Ass’n of Afr. Am.-Owned Media*, 589 U.S. 327 (2020).

76. Transcript of Oral Argument, *Comcast*, 589 U.S. 327 (No. 18-1171); *Comcast*, 589 U.S. 327.

77. In the reported decision, “Black” was used four times total, all of them by Justice Ginsburg. “Rac!” was used twenty-five times total, sixteen times by Justice Gorsuch and nine times by Justice Ginsburg. *Comcast*, 589 U.S. 327.

78. *Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016) [hereinafter *Fisher II*].

79. Transcript of Oral Argument, *Fisher II*, 579 U.S. 365 (No. 14-981); *Fisher II*, 579 U.S. at 389–437 (Alito, J., dissenting).

80. In the *Fisher II* reported decision, “Africa!” was used nine times in the majority opinion by Justice Kennedy and very frequently in Justice Alito’s dissent. “Black” was used twice by Justice Alito. “Discrim!” was used 28 times total, once each in the majority opinion and the dissent by Justice Thomas, and 26 times by Justice Alito. “Hispanic” was used six times by Justice Kennedy and quite frequently by Justice Alito. “Asia!” was used four times total, all by Justice Alito. “Minorit!” was used several times throughout the opinion, 14 times by Justice Kennedy and several times by Justice Alito. “Rac!” was used frequently by both Justices Kennedy and Alito, but only six times by Justice Thomas. “Segregat!” was used five times total, twice by Justice Kennedy and three times by Justice Alito. “Latino” was not used at all in the opinion. *Fisher II*, 579 U.S. at 389–437 (Alito, J., dissenting).

81. Transcript of Oral Argument, *Fisher II*, 579 U.S. 365 (No. 14-981).

argument,⁸² While the term “discrim!” was used only twice in oral argument,⁸³ and only once in the majority opinion, Justice Alito used it twenty-six times in his dissent.⁸⁴ The term “Hispan!” was used about sixteen times in oral argument, mainly by Justice Alito, who also used the term frequently in his dissent.⁸⁵ The term “rac!” was used very frequently both in oral arguments and in the opinions.⁸⁶

*Foster*⁸⁷ considered the permissibility of striking Black prospective jurors and allegations of discrimination, and in the oral argument, five of the Justices (Roberts, Kagan, Ginsburg, Kennedy and Sotomayor) used the terms “Afric!” or “Black!” a total of only thirteen times.⁸⁸ The majority opinion used the term frequently (thirty-three), with the concurrence and dissent each using it four times. “Rac!” was used only six times in the oral arguments (by Ginsburg, Breyer, Kagan and Roberts), but frequently appeared in the majority (Roberts - fourteen), concurring (Alito - four) and dissenting (Thomas - nine) opinions.⁸⁹

In *Jennings*, involving removal procedures for immigrants⁹⁰ only two Justices (Kagan and Sotomayor) used the term “alien!” in oral arguments, but the term was used often in Justice Alito’s majority opinion.⁹¹

82. *Id.*

83. *Id.*

84. *Fisher v. Univ. of Tex.*, 579 U.S. 365, 369–89 (2016); *id.* at 389–437 (Alito, J., dissenting).

85. Transcript of Oral Argument, *Fisher*, 579 U.S. 356 (No. 14-981).

86. *Id.*

87. *Foster v. Chatman*, 578 U.S. 488 (2016).

88. Transcript of Oral Argument, *Foster*, 578 U.S. 488 (No. 14-8349).

89. In the *Foster* reported decision, “Black” was used 41 times total, 33 times in the majority opinion by Justice Roberts, and four times each in the concurrence by Justice Alito and the dissent by Justice Thomas. 578 U.S. 488. “Rac!” was used 27 times total, 14 times by Justice Roberts, four times by Justice Alito, and nine times by Justice Thomas. *Id.*

90. See *Jennings v. Rodriguez*, 583 U.S. 281, 285–86 (2018) (“In this case we are asked to interpret three provisions of U.S. immigration law that authorize the Government to detain aliens in the course of immigration proceedings.”).

91. Transcript of Oral Argument, *Jennings*, 583 U.S. 281 (No. 15-1204).

Cooper addressed redistricting in North Carolina—a state with a large African American population.⁹² While the term “race” was used in oral arguments by Justices frequently, “Africa!” and “Black!” appeared in the transcripts only two or three times each, by Justices Kagan and Breyer.⁹³ The opinions by Justices Kagan for the majority, and Alito’s and Thomas’ concurrences, made minimal use of the term “Black!” but more frequently used “Africa!” and very frequently used “rac!”⁹⁴

In *Pena-Rodriguez*,⁹⁵ on the issue of ethnic bias in criminal jurors, the word “rac!” was used often by Justices in oral arguments, as well as in the majority opinion of Justice Kennedy, and the dissents of Justices Thomas and Alito.⁹⁶ The word “bigot” appeared once in oral arguments, and twice in the opinions.⁹⁷ The term “Hispanic!” which was the ethnicity at issue in the case, was used only twice in oral arguments and four times in the various opinions.⁹⁸

92. See *Cooper v. Harris*, 581 U.S. 285, 291, 293–94 (2017) (“This case concerns North Carolina’s most recent redrawing of two congressional districts, both of which have long included substantial populations of [B]lack voters.”).

93. Transcript of Oral Argument, *Cooper*, 581 U.S. 285 (No. 15-1262). At the oral argument stage, this case was called *McCrorry v. Harris*.

94. In the *Cooper* reported decision, “Africa!” was used 37 times total, 18 times in the majority opinion by Justice Kagan and 19 times in the concurrence by Justice Alito. 581 U.S. 285. Justice Thomas did not use the term at all in his dissent. “Black” and “rac!” were used frequently by Justices Kagan and Alito, but Justice Thomas only used “Black” once and “rac!” twice. *Id.*

95. *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017).

96. In the *Pena-Rodriguez* reported decision, “rac!” was used very frequently by Justices Kennedy and Alito, but only twice by Justice Thomas in the dissent). *Id.*

97. Transcript of Oral Argument, *Pena-Rodriguez*, 580 U.S. 206 (No. 15-606). In the reported decision, “Bigot” was used two times, once in the majority opinion by Justice Kennedy and once in Justice Alito’s dissent. *Pena-Rodriguez*, 580 U.S. at 225, 248.

98. Transcript of Oral Argument, *Pena-Rodriguez*, 580 U.S. 206 (No. 15-606). In the reported decision, “Hispanic” was used four times total, three times by Justice Kennedy and one time by Justice Alito. 580 U.S. 206.

III. Exploring How “Racial Anxiety” Impacts Communication

One explanation for the infrequent use of RETNO terms is racial anxiety, which this part of the article explores. Racial anxiety may be impacting oral arguments during cases involving racial, ethnic, tribal, or national origin discrimination. Racial anxiety can include a fear of being labeled racist, of realizing one’s own racism, and/or concern over confronting one’s own privilege, and manifests in lawyers and judges. It may be on the surface, or buried beneath.⁹⁹ Responses to racial anxiety include racial avoidance, and focusing on meritocracy and colorblindness, and on objectivity and detachment.¹⁰⁰ Colorblindness can lead to “color-mute-ness,” which eliminates racial terms and discussion of racial issues.

A. The Characteristics of “Racial Anxiety”

Scholars define “racial anxiety” as “discomfort about the experience and potential consequences of inter-racial interactions.”¹⁰¹ Professor Rachel D. Godsil and former Dean L. Song Richardson analyzed racial anxiety in the aftermath of the 2016 presidential election,¹⁰² and recognized that it includes

99. See Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2237–38 (2017).

The possibility that egalitarian values can co-exist with behavior inconsistent with those values is now familiar. In the last decade, the social science establishing the powerful effect of our unconscious responses to identity characteristics such as race, ethnicity, gender, and age has entered the national discourse. Even when we genuinely hold egalitarian values, our implicit (i.e., unconscious) responses rather than our conscious values can predict our behavior.

100. See *id.* at 2247 (“While the significance of anxiety about or during intergroup interactions may not be obvious at first blush, its effects can be deeply consequential in every life domain. It can cause reluctance to engage socially across race and lead to significant misunderstandings when these interactions do occur.”).

101. Rachel D. Godsil, *Breaking the Cycle: Implicit Bias, Racial Anxiety, and Stereotype Threat*, POVERTY & RACE RSCH. ACTION COUNCIL, Jan.–Feb. 2015, at 1, 2.

102. See Godsil & Richardson, *supra* note 99, at 2235–36 (analyzing its probable effects in physician-patient and police-civilian encounters).

“concerns that often arise both before and during interracial interactions.”¹⁰³ Parties on each side of interracial interactions may feel some sort of a threat in the situation, or in anticipating the situation, but it may manifest differently depending upon one’s racial or ethnic identity.

On the one side, white people may feel racial anxiety about interracial interactions because they are concerned about being labeled privileged, insensitive, or outright racist.¹⁰⁴ Studies have shown that as concern over appearing racist rises, so do anxiety levels.¹⁰⁵ Manifestations of these anxiety levels include facial twitching, perspiration, and even blinking frequency.¹⁰⁶ Godsil and Richardson are careful to note that “people can experience racial anxiety regardless of their actual racial attitudes and beliefs.”¹⁰⁷

On the other side, people of color also experience racial anxiety in interracial interactions, and may worry about being treated differently, being judged according to negative racial stereotypes, or outright being discriminated against.¹⁰⁸ This anxiety may lead people to use a harsher tone of voice, or avoid making eye contact with the person who is activating the perceived threat.¹⁰⁹ They may

103. *Id.* at 2239.

