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The Rhetoric of Racism in the United States Supreme Court

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THE RHETORIC OF RACISM IN THE UNITED STATES SUPREME COURT

KATHRYN STANCHI

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THE RHETORIC OF RACISM IN THE UNITED STATES SUPREME COURT

KATHRYN STANCHI*

Abstract: This Article is the first study that categorizes and analyzes all the references to the terms “racist,” “racism,” and “white supremacy” throughout Supreme Court history. It uses the data to tease out how the Court shaped the meaning of these terms and uncovers a series of patterns in the Court’s rhetorical usages. The most striking pattern uncovered is that, for the Supreme Court, racism is either something that just *happens* without any acknowledged racist actor or something that is perpetrated by a narrow subset of usual suspects, such as the Ku Klux Klan or Southern racists. In the Supreme Court’s usage, the law and the Court are largely innocent in perpetuating racism. The other striking pattern is the significant modern uptick in the use of “racism” and “white supremacy” to deny or minimize the harms of racism or engage in blame-shifting tactics. This Article demonstrates how the Court’s definitions of “racism” and “white supremacy” undercut the law’s potential to achieve racial justice and have removed the Court as a player in the fight against racism. To rectify this rhetorical (and doctrinal) problem, the Justices on the Court must name racism boldly and directly, especially when the Court and its decisions bear responsibility for it.

INTRODUCTION

The United States struggles with defining racism. As one scholar noted: United States “culture has no common conceptualization of what racism is.”¹

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NOTE: Because not all platforms support reproduction of graphic material, the figures herein are archived at https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/62-4/stanchi_graphics-A1b.pdf [<https://perma.cc/F4MB-BTAR>].

¹ Frank Rudy Cooper, *Masculinities, Post-Racialism and the Gates Controversy: The False Equivalence Between Officer and Civilian*, 11 NEV. L.J. 1, 37 (2010) (discussing Christopher A. Bracey, *The Color of Our Future: The Pitfalls and Possibilities of the Race Card in American Cul-*

Definitions of racism occupy a wide space and cover anything from isolated acts of overt discrimination to unconscious bias and embedded structural bias.² Our definition of racism is in such flux that Merriam-Webster Dictionary recently changed its definition of “racism” to reflect the concept and breadth of structural racism.³

In this way, racism is an example of what academic Raymond Williams would call a cultural keyword.⁴ Cultural keywords are socially prominent words that contain multitudes of cultural meanings: meanings that can be contradictory, contested, and changeable over time and across a wide range of audiences, disciplines, and fields.⁵

This Article treats the words “racism,” “racist,” and “white supremacy” as cultural keywords and examines the Supreme Court’s significant contribution to the cultural meanings of these terms. It explores the Supreme Court’s use of these terms in its opinions from the first use of the words through the present day.

The Article’s premise is that the Supreme Court’s ways of using these highly charged words is an authoritative pronouncement of what is and is not racist.⁶ It shapes the cultural and societal meaning of the terms. And because

ture, 5 STAN. J. C.R. & C.L. 89, 100 (2009) (reviewing RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* (2008)).

² See JONATHAN KAHN, *RACE ON THE BRAIN: WHAT IMPLICIT BIAS GETS WRONG ABOUT THE STRUGGLE FOR RACIAL JUSTICE* 68–71 (2018) (noting that members of the Ku Klux Klan do not consider themselves racist). Jonathan Kahn states that “[r]acism, in short, is not some static ‘thing’ that exists only in one particular form under all circumstances.” *Id.* at 71. Compare *Racism*, OXFORD ENGLISH DICTIONARY (3d ed. 2008) (defining racism as “[p]rejudice, antagonism, or discrimination by an individual, institution, or society, against a person or people on the basis of their nationality or (now usually) their membership of a particular racial or ethnic group”), with TA-NEHISI COATES, *WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY* 123–24 (2017) (“Racism is not merely a simplistic hatred. It is, more often, broad sympathy toward some and a broader skepticism toward others.”), and IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 17–18 (2019) (“Racism is a marriage of racist policies and racist ideas that produces and normalizes racial inequities.”).

³ See Christine Hauser, *Merriam-Webster Revises ‘Racism’ Entry After Missouri Woman Asks for Changes*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/merriam-webster-racism-definition.html> [<https://perma.cc/2F8Y-MGPU>] (discussing how Merriam-Webster expanded its definition of “racism” to include not just prejudice against individuals of a certain skin color, but also oppression based on social and institutional power).