104. *See id.* at 2240 (“For Whites, racial anxiety is experienced as the concern that they will behave in ways that will be evaluated as racist by a person of color.”).

105. *See id.* at 2243 (“Second, people report feeling anxious and uncomfortable during crossracial interactions and often exhibit behaviors associated with anxiety, such as sweating, increased heart rate, facial twitches, fidgeting and avoiding eye contact.”).

106. *See* Jennifer L. Eberhart, *Imaging Race*, 60 AM. PSYCH. 181, 182–83 (2005) (reporting that new studies attempt to measure automatic racial bias by looking at indirect measures of bias).

107. Godsil & Richardson, *supra* note 99, at 2241.

108. *See* Jessica MacFarlane et al., *Our Brains and Difference: Implicit Bias, Racial Anxiety, and Stereotype Threat in Education*, CONNECTIONS Q., Summer 2016, at 2, 5 (“We also know that this discomfort [from racial anxiety], which researchers call racial anxiety, can get in the way of our forming connections across racial lines.”).

109. *See id.* at 16 (“Not surprisingly, if both people are anxious that an interaction will be negative, it usually is — racial anxiety causes us to avoid eye contact, use less friendly tones of voice, and have shorter interactions . . .”).

cross their arms, assume a defensive posture, and stand farther away.¹¹⁰

A negative feedback loop is formed, as each side reacts to the manifestations of discomfort in the other by demonstrating more of their own discomfort.¹¹¹ Moreover, while each side may attribute their own behaviors to a fear of being rejected, studies have confirmed that they also “assume that similar behaviors by someone of the other racial group reflects a lack of interest,”¹¹² rather than empathizing with the other side who may be mirroring their own fear of rejection. Eventually, each person may try to find ways to cut the conversations short, or to avoid them entirely.¹¹³

B. *The Initial Impact of Racial Anxiety on Cross-Racial Communications*

This racial anxiety often has an impact on people’s abilities to converse, to listen, and even to make a logical or rational argument.¹¹⁴ For some people, anxiety impacts their ability to hear the arguments of someone who is exhibiting signs of anxiousness,

110. See, e.g., DERALD WING SUE, RACE TALK AND THE CONSPIRACY OF SILENCE: UNDERSTANDING AND FACILITATING DIFFICULT DIALOGUES ON RACE 234 (Wiley, 2015) (describing defensive reactions to difficult conversations about race).

111. See Godsil & Richardson, *supra* note 99, at 2245 (“These non-verbal signals have the sadly ironic effect of seeming to confirm the concerns underlying racial anxiety.”).

112. See *id.* For example, in the “why do all the black kids sit together in the cafeteria” scenario, a white person walks by the “black table” and chooses to sit elsewhere. From this repeated situation, the Black diners may infer that Whites in general are not interested in interacting with them, while each White diners rationalizes her seating choice because she thinks Blacks are not interested in interacting with White people like her. It becomes a self-fulfilling prophecy. See RACHEL D. GODSIL, ET AL., THE SCIENCE OF EQUALITY, VOLUME 1: ADDRESSING IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT IN EDUCATION AND HEALTHCARE 30 (2014) (“Shelton and Richeson have concluded that both whites and blacks report interest in contact with one another, but both believe the other group will have little interest in interaction with them . . .”).

113. See MACFARLANE ET AL., *supra* note 108, at 16 (“[R]acial anxiety causes us to avoid eye contact, use less friendly tones of voice, and have shorter interactions . . .”).

114. See Godsil & Richardson, *supra* note 99, at 2245 (“[R]acial anxiety can trigger a desire to avoid interracial contact altogether.”).

anger, or sadness.¹¹⁵ Researchers have determined that “attentional bias,” which means paying more attention to the perceived source of threat, is a common side effect of racial anxiety.¹¹⁶ It can result in cognitive fatigue, as each party maintains hyper-vigilance, looking for clues as to whether the perceived threat (for instance, of being perceived as racist, or of being discriminated against), is actually being realized.¹¹⁷ Moreover, the release of stress hormones above certain levels may exacerbate the racial divide by reducing “cognitive control over unwanted expressions of racial bias,” and allowing implicit stereotypes to take over.¹¹⁸

Aside from the perceived or actual threat issue, people from different racial groups often have different goals for these interracial interactions based on their perception of stereotypes impacting their group. As Godsil and Richardson explain,

White people, aware of the stereotypes about their race, may seek confirmation in an interaction with someone of another race or ethnicity that they are liked. However, someone Black or Latino, aware of the stereotype that they lack competence and intelligence, may seek signals the white person respects them Relatedly, Whites, seeking to promote harmony, often emphasize similarities and downplay racial dynamics while people of color, seeking to ensure respect, may take the opposite approach.¹¹⁹

115. *See id.* at 2243 (“During the interracial interaction, individuals become attuned to threat-relevant cues and acutely aware and preoccupied with their own thoughts and behavior as well as the behavior of their interaction partner.”).

116. *See id.* (“For example, researchers in one study found that heterosexual women who were insecure in their romantic relationships paid more attention to attractive women than to attractive men because women posed a greater threat to their relationships.”).

117. *See id.* at 2244 (“A moderate degree of norepinephrine is associated with optimal control over automatic stereotyping. However, once norepinephrine exceeds this optimal level, the ACC’s (anterior cingulate cortex) response to perceived threat and its ability to engage in cognitive control is impaired.”).

118. *See id.* at 2243–44 (“This occurs because both parties are attempting to discern whether they are confirming negative racial stereotypes or whether they are being judged based on those stereotypes.”).

119. *Id.* at 2246.

These different goals further exacerbate effective communication. The next Part discusses some of the resulting barriers.

C. *How Racial Anxiety Alters Continuing Conversations*

Racial anxiety and racial discomfort can manifest in multiple ways, and will have different indications in different individuals. This Part discusses a few of the more common manifestations.

1. *The Cycle of an Individual's Racial Discomfort*

During the course of racial conversations or conversations with people from and among different races, many people begin from a position of discomfort.¹²⁰ They feel uncomfortable in part because they are anxious for the reasons described above. This discomfort then leads to two particular reactions that are relevant for this discussion.

First, people tend to be overly cautious.¹²¹ Caution is a reaction to a perceived threat, and also a way to reduce anxiety and mitigate discomfort.¹²² Much as one would do with a physical concern, such as walking on an uneven path in the dark—one proceeds cautiously, slowly, carefully, taking a step but not putting one's full weight down until sure that the path is firm, for instance. Similarly, people engage in cautious conversation by asking

120. *See id.* at 2259 (“Racial anxiety often leads to the choice to avoid an interracial interaction in order to reduce anxiety. This decision decreases the likelihood of an interaction that may decrease future anxiety.”).

121. *See id.* at 2243 (“[P]eople report feeling anxious and uncomfortable during cross-racial interactions and often exhibit behaviors associated with anxiety White individuals can become so self-conscious during these interactions that behaviors that would normally occur naturally . . . are negatively affected.”).

122. *See id.* at 2242 (“A common response to feelings of threat is to pay more attention to the phenomena that give rise to them This so-called attentional bias is adaptive and ‘honed by a long evolutionary history.’”).

relatively innocuous or uncontroversial questions, or providing uncontroversial, though sparsely detailed, responses.¹²³

Another reaction that people have when they are anxious or feeling this discomfort is they become overly-accommodating.¹²⁴ As discussed above, where many white people seek to feel as though they are liked by the person of the other race in these conversations, due to the impact of biases and stereotypes about white racism, they may be overly-accommodating in an attempt to be perceived as nice.¹²⁵ While this approach can have positive impacts, it can also have negative impacts as the accommodation seeks to include all groups and perhaps ventures into over-accommodation by making inappropriate analogies and remarks suggesting that “we are all the same after all.”¹²⁶ These attempts to “make nice” and not offend anybody can have the opposite impact on the bystander or onlooker of another race.¹²⁷

In addition to caution and over-accommodation, as tensions rise or anxiety increases, two additional reactions are quite common. One is defensiveness.¹²⁸ Instead of listening to the other side of the conversation with the openness and understanding, and even perhaps expectation as Stephen Carter counsels,¹²⁹ that the other side may be right and you may be wrong, the individual may respond by challenging each point, opinion, or even statistic that is presented by the other side. As lawyers, we are trained to defend

123. See *id.* at 2246 (discussing how, in an inter-group interaction, Whites can be more likely to engage in flattery, friendliness and ingratiation).

124. See *id.* at 2258 (“Well-intentioned individuals ‘may overcompensate for their intergroup anxiety and behave so positively that they come off as inauthentic and/or even patronizing to their interaction partner.’”).

125. See *id.* at 2258–59 (describing attempts by Whites to deal with their anxieties of being perceived as racist by being overly nice).

126. See *id.* at 2246 (discussing ingratiating behavior); see also *id.* at 2237 (“Even when we genuinely hold egalitarian values, our *implicit* (i.e., unconscious) responses rather than our conscious values can predict our behavior.”).

127. See *id.* at 2258–59 (warning that attempts to ameliorate racial anxiety may go awry).

128. See STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY 136–40 (1998) (describing defensiveness as behavior in which one refuses to acknowledge that the opposing position could be correct).

129. See *id.* at 17–19 (describing civility as a moral issue, and providing rules of civility as a component of democratic etiquette).

the weak, as well as our clients regardless of their strength, and with defending our position as zealous advocates, like any good thing, too much can lead to harm.¹³⁰

Another reaction is avoidance.¹³¹ During the course of the conversation, the individual may seek to reduce any further exacerbation of racial tensions and racial anxiety by avoiding responding or reacting to content that involves RETNO issues.¹³² In many cases, the individual may end the conversation or simply walk away.¹³³ At the extreme, people will avoid even engaging in these conversations in the first place, rather than engaging and then retracting as things get difficult.¹³⁴

All of these reactions lead to a vicious cycle where the discomfort leads someone to be more cautious and perhaps more accommodating, which then leads that person to become defensive and avoid, after their cautious accommodation strategy does not produce the desired effect of “I think they like me.” This cycle is depicted in Figure 1:

130. See Sharon Dolovich, *What Does It Mean to Practice Law “in the Interests of Justice” in the Twenty-First Century?: Ethical Lawyering and the Possibility of Integrity*, 70 *FORDHAM L. REV.* 1629, 1682 (2002) (explaining that excessive deference to clients can lead to lawyers taking actions that are contrary to justice)

131. See Godsil & Richardson, *supra* note 99, at 2242–44 (observing that individuals may avoid discussing race due to heightened feelings of anxiety and self-consciousness surrounding the topic).

132. See *id.* at 2243 (discussing how individuals, when discussing race, may feel “particularly sensitive to the risk of negative evaluations and treatment”).

133. See *id.* at 2245 (noting that a common response to anxiety is physical distancing).

134. See *id.* (“[R]acial anxiety can trigger a desire to avoid interracial contact altogether.”).



2. Onlooker/Bystander Interpretations

Why do the cautious and overly-accommodating strategies not produce the desired effect? From the other side of the communication, the person who is observing this discomfort may have different interpretations of the reactions described above.¹³⁵ Many participants in these conversations, as well as bystanders, are also uncomfortable in the face of someone else's racial anxiety or racial discomfort.¹³⁶ They too may be uncomfortable about having, observing, or overhearing a cross-racial conversation.¹³⁷ When that participant, onlooker, or bystander is a person of a different race, however and particularly of an underrepresented and/or historically marginalized RETNO group, their

135. See *id.* at 2253 (showing that police officers and people of color's racial anxieties can cause them to misinterpret each other).

136. See *id.* (discussing how mutual racial anxiety can result in mutual discomfort).

137. See *id.* at 2243 (acknowledging that some individuals report feeling uncomfortable and anxious during cross-racial interactions).

interpretation of the manifestations of the other's racial discomfort may be substantially different.¹³⁸

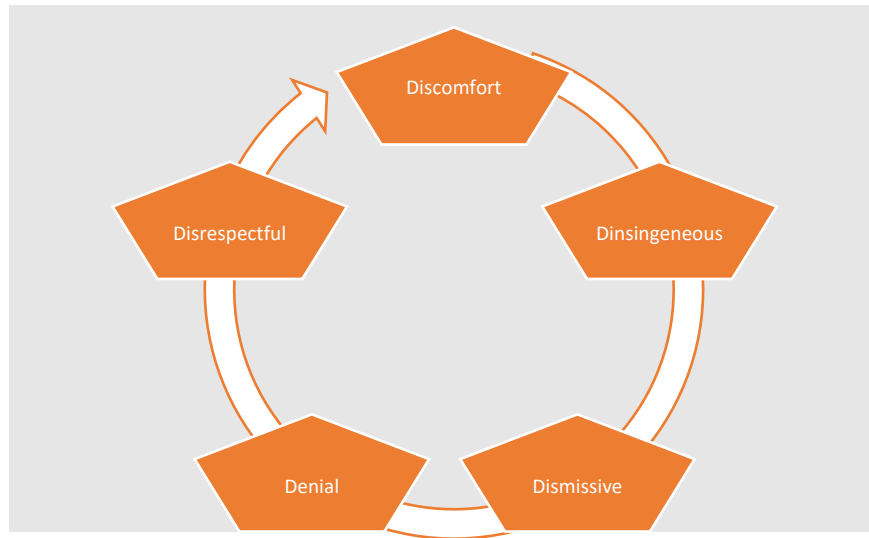
For instance, caution can be interpreted as disingenuousness because many see hesitation in conversation as evidence of fabrication, as opposed to simply being careful. Similarly, over-accommodation and an attempt to find common ground or ensure that "everyone gets along" can come across as dismissive of the real differences and the real disparities across races. The resulting defensiveness described above can be interpreted as a denial of the real struggles and issues that impact people of color, as well as of the privileges and benefits that are inextricably linked with whiteness. Finally, avoidance can be interpreted as disrespect, capitalizing on a notion that "if you don't have the courtesy to participate in the conversation, then you must not respect my views about the need to engage in this conversation."

With one side feeling uncomfortable and therefore behaving in a cautious and overly-accommodating way that might lead to defensiveness and avoidance, and the other side also feeling discomfort, but interpreting disingenuousness, dismissiveness, denial, and disrespect from across the aisle, a vicious negative feedback loop is formed. Acting in response to perceived disrespect, the tone of the conversation may actually become less respectful – thus confirming the feelings of disrespect, which may lead to additional defensiveness and further impede meaningful conversation.

The feelings, emotions, and behaviors intended and exhibited on one side (blue in Figure 1) often are perceived and interpreted by the other side in ways that diverge significantly from that initial intent (orange in Figure 2).

Figure 2:

138. See *id.* at 2245 (describing how some individuals feel anxiety when interacting with someone of another racial group).



D. What can be Done to Address Racial Anxiety?

Professor Godsil recommends several strategies to help reduce racial anxiety, including increasing both direct and indirect interaction between members of one's own group and another racial, ethnic, tribal, or national origin group.¹³⁹ She recommends vicarious contact, which simply means that members of your group interact with members of another group even if you do not, as well as extended contact which is when you know people in your group who have interactions with people from another group.¹⁴⁰ The sequence of the contact matters, as Godsil notes, because it is "essential to first create a shared sense of identity, while also acknowledging group differences."¹⁴¹

Four other approaches Godsil and Richardson recommend are: (1) to acknowledge the anxiety, (2) to practice by scripting the

139. See generally Godsil, *supra* note 101 (discussing intentional thinking about stereotype responses as one way to combat future biased statements).

140. See *id.* at 8 ("[I]ncreased contact between groups can ameliorate implicit bias through a wide variety of mechanisms . . .").

141. See Godsil & Richardson, *supra* note 99, at 2257 (commenting on how group differences can enhance the intergroup contact).

interaction, (3) to develop a growth mindset that prejudice can be changed, and (4) that instead of expecting perfection, consider “interracial interactions as opportunities to improve”¹⁴² skills.

These recommendations can be quite useful for interpersonal interactions, as well as for oral arguments in the Supreme Court. After doing additional research specific to the individual justices, the author hopes to tailor these recommendations more specifically for oral argument interactions.

IV. Conclusion: The Implications of Racial Anxiety for U.S. Supreme Court Oral Arguments

A. And then Things Changed: the 2022-2023 Term

Expanding the data set to include arguments in the 2022–23 term significantly increased the frequency of the words used, and also the number of justices using them. While in the earlier cases, when RETNO terms were used, they were used by three or fewer justices, the most recent Court terms shows some cases with six or more justices using the RETNO terms.¹⁴³ One explanation, of course, is the Court’s docket, with heavy uses by many justices in the affirmative action cases.¹⁴⁴ When compared to earlier affirmative action cases in the dataset, this term’s uses are still significantly greater,¹⁴⁵ except with respect to the term “rac!”, which was used frequently in the affirmative action case oral arguments over the years.

142. See *id.* at 2261 (laying out the steps towards improving racial anxiety).

143. See generally *infra* Appendix A (showing a higher number of justices using RETNO terms in recent terms).

144. See *infra* Appendix A, at 18–19 (indicating extensive use of RETNO terms in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*).

145. For instance, in the oral argument of the earlier affirmative action cases of *Fisher II* and *Schuetz*, the justices used the terms “Asian” only three times total, the term “Africa!” was not used at all in *Schuetz*, and ten times in *Fisher II*. “Discrim!” was used eight times total in the two earlier cases. Whereas, in the *SFFA v. UNC* and *SFFA v. Harvard* cases combined, “Asian” was used 29 times, “Africa!” 23 times, and “discrim!” 52 times. *Infra* Appendix A.

The 2022–23 term’s use of RETNO words is also significantly greater than that of earlier terms in the redistricting case, except for one outlier.¹⁴⁶ Even the oral argument in the tribal cases in the 2022–23 term had a noticeably greater use of RETNO terms than previous cases involving tribes.¹⁴⁷ These cases and the more-frequently appearing words are:

- a. *Allen v. Milligan*: African, Black, discrim!, minorit!, rac!, slaves, White
- b. *Haaland v. Brackeen (Cherokee Nation)*: Alien, Asian, Cherokee, Discrim! Foreign, Latino, Native, Navajo, Preferen!, rac! White
- c. *Lac du Flambeau*: Indian!, trib!, preferen!
- d. *SFFA v. UNC*: African, Asian, Black, Caucasian, discrim!, Hispanic, minorit!, slave, White
- e. *SFFA v. Harvard*: African, Asian, Black, discrim!, minorit!, rac!, slave, White

In *Allen v. Milligan*, many of the racial terms were used several times throughout oral argument.¹⁴⁸ Even though “slave”

146. While in many of the earlier cases, the justices used the terms “Black” from zero to five times, and the term “rac!” from four to eleven times in oral argument, they used both terms frequently in the recent case of *Allen v. Milligan*. Transcript of Oral Argument, *Allen v. Milligan*, 599 U.S. 1 (2023) (No. 21-1086). In cases other than the outlier *Al. Leg. Black Caucus*, the term “minorit!” was used only two to seven times, whereas it was used 18 times in the *Allen* oral argument. Transcript of Oral Argument, *Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015) (No. 13-895).