⁴ See RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY*, at xxvii–xxx (3d ed. 2015) (discussing how the meanings of particular words have changed with time).

⁵ *Id.*

⁶ By looking at the use of the terms “racist,” “racism,” and “white supremacy,” this Article in no way suggests that the only racism perpetuated, tolerated, or created by the Supreme Court is that which one or more Justices have labeled as “racist” or “white supremacy.” Nor does it suggest that the only way to challenge racism is to use those words. Indeed, there are many opinions that are powerfully antiracist without ever using that word. For example, Justice Sonia Sotomayor’s dissent in *Utah v. Strieff* is often recognized as a powerful antiracist dissent and yet she never uses the word “racism.” See 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (“[I]t is no secret that people of color are

language can “reframe, reconstruct, and otherwise revise our very conception of reality,” the way a powerful entity like the Court uses these terms has a significant impact on our perception of reality.⁷

But even more than that, the Supreme Court’s way of using these words also affects the behavior of others and, ultimately, the quest for racial justice. As Professor Robert Cover wrote, “[t]he judicial word is a mandate for the deeds of others” to the extent that “we expect the judges’ words to serve as virtual triggers for action.”⁸ The Court’s definition of “racism” or “racist” has a profound “trickle down” effect on lower courts and legal advocates; consequently, it shapes the law’s ability or inability to rectify racism.

This Article makes two interrelated arguments about the way that the Supreme Court has defined “racism” throughout history. First, since the Supreme Court started using these keywords, its rhetoric of racism has consistently distanced the Court and the law from responsibility for upholding racism and racist policies. Supreme Court opinions almost never acknowledge the Court’s complicity in creating and upholding racist structures. Instead, when Court opinions use these keywords, they tend to deflect criticism away from the Court. Second, the rhetoric within the relatively few opinions that challenge racist laws and policies has become weaker over time.

The intersection of these two patterns—the rare use of these keywords to challenge racism and the weakness of the rhetoric in those rare cases—constructs a narrow definition of racism as a pejorative term that encompasses

disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.” (citation omitted); see also Catherine M. Grosso & Barbara O’Brien, *Grounding Criminal Procedure*, 20 J. GENDER, RACE & JUST. 53, 76 (2017) (discussing the national media attention that Justice Sotomayor’s dissent in *Streiff* received). Justice Marshall’s concurrence in *Castaneda v. Partida* also contains a particularly sophisticated analysis of racial dynamics for the time (1977) without ever using the word “racism.” See 430 U.S. 482, 503 (1977) (Marshall, J., concurring) (responding to Justice Powell’s argument that minority groups would not discriminate against people in the same minority group by noting that “members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group” may adopt negative attitudes toward their own group).

⁷ Clarke Rountree & John Rountree, *Burke’s Pentad as a Guide for Symbol-Using Citizens*, 34 STUD. PHIL. EDUC. 349, 350 (2015). We use, but are simultaneously used by, language. See KENNETH BURKE, LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD 6 (1966) (“Do we simply use words, or do they not also use us?”); NOEL A. CAZENAIVE, CONCEPTUALIZING RACISM: BREAKING THE CHAINS OF RACIALLY ACCOMMODATIVE LANGUAGE 9 (2016) (“[I]t matters whether the words we choose are ‘race’ or ‘racism,’ ‘black’ or ‘African American,’ ‘minority’ or ‘racially oppressed.’ It matters, for example, whether we select words that allow racism to be examined directly and explicitly or whether we opt to conform to what is comfortable and safe.”).