147. For instance, this term, the justices used the terms “Indian!” and “Trib!” very frequently in oral arguments for the cases of *Oklahoma v. Castro Huerta*, and *Lac du Flambeau v. Coughlin*, but those terms were used less than eight times in most previous cases, with the exception of the word “trib!” being used 28 times in one outlier case of *Salazar v. Ramah Navajo Chapter* (2012). Transcript of Oral Argument, *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022) (No. 21-429); Transcript of Oral Argument, *Lac du Flambeau Band v. Coughlin*, 599 U.S. 382 (2023) (No. 22-227); Transcript of Oral Argument, *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012) (No. 11-551).

148. Transcript of Oral Argument, *Allen v. Milligan*, 599 U.S. 1 (2023) (No. 21-1086). Even though “slave” was only used once total by Justice Jackson at 58:12 and “Africa!” was used just twice total, both times by Justice Kagan at 9:12 and 43:9, the other terms were mentioned with much greater frequency. “Black” was used 58 times total. “Discrim!” was used 34x total, 23x by counsel and 11x by the following justices: Justice Kagan at 9:15, 15:4, 15:7, and 15:13; Justice

was used once by Justice Jackson and “Africa!” was used just twice, the other terms were mentioned with much greater frequency.¹⁴⁹ “Black” was used 58 times total.¹⁵⁰ “Rac!” was used 177 times total.¹⁵¹ “White” was used eighteen times total, ten times by counsel and eight times by the justices.¹⁵²

These same terms also appeared in the final decision. In *Allen v. Milligan*, “enslaved” was used once within quotes in the majority opinion by Justice Sotomayor.¹⁵³ “Africa!” was used three times total, all of them in the dissent authored by Justice Thomas.¹⁵⁴ “Black” was used hundreds of times throughout the entire opinion (approximately 200).¹⁵⁵ “Discrim!” was also used throughout the entire opinion (approximately 100 times).¹⁵⁶ “Majority-min!” was used thirty-seven times total, thirteen times in the majority, seven times in the concurrence, five times in the dissent authored by Justice Thomas, and twelve times in the dissent authored by Justice Alito.¹⁵⁷

Jackson at 18:21, 25:22, 58:2, 58:16, and 86:16; Justice Sotomayor at 29:16; and Justice Barrett at 52:14. “Majority-min!” was used 32 times total, 12 times by counsel and 20x by the following justices: Justice Jackson at 19:6, Justice Alito at 21:25, 22:1, 22:10, 67:9, 69:20, 84:21, 87:13, 111:9, Justice Kagan at 41:1, 41:18, 79:1, Justice Kavanaugh at 46:2, 46:7, 46:12, 46:21, Justice Barrett at 52:24, 53:7, 53:17, 93:8. “Rac!” was used 177 times. “White” was used 18 times total, ten times by counsel and eight times by the following justices: Justice Sotomayor at 28:9 and 28:16; Justice Kagan at 43:11; Justice Jackson at 59:1, 59:4, 59:16, and 60:17; and Justice Alito at 105:20. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Allen v. Milligan*, 599 U.S. 1 (2023).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

In another recent case, the oral argument of *Haaland v. Brackeen*,¹⁵⁸ “alien” was used twice, both times by counsel.¹⁵⁹ “Asian” was used three times total, once by counsel and two times by Justice Kavanaugh.¹⁶⁰ “Cherokee” was used four times total, twice by counsel and twice by the justices.¹⁶¹ “Discrim!” was used seven times total, six times by counsel and once by Justice Kavanaugh.¹⁶² “Foreign” was used thirteen times total, seven times by counsel and six times by the justices.¹⁶³ “Latino” was used four times total, all of them by Justice Kavanaugh.¹⁶⁴ “Native” was used fourteen times total, six times by counsel and eight times by the justices.¹⁶⁵ “Navajo” was used four times total, three times by counsel and once by Justice Barrett.¹⁶⁶ “Preferen!” was used eighty-three times total.¹⁶⁷ “Rac!” was used twenty-nine times

158. Transcript of Oral Argument, *Haaland v. Brackeen*, 599 U.S. 255 (2023) (No. 21-376). “Alien” was used twice total, both times by counsel. “Asian” was used three times total, once by counsel and twice by Justice Kavanaugh at 132:24 and 132:25. “Cherokee” was used four times total, twice by counsel and twice by Justice Kavanaugh at 42:20 and Justice Barrett at 135:12. “Discrim!” was used seven times total, six times by counsel and once by Justice Kavanaugh at 94:25. “Foreign” was used thirteen times total, seven times by counsel and six times by Justice Sotomayor at 10:10, 10:12, 83:15, 122:16, 122:17, and Justice Gorsuch at 37:12. “Latino” was used four times total, all of them by Justice Kavanaugh at 95:9, 95:10, 132:23, and 132:24. “Native” was used 14 times total, six times by counsel, eight times by Justice Kagan at 28:4, and Justice Gorsuch at 39:20, 39:24, 77:17, 77:23, 79:2, 93:3, 94:1. “Navajo” was used four times total, three times by counsel and once by Justice Barrett at 135:11. “Preferen!” was used 83 times total. “Rac!” was used 29 times total, 16 times by counsel and 13 times by the following justices: Justice Kavanaugh at 95:4, 151:2, 148:15, Justice Gorsuch at 21:24, Justice Kagan at 27:16, 29:8, Justice Barrett at 154:19, 155:3, 155:16, 156:21, Justice Roberts at 174:6, 174:14, 174:17. “White” was used seven times total, once by counsel and six times by the following justices: Justice Sotomayor at 14:21 and 75:12; Justice Kavanaugh at 95:7, 95:8, and 132:22 (twice). *Id.*

159. 599 U.S. 255 (2023).

160. Transcript of Oral Argument, *Haaland*, 599 U.S. 255 (No. 21-376)

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

total, sixteen times by counsel and thirteen times by the justices.¹⁶⁸ “White” was used seven times total, once by counsel and six times by the justices.¹⁶⁹

These same terms appeared in the final decision. “Alien” was used five times total, four times in the majority opinion by Justice Barrett and once in the concurrence authored by Justice Gorsuch.¹⁷⁰ It was not mentioned at all in the concurrence authored by Justice Kavanaugh, nor in either of the dissents by Justices Thomas or Alito.¹⁷¹ “Asian” and “Latino” were not used in the opinions at all. “Cherokee” was used nine times total, twice in the majority, three times by Justice Gorsuch, and four times by Justice Thomas.¹⁷² “Discrim!” was used five times total, all within the majority opinion.¹⁷³ “Foreign” was used fifty-one times total, once by Justice Barrett, thirteen times by Justice Gorsuch, and thirty-seven times by Justice Thomas.¹⁷⁴ “Native” was used nine times total, eight by Justice Gorsuch, and once by Justice Thomas.¹⁷⁵ “Navajo” was used seven times total, six times by Justice Barrett, and once by Justice Gorsuch.¹⁷⁶ “Race” was used three times by Justice Barrett, three times by Justice Gorsuch, and twice by Justice Kavanaugh.¹⁷⁷ It is not mentioned in either of the dissents. “White” was not mentioned in the majority opinion, but it is used four times by Justice Gorsuch and three times in Justice Thomas’s dissent.¹⁷⁸ “Prefer!” was mentioned forty-seven times total, thirty-seven times in the majority, but only three times in the concurrence by Justice Gorsuch, five times in the dissent by Justice Thomas, and twice in the dissent by Justice Alito.¹⁷⁹

168. *Id.*

169. *Id.*

170. *Haaland v. Brackeen*, 599 U.S. 255 (2023).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

In the 2022–23 term, in the oral argument of *Lac du Flambeau*, “trib!” was used 198 times total and “Indian” was used 69 times total.¹⁸⁰ “Preferen!” was mentioned eight times total, all of them by counsel.¹⁸¹ These terms were also used frequently in the final opinion.¹⁸² “Trib!” was used throughout the entire opinion (approximately 200 times).¹⁸³ “Indian” was used approximately fifty times.¹⁸⁴ “Preferen!” was not used in the opinion at all.

Turning to the affirmative action cases, in the oral arguments for *Students for Fair Admissions v. University of North Carolina*,¹⁸⁵ the terms “rac!” were used frequently, and “minority” and “White” were used by justices twenty-one times and ten times respectively.¹⁸⁶ The oral arguments in *Students for Fair Admissions v. Harvard* show numerous uses of “rac!” by justices, about seventeen uses of “Asian” and twenty-seven uses of the term “discrim!” and twelve of the term “White.”¹⁸⁷ These terms were used frequently in the opinions, which consolidated the two cases, as were the terms “Asian,” “Black” and “slave.”¹⁸⁸

B. A Critical Mass of Justices of Color Appears to Alter the Landscape

One explanation for the increase in the use of RETNO words by justices during oral arguments is Occam’s razor—that the

180. Transcript of Oral Argument, *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023) (No. 22-227).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Transcript of Oral Argument, *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (No. 20-1199). This case was consolidated with *Students for Fair Admissions v. Harvard College* in the Court’s final decision.

186. *Id.*

187. *Students for Fair Admissions v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

188. *Id.*

simplest explanation is often the right one.¹⁸⁹ Justice Ketanji Brown Jackson was sworn in to serve at the beginning of the 2022–23 term.¹⁹⁰ She is an African American, and takes seriously her role on the Court to uphold the rights and privileges of underrepresented groups.¹⁹¹ And she also “talks the talk,” she acknowledges race when it matters, and perhaps has given courage to her colleagues to do more of the same.¹⁹² With the Court now holding what could arguably be described as a critical mass of justices of color—33% with Justices Jackson, Sotomayor, and Thomas,¹⁹³ even the white justices may feel that they too, have permission to use RETNO words, and they can feel more comfortable doing so as they are not singling out a justice or two of a different race. Of course this article cannot include the justices’ own views on this increase in the use of RETNO words, but it is worth watching to see if the trend continues.

Another potential explanation involves the rhetorical notions of primacy and recency.¹⁹⁴ During the COVID-19 crisis, when the oral arguments were conducted telephonically, Chief Justice Roberts used a roll call system, based on seniority, beginning with the most senior justice on the Court, Justice Thomas, and ending with the most junior at the time.¹⁹⁵ Since the return to in-person

189. See *Occam’s razor*, MIRRIAM-WEBSTER (interpreting the rule of Occam’s razor as “requiring that the simplest of competing theories be preferred to the more complex or that explanations of unknown phenomena be sought first in terms of known quantities”) [perma.cc/G2CB-HK85].

190. *Associate Justice Ketanji Brown Jackson Investiture Ceremony*, SUP. CT. U.S. [perma.cc/Q3MB-X56Z].

191. See Candice Norwood, *As Ketanji Brown Jackson Testified, Black Women Saw Themselves Reflected*, CT MIRROR (Mar. 27, 2022) (profiling Justice Jackson through her confirmation hearings and her experiences with underrepresented groups) [perma.cc/S3RV-S4K9].

192. *Transcript: The Beat with Ari Melber*, MSNBC (Jan. 26, 2022, 6:00 PM) [perma.cc/UA6A-PGEX].

193. See *Supreme Court Justices*, JUSTIA (listing the current Supreme Court justices) [perma.cc/YY5A-ZCAL].

194. See *The Rule of Recency and Primacy*, CORP. COMM’N EXPERTS (discussing the rule of recency and primacy, which suggests that an audience is most likely to remember the themes, ideas, or propositions put forth at the beginning and end of a presentation) [perma.cc/K4RD-7F9U].

195. See Steven Mazie, *The Court After COVID: A Recipe for Oral Argument Reform*, SCOTUSBLOG (Jul. 28, 2021 10:21 AM) (analyzing the change in oral

oral arguments, justices can ask questions whenever they wish, but before counsel's time expires, the Chief Justice will often go through the roll call to see if any justice has anything else to ask before time is up.¹⁹⁶ During the 2022–23 term, that roll call began and ended with the African American Justices Clarence Thomas, and Ketanji Brown Jackson, who are at close to opposite ends of the ideological spectrum.¹⁹⁷ During the final minutes of counsel's time, the first and last questions or comments are posed by Black justices, and the notions of primary and recency are reinforced.¹⁹⁸ While their judicial perspectives and scope of questions differ, the activation of race in the context of these cases is another area for exploration in the next stage of this research.

C. Conclusion and Roadmap of Ongoing Research

This research project has blossomed into several additional areas of inquiry that this author will be diligently pursuing. One project is to analyze earlier decisions, to consider cases immediately before and after the first justice of color Thurgood Marshall joined the Court. The goal would be to analyze how the use and frequency of racial terms has changed over time—from the early Civil Rights movement, to the substitution of Justice Thomas for Justice Marshall as the sole person of color on the bench, to the addition of Justice Sotomayor, and of Justice Jackson, such that

arguments during COVID-19 where justices asked questions “one-by-one in order of seniority”) [perma.cc/83GF-WVGZ].

196. See Amy Howe, *Justices Tweak Format of In-Person Oral Arguments to Allow Time for Taking Turns*, SCOTUSBLOG (Sep. 21, 2021 3:19 AM) (explaining how during Supreme Court oral arguments, “each Justice will have the opportunity to question that attorney individually” after each lawyer’s time ends) [perma.cc/3RHL-U2FD].

197. See Devan Cole, *Justices Clarence Thomas and Ketanji Brown Jackson Criticize Each Other in Unusually Sharp Language in Affirmative Action Case*, CNN (Jun. 29, 2023) (describing Justice Thomas and Justice Jackson as “ideologically opposed jurists”) [perma.cc/KYM8-AYHD].

198. See *The Rule of Recency and Primacy*, *supra* note 194 (asserting the human tendency to remember or recall the first and last things one hears).

for the first time in history, three justices of color sit on the U.S. Supreme Court bench.¹⁹⁹

Another project is gathering data to evaluate the race and ethnicity of attorneys presenting during the oral arguments, to provide a deeper analysis of the impact of cross-racial communications in oral arguments.²⁰⁰ For instance, while most of the attorneys are white and male, in the past decade, no Black attorney has argued on behalf of the government in front of the Court.²⁰¹

A third project focuses on the individual justices and their clerks. One part would involve identifying and analyzing the demographics of U.S. Supreme Court judicial clerks over the years, to see if there is any correlation with the justices' use or avoidance of racial terms in oral arguments, and in their eventual opinions. The next part is to trace any changes in the individual justices' use of these RETNO terms longitudinally, over the course of their terms on the Court, and to qualitatively analyze their colloquies with counsel when they do use racial terms during oral arguments.

After compiling this additional data, the next article in this series will apply notions of racial anxiety to further understanding about how the dynamics of cross-racial conversations, stock stories, and storytelling communications inform and influence the Court's arguments and eventual decisions on cases that implicate

199. See Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Arguments in the Supreme Court, October Terms 1958–60 and 2010–12*, 2015 UTAH L. REV. 1005, 1005–09 (reviewing changes in oral arguments in the Supreme Court in history). I am indebted to participants in the 13th Annual Constitutional Law Colloquium in Chicago in November, 2022, and especially colloquium convener Barry Sullivan, who recommended his work with Megan Canty.

200. See Theodoric Meyer & Tobi Raji, *Historically Diverse Supreme Court Hears Disproportionately From White Lawyers*, WASH. POST (Oct. 30, 2022) (stating that white male lawyers predominate the ranks of those who argue before the Supreme Court) [perma.cc/7WCK-JDR9].

201. See, e.g., *Biden Lawyer Who Defended Affirmative Action Grapples with Diversity in Her Own Office*, WASH. POST (June 23, 2023) (“[M]ore than 80 percent [of arguments made on behalf of government] have been made by White lawyers No Hispanic lawyer has argued a case for the office since 2016. No Black lawyer has done so since 2012.”) [perma.cc/9AML-WDB4]. Thanks to a participant in the 9th Biennial Applied Legal Storytelling Conference in London for suggesting this line of inquiry.

race, ethnicity, tribal, and national origin issues. The next phase in the research will continue to analyze the extent to which the minimal use of racial terms in U.S. Supreme Court oral arguments impacts justice.

APPENDIX A

This Appendix A is a table listing the cases considered, the year of the oral argument, the issues addressed, the list of terms found in the transcripts, and in the eventual opinions, along with the frequency, identified by justice. The “Frequency” column notes the amounts terms came up during oral arguments, while the “Freq.” column refers to written opinions.

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
<i>Berghuis v. Smith</i>	Fair representation in murder trial jury pool	Africa! Black! Discrim! Ethn! Hispanic Latino Minorit! Native Rac! White	Africa!: PS 3, JR 4; Black!: SB 4, AS 15; Discrim!: AK 2; Ethn!: 0; Hispanic: 0; Latino: 0; Minorit!: PS 2, RBG 1, JR 4, SB 5, AS 1; Native!: 0; Rac!: 0; White: AS 1	RBG opinion, CT concurrence	Africa! : RBG alot; Black! : 0; Discrim! : 0; Ethn! : 0; Hispanic: 0; Latino : 0; Minorit! : 0; RBG2; Native : 0; Rac! : 0; RBG 1; White: RBG	1/20/2010

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
					3, CT 1	
Chamber of Commerce v. Whiting	Immigration enforcement	Alien! Discrim! Rac!	Alien!: SA 2, SS 6, SB 1; Discrim!: SB 6; Rac!: 0	JR opinion, CT concurrence, SB dissent, SS dissent	Alien: a lot; Discrim: JR 11, SB 22; Rac!: JR 2, SB 2	12/8/2010
Lewis v. Chicago	Racial discrimination in Firefighter application cut off score	Africa! Black Discrim! Prejudi! Rac!	Africa!: 0; Black: JR 1; Discrim!: JR 3, RBG 1; Prejudi!: SA 1; Rac!: AS 1	AS opinion	Africa!: AS 5; Black: 0; Discrim!: AS 17; Prejudi!: 0; Rac!: AS 3	2/22/2010
Staub v. Proctor	Supervisor's anti-military bias as basis for firing	Bias! Discrim!	Bias!: SA 4, AK 1, SS 1; Discrim!: SS 3, JR 6, SB 3, AS 2, SA 1	AS opinion, SA concurrence	Bias!: AS 9, SA 1; Discrim!: AS 23, SA 5	11/2/2010
US v. Jicarilla Apache Nation	Attorney-client privilege applies to government administrative of tribal trust property	BIA Indian Privileg! Trib! White	BIA: 0; Indian: a lot; Privileg!: SA 2, AK2, JR 4, SB 2, RGB 1; Trib!: SS 2, SB 3, RBG 3, AK 1; White: 0	SA opinion, RBG concurrence, SSdissent	BIA: 0; Indian: a lot; Privileg!: a lot; Trib!: a lot; White:	4/20/2011
Az v. US	Federal immigration laws impact on AZ SB 1070	Alien Color Ethni! Hispanic Latino Rac!	Alien: SS 12, AK 4, SA 3, RBG 2, JR 2; Color: 0; Ethni!: JR 2; Hispanic: 0; Latino: 0; Rac!: JR1,	AK opinion, AS concurrence, CT concurrence, SA concurrence	Alien: a lot; Color: AK 1; Ethni!: 0; Hispanic: 0 outsid	4/25/2012