⁸ Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1611–13 (1986).

only overt racism by a small number of “bad” actors.⁹ Not surprisingly, this definition goes hand in hand with legal doctrine, making it virtually impossible to use the law to combat racism and white supremacy.¹⁰

In Part I, this Article summarizes the methodology used to analyze the Supreme Court’s rhetoric.¹¹ Part II gives a theoretical overview of critical race theorists’ critiques of the Supreme Court’s doctrinal approach to racism as a way of framing how the rhetorical analysis fits into the ongoing conversation about the Supreme Court’s approach to race.¹² In Part III, the Article describes my categorization of the references and reviews each category in detail, highlighting trends and patterns.¹³

I. METHODOLOGY

To determine how the United States Supreme Court has used the terms “racist,” “racism,” and “white supremacy” though time, I conducted a series of Westlaw searches designed to retrieve all references to these terms in Supreme Court case law. I was not interested in softer rhetoric such as “racial,” “race discrimination,” “racially charged,” or “racial bias.”¹⁴ Part of my thesis is that there is something particularly powerful and provocative about the words “racist” and “racism.”¹⁵ As Professor Noel Cazenave states, in the language of the

⁹ See ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM* 71–72 (2018) (analyzing how “the good/bad binary” of racism first started and its practical impact); Ian F. Haney López, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 *CARDOZO L. REV.* 807, 815 (2011) (explaining that, in *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Supreme Court rejected claims that racism influenced Georgia’s application of its death penalty, despite extensive evidence suggesting such was the case, because, in the Court’s opinion, racism requires particular actors and none were identified in that specific case).

¹⁰ Ian Haney López, *Intentional Blindness*, 87 *N.Y.U. L. REV.* 1779, 1781–84 (2012).

¹¹ See *infra* notes 14–18 and accompanying text.

¹² See *infra* notes 19–58 and accompanying text.

¹³ See *infra* notes 59–296 and accompanying text.

¹⁴ Professor Noel Cazenave calls this softer rhetoric “racially accommodative language.” CAZENAVE, *supra* note 7, at 7–8. The Supreme Court’s penchant for using more euphemistic language for racism might also be because it prioritizes etiquette or civility over plain statement. See Leslie Kendrick & Micah Schwartzman, *The Supreme Court, 2017 Term—Comment: The Etiquette of Animus*, 132 *HARV. L. REV.* 133, 135 (2018) (“In our view, the Court erred [in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018),] by elevating matters of etiquette—the importance of appearing respectful and considerate—over giving a reasoned justification for resolving conflicts between religious liberty and antidiscrimination law.”).

¹⁵ See CAZENAVE, *supra* note 7, at ix (stating that certain words that are used to discuss issues surrounding racism downplay its effect and actually “allow[] racial oppression to flourish”); see also, e.g., KENDI, *supra* note 2, at 9, 18 (“‘Racist policy’ . . . is more tangible and exacting, and more likely to be immediately understood by people, including its victims . . .”).

oppressed, racism is the most important word.¹⁶ Moreover, if racism is not called out, it is not challenged or threatened, and it will not change. White supremacy keeps its power because it is neutral, traditional, and never truly acknowledged.¹⁷ Naming racism, especially by a body as powerful as the Supreme Court, puts a reconstructive burden on the powerful and starts a painful but necessary process of change.

For the most part, I excluded opinions in which the Court quotes someone else (i.e., a witness, another court, or brief) unless the choice of quotation was a significant use of the word. I also eliminated most parenthetical or footnote uses of the word, particularly if quoting another case, brief, or scholar, again unless the use was significant or substantive. Also excluded are any uses of the words in a party name. Finally, I counted some references as one usage and others as more than one. Generally, if within one case, different Justices use the same keywords but in different opinions and in substantially different ways, I usually counted that case as more than one reference. But, if one Justice in one opinion used the keywords multiple times in the same way, I generally counted that as one reference.¹⁸ The resulting list includes ninety-two references to “racist” or “racism” and fifteen references to “white supremacy,” for a total of 107 references. I then analyzed those 107 references to understand how the Justices used the words in the opinions. The resulting data reveals an interesting tapestry of the use of these keywords in Supreme Court opinions through eighty years of jurisprudence. As part of this analysis, I situated the usages of the keywords in time, connected the usages to the doctrinal shifts in the Court’s approach to racism, and analyzed and categorized the definitional and rhetorical usages.

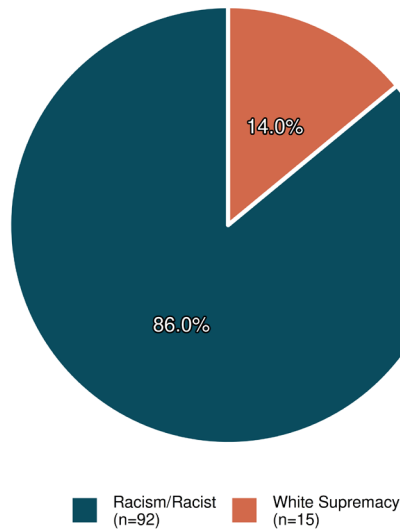
Figure 1 shows the vast prevalence of “racism” and “racist” as compared to “white supremacy.”