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
			AS 2		e citatio n; Latino : 0; Rac! AK 1	
Fisher v. UT Austin	Affirmative action in higher education	Africa! Black: Hispanic Latino Minorit!	Africa!: SB 1, SA 8, AS 1; Black: SS 7, SA 2, AS 5; Hispanic: SS 5, SB 1, SA 10;	AK opinion, AS concurrence, CT concurrence, RBGdissent	Africa! : AK 2, CT 1; Hispa nic: AK2, CT 11;	10/10 /2012
Holder v. Guitierrez	Immigration appeal for Mexican national removal	Alien!	Alien!: EK 2, RBG1, SB 1, SA 2	EK opinion	Alien! EK 31	1/18/ 2012
Perry v. Perez	Texas Redistricting	Discrim! Minorit! Prejudi! Rac! White	Discrim!: JR 1; Minorit!: JR 10, SB2, AK 2; Prejudi!: AS 1; Rac!: SA 1; White: 0	Per curiam opinion, CT concurrence	Discrim! : Per curia m 2; Minori t!: Per curia m 5; Prejud i!: 0; Rac! : Per curia m 2; White: 0 except in citatio n	1/9/2 011
Pottawatomie v. Patchak	Quiet Title Act & sovereign immunity regarding Native lands	BIA Indian Trib!	BIA: 0 by Justices; Indian: SS 2; Trib!: SS 4, RBG 5, EK 1, AK 1, JR 5,	EK opinion, SSdissent	BIA: 0; Indian : EK 22, SS 18; Trib! EK	4/24/ 2012

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
			AS 3		13, SS 5	
Salazar v. Ramah Navajo Chapter	Federal government payment of tribal costs exceeding statutory cap	BIA Indian Navajo Trib!	BIA: RBG 1; Indian: 0 by Justices Navajo: 0 outsideparty name; Trib!: SS 7, JR 2, AK 4, AS 3, RBG 3, EK 9	SS opinion, JRdissent	BIA: SS 12; Indian : SS 4, JR 1; Navaj o: 0 outsid e of party name; Trib!: a lot	4/18/ 2012
Taniguchi v. Kan Pacific Saipan	Compensation for litigation interpreters does not also include for translations	Black	Black: 0 outside of title	SA opinion, RBGdissent	Black: 0 outsid e of title	2/21/ 2012
AZ v. Inter Tribal	National Voter registration on act preemption of other voter requirements	Hispanic Indian Rac!	0 terms used byJustices	AS opinion, AK concurrence, CT dissent, SA dissent	Hispan ic: 0; Indian : CT 2; Rac!: CT 1	3/18/ 2013
Scialabba v. Cuellar de Osorio	Bd. Of Immigration appeal over converting new and existing petitions	Alien! Prejudic!	Alien!: SB 2, AS 1; Prejudic!: 0 byJustices	EK opinion, JR concurrence, SA dissent, SS dissent	Alien!: EK a lot, JR 4, SA 3, SS 12 Prejud ic!: 0	12/10 /2013
Schuette v. BAMN	MI Anti-preferenc estatus and equal protection clause	Afric! Hispanic Latino Asian Black Color! Discrim! Ethnic! Minorit!	Afric!: 0 by Justices; Hispanic: 0; Latino: 0 by Justices; Asian: AS 1; Black: SS 1, AS 2; Color!: SA 1;	AK opinion, JR concurrence, AS concurrence, SB concurrence, SSdissent	Afric!: SB 2, SS 1; Hispa nic: SB2, SS 3; Latino : AS 2,	10/15 /2013

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
		Preferen !Prejudi Privilege !Rac! White	Discrim!: SS 1, RBG 1, AS 1, SB 3; Ethnic!: 0 by Justices; Minorit!: SS 2, RBG 10, SA 2, AS 9, JR 5, SB 1; Preferen! SS 2, JR5, SA 2, SB 2; Prejudi! RBG 1; Privilege!: 0 byJustices; Rac!: A lot; White: SA 3, AS 2		SS 3; Asian: 0; Black: AK 5, AS 2, SS 24; Color!: AK 2, AS 6, SB 1, SS 4; Discrim! m!: AK18, JR 2, AS 10, SB 3, SS a lot Ethnic !: AK 2, AS 1, SB 1, SS 8 Minori t!: AK 15, AS 27, SB 9, SS a lot Prefer en! AK24, JR 5, AS 2, SB 3, SS 3; Prejud i!: AS 4, SS 3 Privile ge! AK1, SS 3; Rac!:	

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
					A lot; White: AK 4, AS 3, SB 2, SS 7	
<i>Shelby County v. Holder</i>	Constitutionality of Voting Rights Act sections	Black Color Discrim! Minorit! Rac! Slave!	Black: EK 2, AS 1; Color: SB 2; Discrim!: SS 10, SB3, RBG 1, JR 1, EK 1; Minorit!: 0 byJustices; Rac!: SB 2, AS 3, SS 3, EK 1 Slave!: SB 1	JR opinion, CT concurrence, RBGdissent	Black: JR 4, RBG 23; Color: JR 9, CT 1, RBG 2; Discrim!: JR/RB G a lot,CT 5; Minorit!: JR 13, CT 2, RBG 37; Rac!: JR 20, CT 1, RBG a lot; Slave!: JR 1	2/27/ 2013
<i>UT Southwestern Medical Center v. Nassar</i>	Title VII retaliation claims require but-for causation	Color Discrim! Rac! White	Color: AS 2, JR 3; Discrim!: RBG 8, EK 10, SS 2, SA 7, SB 6, AS 7, JR 2; Rac!: SS 1, SB 18, AS 5, JR 3, SA 1, AK 1; White: 0 by Justices	AK opinion, RBGdissent	Color: AK 13, RBG 9; Discrim!: A lot; Rac!: AK 22, RBG 21; White: AK 1, RBG 2	4/24/ 2013

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
<i>AL. Legis. Black Caucus v. AL Demo. Conf.</i>	Redistricting in Alabama	Africa! Black Hispanic Minorit! Rac!	Africa!: SB 2, EK 3, SA 2; Black: A lot; Hispanic: 0; Minorit!: JR 10, AS2, AK 8, EK 5; Rac!: A lot	SB opinion, ASdissent	Africa!: AS 1; Black: A lot; Rac!: A lot; Hispanic: 0	11/12/2014
<i>Evenwel v. Abbott</i>	Vote dilution in Texas redistricting	Alien Discrim! Minorit! Rac!	Alien: SA 2; Discrim!: 0 Minorit!: 0 Rac!: 0 by Justices	RBG opinion, CT concurrence, SA concurrence	Alien: SA 2 Race: CT 1 Discrim!: CT 2	12/8/2015
<i>Fisher v. UT Austin II</i>	Narrowly tailored ways of using race as a factor of a factor in university admissions	Africa! Black Discrim! Hispanic Latino Asia! Minorit! Rac! Segregat!	Africa!: SB 1, SA 8, AS 1; Black: SS 7, AS 5, SA 2; Discrim!: SA 1, SS1; Hispanic: SS 5, SB1, SA 10; Latino: 0 by Justices; Asia!: SS 1, SA 1; Rac!: a lot; Segregat!: RBG 3	AK opinion, CT dissent, SA dissent	Africa!: AK 9, SA a lot; Black: SA 2; Discrim!: AK 1, CT 1, SA 26; Hispanic: AK6, SA a lot; Latino: 0; Asia!: AK 4; Minorit: AK 14, SA a lot; Rac!: AK/SA a lot, CT 6; Segregat!: AK 2, SA 3	12/9/2015

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
Foster v. Chatman	Permissibility of striking black prospective jurors	Africa! Black Rac!	Africa!: JR 1, EK 1, RBG 1; Black: RBG 1, SS 3, AK 5, EK 1; Rac!: RBG 1, JR 1, SB 2, EK 2	JR opinion, SA concurrence, CTdissent	Africa!: 0; Black: JR 33, SA 4, CT 4; Rac!: JR 14, SA 4, CT 9	11/2/2015
Green v. Brennan	Black postal worker Title VII hostile work environment statutory limitations period	Bias! Black Discrim! Rac!	Discrim!: a lot Rac!: 0 Black: 0 Africa!: 0	SS opinion, SA concurrence, CTdissent	Discrim!: a lot; Rac!: SS 2, SA3, CT 1; Black: SS 1, SA 1; Bias: SA 1, CT 1	11/30/2015
Harris v. AZ Independent Redistricting Com'n	Complying with Voting Rights Act may require unequal districts	Bias! Discrim! Hispanic Minorit! Rac!	Bias!: 0 by Justices; Discrim!: SB 6; Hispanic: 0 by Justices; Minorit!: 0 by Justices; Rac!: SA 2, JR 2	SB opinion	0 all terms	12/8/2015
Mellouli v. Lynch	Bureau of Immigration appeals removal for drugs	Alien Black!	Alien: SA 4; Black!: 0	RBG opinion, CT concurrence	Alien: RBG 23, CT 12; Black!: 0	1/14/2015
Bethune v. VA	Virginia redistricting	Black Africa! Latino Rac!	Black: SB 5, AK 1; Africa!: SA 1, EK 1; Latino: AK 1; Rac!: A lot	AK opinion, SA concurrence, CT concurrence	Black: AK 6, CT 12; Africa!: 0 Latino: 0 Rac!: A lot	12/5/2016
Bank of	City suit	Africa!	Africa!: 0 by	SB opinion,	Africa!	5/1/2

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
<i>Amer. v. Miami</i>	under Fair housing law to combat racial discrimination	Latino Discrim! Minorit! Prejudi! Rac!	Justices; Latino: 0; Discrim!: SS 1, AK3, EK 4, SS 2, JR 2; Minorit!: SS 1; Prejudi!: 0 by Justices; Rac!: EK 4	CT concurrence	: SB 3; Latino : SB 4, CT 1; Discrim!: SB 19, CT 23; Minorit!: SB 9, CT 1; Prejudi!: 0; Rac!: SB 9, CT 10	017
<i>Jennings v. Rodriguez</i>	Removal procedures for immigrant aliens	Alien!	SS 3, EK 2	SA majority, CT concurrence, SB dissent	Alien!: A lot	11/30/2016
<i>Sessions v. Morales-Santana</i>	Citizenship for those not born on US Soil	Alien! Discrim! Rac!	Alien!: SA 1; Discrim!: SB 4, RBG 3, SA 4; Rac!: 0 by Justices	RBG opinion, CT concurrence	Alien!: RBG 18; Discrim!: RBG 12; Rac!: 0 outside of title	11/9/2016
<i>Cooper v. Harris</i>	North Carolina redistricting	Africa! Black Rac!	Africa!: EK 2, SB 1; Black: EK 2, SB 2; Rac!: A lot	EK opinion, SA concurrence, CT concurrence	Africa!: EK 18, SA 19, CT 0; Black!: EK/SA A lot, CT 1; Rac!: EK/SA A lot, CT 2	12/5/2016
<i>Pena-Rodriguez</i>	Juror ethnic	Bigot Hispanic	Bigot: JR 1 Hispanic:	AK opinion, SA dissent,	Bigot: AK 1,	10/11/2016

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
<i>v.CO</i>	bias during deliberations	Rac!	SA 1, RBG 1; Rac!: A lot	CT dissent	SA 1; Hispanic: AK3, SA 1; Rac!: AK/SA A lot, CT 2	
<i>US v. TX</i>	Deferred removal of DACA parents 1	Aliens Discrim! Race, Ethnic! National origin	SS 3 EK 2 JR 2 RBG 1 Alien: SS 3, EK 2, JR 2, RBG 1	Per curiam opinion-1 sentence	N/A	4/18/2016
<i>Wittman v. Personhullah</i>	Redistricting and majority minority using race	Africa! Black Discrim! Latino Majority/minority Rac!	Africa!: EK 4, SB 3; Black: 0 by Justices; Discrim!: SS 2, EK3, SA 1; Latino: 0 by Justices; Majority/minority:SS 1; Rac!: SA 7, SB1,AK 4, JR 11 SS 6, EK 12	JR opinion	Africa!: 0; Black: 0; Discrim!: 0 Latino: 0; Majority/minority: 0 Rac!: JR 7	3/21/2016
<i>Gill v. Whitford</i>	Redistricting in Wisconsin but no standing	Discrim! Minorit! Rac! White	Discrim!: SA 2; Minorit!: EK 1, SS2; Rac!: RBG 1, JR 5, SA 1; White: 0	JR opinion, EK concurrence, CT concurrence	Discrim!: JR 2, EK 1; Minorit!: 0; Rac!: JR 4, EK4 White: 0	10/3/2017
<i>Jesner v. ArabBank</i>	Alien Tort stat. precludes corporate liability for terrorist act	Alien Slave	Alien: NG 2, SS 1; Slave: SS 1, EK 3, SA 1	AK opinion, CT concurrence, SA concurrence, NG concurrence, SS	Alien: AK 4, SA 4, NG 15, SS 9; Slave: AK 4,	10/11/2017

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
<i>Matal v. Tam</i>	Racial slur in patent application, First Amendment	Asian! Discrim! Minorit! Rac!	Asian!: 0 by Justices; Discrim!: EK 4, RGB 1, SA 1; Minorit!: SB 1; Rac!: RGB 1	dissent SA opinion, AK concurrence	SS 2 Asia! SA 4; AK 2, Rac! AK 7, CT1	1/18/ 2017
<i>Lewis v. Clarke</i>	Implications of tribal sovereign immunity and indemnification	Indian! Trib!	Indian: SA 1, RGB1, AK 2, SB 1; Trib!:	SS opinion, CT concurrence, RBG concurrence	Indian : SS 4; Trib! a lot	1/9/2 017
<i>Patchak v. Zinke</i>	Neighboring over tribal Casino	Alien Trib!	Alien: SA 2; Trib!: SB 4, JR 1, SA 1	CT opinion, SB concurrence, RBG concurrence, SS concurrence, JR dissent	Alien: 0; Trib! CT 2, SB3, RBG 1, JR 1	11/7/ 2017
<i>Abbott v. Perez</i>	TX redistricting using race	Hispanic Latin! Black Minorit! Rac!	Hispanic: SS 1; Latin!: SA 1; Black: 0 by Justices; Minorit!: SA 1, SS1; Rac!: SS 6, NG 1, SA 1, JR 3	SA , CT concurrence, SS dissent	Hispanic: SA1, SS 27; Latin!: SA/SS a lot, CT 0 Black: SS 1 Minorit!: SA 12, SS 13 Rac!: A lots	4/24/ 2018
<i>Benisek v. Lamone</i>	Partisan gerrymandering in MD	Discrim! Ethnic! Minorit! Rac! White	Discrim!: AK 1, SS3, JR 1; Ethnic: 0 by Justices; Minorit!: AK 2; Rac!: EK 4,	Per curiam opinion	0 terms used	3/28/ 2018

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
			JR 2, RBG 1; White: 0 by Justices			
<i>Trump v. HI</i>	Travel ban impacting Muslim countries	Africa! Discrim! Muslim! Rac!	Africa!: 0 by Justices; Discrim!: JR 5; Muslim!: EK 1, JR3, SA 8; Rac!: 0 by Justices	JR opinion, AK concurrence, CT concurrence, SB dissent, SS dissent	Africa! : 0; Discrim!: JR 10, CT 2, SS 9; Muslim: a lot; Rac!: JR 2, SS 1	4/25/2018
<i>Upper Skagit Ind. Tribe v. Lundgren</i>	<i>In rem</i> jurisdiction and tribal sovereign immunity	Indian!	Indian!: SA 1, RBG1, EK 1, SB 1	NG opinion, JR concurrence, CTdissent	Indian : NG 8, JR 2, CT 6	3/21/2018
<i>WA v. US</i>	WA state water diversion and tribal treaties	Indian! Trib!	Indian!: EK 1, SS 2, SB 2, RBG 3; Trib!: RBG 1, SB 1	Per curiam opinion-1 sentence	N/A	4/18/2018
<i>Comcast v. Nat'l. Asso. Afr.Am. Media</i>	Under Section 1981 racial discrimination claim, race must bebut-for cause	Africa! Black! Rac!	Africa!: only incase name; Black!: SB 4, SS1;Rac!: A lot	NG opinion, RBG concurrence	Africa! : NG 4, RBG 1; Black! : RBG 4; Rac!: NG 16, RBG 9	11/13/2019
<i>Commerce v. NY</i>	Citizenship question on census survey	Hispanic Race Ethnicity	Hispanic: SS 1; Race: SB 1; Ethnicity: SB 1	JR opinion, CT concurrence, SB concurrence, SA concurrence	Race: only in list or quotes ; Hispanic: 1 JR; SB	4/23/2019

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
<i>DHS v. Regents</i>	DACA rescission was arbitrary and capricious under APA	Hispanic Latino Race	0 by Justices	JR opinion, SS concurrence, CT concurrence, SA concurrence, BK concurrence	6 Hispanic: 0; Latino: JR 3, SS 1; Rac!: SS 1	11/12/2019
<i>VA v. Bethune-Hill</i>	Virginia redistricting use of race under Voting Rt Act	Africa! Black Discrim! Maj/min! Rac!	Africa!: BK 2; Black: SB 1,SS 3, BK 1; Discrim!: BK 1; Maj/min!: BK 2;Rac!: SB 1, SS 2, EK 1,JR 1	RBG opinion, SA dissent	Africa!: 0; Black: 0; Discrim!: 0; Maj/min!: 0 Rac!: RBG 1	
<i>No cases</i>						
<i>Alaska Native Village Corp v. Confed. Tribes of Chehalis; Yellen v. Conf. Tribe</i>	Treating Alaska Native Corporations as Indian Tribes	Alaska! Indian Preferen! Native	Alaska!: SB 2, SS 1, EK 3, BK 10, ACB 12, CT 1, JR 4	SS opinion, SA concurrence, NGdissent	Alaska!: a lot; Indian: a lot; Preferen!: 0; Native: a lot	4/19/2021
<i>AZ v. DNC; Brnovich v.DNC</i>	Vote by mail restrictions and voter dilution	Black Discrim! Latino Hispanic Minorit! Native Rac! White	Black: EK 9, ACB 4; Discrim!: CT 2, BK3, SB 3, SS 2; Latino: EK 1; Hispanic: SS 1; Minorit!: JR 3, SB4, BK 1, ACB 3, CT 3, SA 1, SS 1; Native: SS 1, EK 1; Rac!: CT 2,	SA opinion, NG concurrence, EKdissent	Black: SA 4, EK 10; Discrim!: a lot; Latino: SA 1; Hispanic: SA3, EK 10; Minorit!: a lot;	3/2/2021