¹⁶ CAZENAVE, *supra* note 7, at xi; *see id.* at 92 (“[R]acially accommodative terminology like . . . ‘racial conflict’ . . . keeps hidden the[] hierarchical and asymmetrical nature [of race relations] . . .”).

¹⁷ *Id.* at x (“The abilities to see and to comprehend systems of racial oppression are essential . . . for those who would dismantle them.”); *see id.* at 77 (explaining that racism today is so hidden that acts of prejudice and human agency are not necessary); KENDI, *supra* note 2, at 9 (“[T]he only way to undo racism is to consistently identify and describe it . . .”); Haney López, *supra* note 10, at 1876 (“The country deserves an equality jurisprudence with eyes open to racial context.”).

¹⁸ I have tried to indicate my counting strategies in the footnotes, especially when I deviate from this methodology.

Figure 1.



II. DOCTRINAL THEORETICAL OVERVIEW

Critical race theorists have criticized and charted the timeline of the Supreme Court's doctrinal approach to race.¹⁹ This paper does something slightly different by taking a hard, linguistic look at the rhetoric of the Supreme Court's approach to racism. Nevertheless, the two conversations are hardly separate, so it makes sense to give a brief synopsis of what critical race theorists have said about the Supreme Court's approach to race to situate this rhetorical look in that context.

Professor Sumi Cho has organized the Supreme Court doctrine as it applies to race into four eras: the Racial-Dictatorship Era, the Civil Rights Era, the Post-Civil Rights Era, and the Post-Racial Era.²⁰ The Racial-Dictatorship Era was pre-*Brown v. Board of Education* and marked by white dominance.²¹

¹⁹ See *infra* notes 20–58 and accompanying text.

²⁰ Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1605 (2009). Professor Cho considers everything preceding the Court's *Brown v. Board of Education* decision in 1954 as the Racial-Dictatorship Era. *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)). The Civil Rights Era came next. *Id.* It began with the *Brown* decision and ended in 1986 when William Rehnquist became Chief Justice. *Id.* The third period, the Post-Civil Rights Era, encompasses 1986–2007. *Id.* This era spans both the Rehnquist and Roberts Courts. *Id.* And the final term, the Post-Racial Era, begins in 2007 and continues through the present. *Id.*

²¹ See *id.* at 1605–06 (“[During the first era] whiteness . . . was a valuable form of property recognized and enshrined by law as a normative civic and legal ideal.” (citing Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713–14 (1993))).

Legislatures passed openly “race-d” laws meant to disadvantage “peoples of color” and the courts did nothing to alleviate the injustices (and often assisted in supporting them).²² Professor Cho outlines three “moves” by the courts that supported and upheld the racial apartheid of this era: (1) establishing legal rationales and doctrines that appeared race-neutral but were designed to defeat civil rights laws (e.g., “no private constitutional rights”); (2) making binary doctrinal distinctions that preserved racial hierarchy (e.g., public vs. private); and (3) creating foundational legal principles that solidified racial stratification (e.g., federalism).²³

The Civil Rights Era was marked by the move toward formal equality.²⁴ In addition to *Brown*, this era is marked by the Civil Rights Act of 1964, the Voting Rights Act, and other legislation designed to undo the law’s *de jure* discrimination against people of color.²⁵ Professor Cho categorizes these decisions as largely about “racial redemption”—attempting to cleanse whiteness (and the law) from its complicity in white supremacy.²⁶ Rather than truly disrupting the law’s participation in white supremacy, the cases of this era laid a foundation that would allow the Post-Civil Rights Era courts to maintain white dominance within a narrative of white innocence.²⁷ At the same time, the push toward formal equality in this era also planted the seeds for the racial backlash that Professor Cho identifies as emerging in the 1980s.²⁸

²² *Id.* at 1606.