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
			SB 10, SS 2, EK 1, BK 3, JR 11, ACB 1; White: JR 1, EK 4, ACB 3, CT 1		Native : SA 4, EK 27; Rac!: a lot by SA and EK; White: SA 5, EK 23	
Sanchez v. Mayorkas	TPS status for lawful status as permanent residents	Alien Minorit! Privilege!	Alien: SB 1, SA 1, EK 1, ACB 3, SS 3; Minorit!: 0 by Justices; Privilege!: 0 by Justices	EK opinion	Alien: EK 4; Minorit!: 0 uses; Privilege!: 0 uses	4/19/2021
Terry v. US	Modification to crack cocaine sentencing guidelines	Bias! Prejudi! Rac!	Bias!: 0 outside of name; Prejudi!: JR 1; Rac!: BK 2	CT opinion, SS concurrence	Bias: CT 1; Prejudi!: 0 uses; Rac!: CT 1, SS 1	5/4/2021
US v. Vaello-Madero	SSI benefits for Puerto Rican citizens	Black! Discrim! Rac! Hispanic! Puerto Ric!	Black!: CT 1; Discrim!: SS 2 NG 2; Hispanic: CT 1, SS1; Rac!: NG 1; Puerto Ric!: CT 11, SS 16, SB 11, SA 2, ACB 6, EK 2, JR 2	BK opinion, CT concurrence, NG concurrence, SS dissent	Black! : CT 9; Discrim!: CT 14; Hispanic: 0 uses; Rac!: CT 12, NG 8; Puerto Ric!: a lot	11/9/2021
Garland v. Dai	Asylum Adverse credibility determinations	Alien	Alien: JR 1, SA 2, ACB 2	NG opinion	NG 12	2/23/2021
Berger v. N.C.	Challenge r to voter	Rac! Africa!	0 terms used	NG opinion, SS dissent	Rac!: 0;	3/21/2022

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
<i>NAACP</i>	ID law and legislative intervenors	Black Hispanic Latino			Africa! : 0 Black: SS 1; Hispanic: 0; : Latino : SS 1	
<i>Denezpi v. US</i>	No double jeopardy for successive prosecutions by distinct sovereigns (tribal)	Indian! Navajo Rac!	Indian!: SR 1, CT 1, SA 2; Navajo: SS 1, SA 1; Rac!: SA 1	ACB opinion, NG dissent	Indian : only in descriptor and title	2/22/2022
<i>Haaland v. Brackeen</i>	Do the Indian Child Welfare Act's restrictions on placement of Native American children violate anti-commandeering principles of the Tenth Amendment?	Alien Asian Cherokee Discrim! Foreign Latino Native Navajo Preferen! Rac! White	Alien: 0 by Justices; Asian: BK 2; Cherokee: BK 1, ACB 1; Discrim!: BK 1; Foreign: SS 6, NG1; Latino: BK 4; Native: EK 1, NG7; Navajo: ACB 1; Preferen!: a lot; Rac!: BK 3, NG 1, EK 2, ACB 4, JR 3;	ACB opinion, NG concurrence, BK concurrence, CT dissent, SA dissent	Alien: ACB 4, Asian: 0; Cherokee: ACB 2, NG 3, CT 4; Discrim!: ACB5; Foreign: ACB1, NG 13, CT 37 Latino : 0; Native : NG 8; CT 1 Navajo: ACB 6, NG 1;	11/9/2022

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
					Preferen!: ACB 37, NG 3, CT 5, SA 2; Rac!: ACB 3, NG 3, BK 2; White: NG 4, CT 3	
Johnson v. Arteaga-Martinez	Bond hearings for non-citizen in immigration detention seeking deportation withholding	Alien Hispanic Latino Rac!	Alien: SS 1, EK1, SB2; Hispanic: 0; Latino: 0; Rac!: SS 1	SS opinion, CT concurrence, SB concurrence in part and dissent in part	Alien: SS 3, CT 9, SB 11; Hispanic: 0; Latino: 0; Rac!: 0	1/11/2022
Allen v. Milligan	Section 2 of VRA and racial gerrymandering for majority-minority districts	Africa! Black Discrim! Maj-min! Rac! Slave White	Africa!: EK 2; Black: a lot; Discrim!: EK 4, KBJ5, SS 1, ACB 1; Maj-min!: KBJ 1, ACB 4, SA 8, EK 3, BK 4; Rac!: a lot; Slave: KBJ 1; White: SS 2, EK 1, KBJ 4	SS opinion, CT dissent	Africa!: CT 3; Black: a lot; Discrim!: a lot; Maj-min!: SS13, CT 5, SA 12;	10/4/2022
Moore v. Harper	Are state legislatures bound by state constitutional constraint	Rac! Africa! Minorit!	Rac!: 0 by Justices; Africa!: NG 2 Minorit!: CT 1	JR opinion, BK concurrence, CT dissent	0 terms used	12/7/2022

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
	s when exercising authority under the Elections Clause?					
OK v. Castro-Huerta	State prosecutorial authority over non-Indians committing crimes on tribal lands	Indian! Trib!	Indian!/Trib!: A lot	BK opinion, NGdissent	Indian!/Trib!: A lot	6/29/2022
SFFA v. Harvard	Race-based admissions in private universities under Title VI; negative Asian action	Asian Africa! Black Caucasia n Discrim! Hispanic Minorit! Rac! Slave! White	Asian: EK 1, SS 5, NG 4, SA 4, JR 3; Africa!: EK 1, NG 2, SA 1, JR 6; Black: SS 7, BK 1 Caucasian: 0 terms used; Discrim!: SS 6JR 5, ACB 1, SS 9, NG 3, EK 2, BK 1; Hispanic: SS 3, EK 1, SA 1, JR 1, NG 1; Minorit!: SS 1, JR 1, ACB 1, BK 1; Rac!: a lot; Slave!: BK 4, SS 1; White: SS 7, EK 1, SA 1, JR 2, NG 1	JR opinion, CT concurrence, NG concurrence, BK concurrence, SS dissent	Asian: a lot; Africa!: JR 2, CT 4, NG 7, BK 1, SS 6; Black: a lot; Caucasian: 0; Discrim!: a lot; Minorit!: a lot; Rac!: a lot; Slave: JR 0, CT 24, NG 1, BK 1, SS 30; White: a lot	10/31/2022
SFFA v.	Whether	Asian	Asian: NG 3,	JR opinion,	Asian:	10/31

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
<i>UNC</i>	Grutter should be overturned/diversity as a compelling interest and narrowly tailoring of admissions plans, and whether racial preferences in higher education violate the 14 th amendment	Africa! Black Caucasian Discrim! Hispanic Minorit! Rac! Slave! White	JR 1, SS 1,SA 7; Africa!: SA 2, EK 1, BK 1, JR 4, KBJ 5; Black: SS 9; ACB 2 Caucasian: KBJ 2; Discrim!: EK 4, JR 2, SA 2, NG 4, ACB 1, CT 11, SS 2; Hispanic: SS 1, EK1, SA 1, ACB 1; Minorit!: JR 1, EK 3, SS 4, SA 3, BK 2, ACB 1, KBJ 7; Rac!: a lot; SS 3, BK 1, KBJ 1; White: SS 6, SA 1, EK 1, NG 1, ACB 1	CT concurrency, NG concurrency, BK concurrency, SS dissent, KBJ dissent Note: This opinion is the same as the opinion in <i>SFFA v.</i> <i>Harvard</i> because the two cases were consolidated .	a lot; Africa! : JR 2, CT 4, NG 7, BK 1, SS 6, KJB 4; Black: a lot; Caucasian: 0; Discrim! : a lot; Hispanic: JR 5, CT 8, NG 9, SS 5; Minorit! : a lot; Rac!: a lot; Slave: JR 0, CT 24, NG 1, BK 1, SS 30, KJB 11; White: a lot	/2022
<i>US v. TX</i>	DHS Immigration enforcement priorities	Rac! Ethnicity Latino Hispanic Alien!	Rac!: 0 Ethnicity: 0 Latino: 0 Hispanic: 0 Alien!: JR 1, SS 5, SA 4, KBJ 2, ACB 1, EK 1	BK opinion, ACB concurrency, NG concurrency, SA dissent	Rac!: 0; Ethnicity: 0; Latino : 0; Hispanic: 0; Alien: NG 4, SA a lot	11/29 /2022

Case	Issue	Terms	Frequency	Opinion(s)	Freq.	Arg.
<i>Lac du Flambeau v. Coughlin</i>	Bankruptcy Code abrogating tribal sovereign immunity	Indian Preference !Trib!	Indian: a lot; Preference: 0 by Justices; Trib!: a lot	JR opinion, CT concurrence, NGdissent	Indian: A lot; Preference: 0; Trib!: A lot	4/24/2023