²³ *Id.* at 1605–10. Examples of some of these “moves” include the Court’s rejection of concurrent jurisdiction, its reliance on the public versus private distinction to preserve subordination, and its further development of federalism and the plenary power. *Id.*

²⁴ *Id.* at 1611; see Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

²⁵ Cho, *supra* note 20, at 1611–12. These moves established facial equality only; they did not change the “substantive definition of what equality requires in material terms.” *Id.* at 1611.

²⁶ *Id.* at 1612.

²⁷ *Id.* at 1612–14 (discussing racial redemption, the “process through which whiteness is decoupled from its problematic association with white supremacy”); see Sumi Cho, *Redeeming Whiteness in the Shadow of Intermittent: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 119–50 (1998) (using racial redemption as a framework for understanding legal history). Professor Thomas Ross used the phrase “white innocence” to refer to the narrative of the white “victim” of affirmative action. Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 302–03 (1990). The term has expanded to include the assertion of white moral purity in the construction of racism. See, e.g., David Simson, *Whiteness as Innocence*, 96 DENV. L. REV. 635, 642 (2019) (arguing that this results in “making America’s tenacious racial hierarchy legally consistent with the country’s egalitarian aspirations”).

²⁸ Cho, *supra* note 20, at 1591–92, 1620 (explaining that racial backlash started in the “sunset of the civil-rights era” and the periods before post-racialism were a “land bridge” to the current backlash); see Cooper, *supra* note 1, at 32–33 (stating that racial backlash was a response to the gains made by the civil rights movement).

The Post-Civil Rights Era starts with the elevation of William Rehnquist to the position of Chief Justice of the United States Supreme Court.²⁹ This era is marked by: (1) the Court's inversion of civil rights to mean the rights of white men were harmed by civil rights laws; (2) the Court's use of equality principles to support racial hierarchy; and (3) the view that critiques of racism are the moral equivalent of racism.³⁰

Cho's final era, the Post-Racial Era, is exemplified by the Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, in which the Court struck down the plans of school districts that used racial classifications to achieve diversity and integration in their schools.³¹ In Cho's view, the plurality in *Parents Involved* applied what were, at the time, "the newest judicial mechanisms created to preserve racial hierarchy" while simultaneously averring that racial discrimination was the problem of a bygone era.³²

Overlapping with Professor Cho's timeline is Professor Ian Haney López's map of the evolution of the concepts of "colorblindness" and "malicious intent."³³ When these two concepts converged in Supreme Court jurisprudence, they created a double bind for those seeking racial justice. As Professor Haney López described: "Colorblindness denies that the state's purposes can be discerned; intent doctrine demands proof of malicious purpose."³⁴

According to Professor Haney López, the concept of colorblindness shifted in the twentieth century from a progressive, quasi-utopian view of the Constitution to a weapon used against race-conscious remediation.³⁵ But, as Professor Haney López explains, the damage of this new version of colorblindness goes beyond its use against affirmative action; it has changed the definition of racism itself by "defining racism as any use of race" and simultaneously defining "all interactions not expressly predicated on race, no matter how closely

²⁹ Cho, *supra* note 20, at 1614.

³⁰ *Id.* at 1616.

³¹ 551 U.S. 701, 723 (2007) (Roberts, C.J., majority opinion) (stating that "racial classifications . . . to achieve racial balance . . . [are] 'patently unconstitutional'" (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003))).

³² Cho, *supra* note 20, at 1616. In addition to the Court's post-racialism ("legal post-racialism") Cho also identifies "political post-racialism," which was "popularized" by the election of President Barack Obama, the nation's first African American leader. *Id.* at 1621–22.

³³ See Haney López, *supra* note 9, at 809–11 (summarizing the history of the colorblindness doctrine). See generally Haney López, *supra* note 10; (tracking the development of both the intent and colorblindness doctrines from the Civil Rights Era onward).

³⁴ Haney López, *supra* note 10, at 1784.

³⁵ Haney López, *supra* note 9, at 809–10; see Cooper, *supra* note 1, at 32–33 (explaining how the concept of weaponizing colorblindness to undermine Black civil rights was the predecessor of post-racialism).

correlated with racial hierarchy” as “not racism.”³⁶ Haney López refers to this more modern use of colorblindness as “reactionary” colorblindness to distinguish it from the use of colorblindness that galvanized the civil rights movement.³⁷

For Professor Haney López, the tipping point of the Supreme Court’s embrace of reactionary colorblindness was the language in *Brown* to proceed with caution in dismantling Jim Crow laws “with all deliberate speed” instead of wholesale. By the 1960s, Professor Haney López notes, it became clear to “the friends and foes of racial emancipation” that racial segregation was thriving despite the Court’s move toward formal equality.³⁸ As early as 1955, just one year after *Brown*, a district court in South Carolina used a colorblind rationale to undercut integration efforts; as Professor Haney López notes, from there it was just a “short step” toward reactionary colorblindness—the use of colorblindness as a counterargument to race-conscious remediation.³⁹ At the same time as the reactionary colorblindness philosophy was percolating in the courts in the late 1960s, the political arena saw the racial dog-whistle politics of the “tough on crime” era and the demonization of welfare recipients.⁴⁰ All of these forces coalesced to eventually create what civil rights advocate Michelle Alexander labeled the “New Jim Crow.”⁴¹

³⁶ Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1062 (2010).

³⁷ Haney López, *supra* note 9, at 809; *see id.* at 811 (explaining that “[b]y the end of the 1970s, the rhetoric of colorblindness had been repurposed as an attack on affirmative action,” “shift[ing] . . . from emancipatory to reactionary”); *see also* Cooper, *supra* note 1, at 32–33 (attributing this evolution of “racial backlash” colorblindness to the civil rights movement and the combined policies of white conservatives and liberals that succeeded in “[s]hifting the costs of black civil rights to the white working and middle classes” and the “Southern Strategy” as a proxy for suppressing Black civil rights).

³⁸ Haney López, *supra* note 9, at 809–11. Jim Crow laws legalized racial segregation in public facilities in the South for approximately one hundred years following the Civil War era. *Jim Crow Laws*, HISTORY, <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> [<https://perma.cc/6EZ9-SLEE>] (Jan. 19, 2021).

³⁹ Haney López, *supra* note 9, at 810 (identifying the use of colorblind rhetoric as a reactionary tool in a 1969 North Carolina statute and stating that after the passage of that statute, “it was but a short step to the contention that colorblindness affirmatively prohibited race-conscious integration measures”).

⁴⁰ *Id.* at 811–14; *see* Sara Grossman, *Revisiting ‘Dog Whistle Politics,’* OTHERING & BELONGING INST.: BLOG (Sept. 22, 2017), <https://belonging.berkeley.edu/blog-revisiting-dog-whistle-politics> [<https://perma.cc/E9L2-9NH8>] (“‘Dog whistles’ are what [Haney López] terms political catch-phrases that don’t explicitly mention race but are ultimately used to refer to people of color and the various threats they apparently command.”).

⁴¹ *See* Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 1, 8 (2011). *See generally* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2* (rev. ed. 2012) (explaining the network of events that led to mass incarceration, which she terms a new type of Jim Crow).

At first, state attempts to circumvent Black civil rights by passing legislation that embraced reactionary colorblindness were rejected by the Supreme Court. But as the membership of the Court changed, the Court came to embrace this philosophy.⁴² Professor Haney López identifies the watershed moment of the Court's adoption of reactionary colorblindness as the Court's 1978 decision in *Regents of the University of California v. Bakke*.⁴³ Justice Thurgood Marshall attempted, to no avail, to convince the *Bakke* Court to reject reactionary colorblindness.⁴⁴ After *Bakke*, colorblindness was firmly enshrined into the Constitution as a means of defeating racial equality.⁴⁵

In addition to functioning as a sword against race-conscious remedies like affirmative action, reactionary colorblindness also contributes to racial injustice by labeling as “not racist” anything short of an overt, clear, intentional slur.⁴⁶ This “malicious intent” requirement began with the Court's 1979 decision in *Personnel Administrator of Massachusetts v. Feeney*.⁴⁷ In *Feeney*, the Court held that a statute giving hiring priority to veterans did not violate the Equal Protection Clause even though it effectively excluded women from the top civil service jobs.⁴⁸ The Court's reasoning resulted in a “new . . . bifurcation of equal protection” in which facially neutral laws, like the one in *Feeney*, would fall under intent doctrine and require an almost impossible showing from plaintiffs, whereas laws expressly using race (like affirmative action laws) would receive, and likely not survive, strict scrutiny based on the philosophy of colorblindness.⁴⁹

The 1987 case of *McCleskey v. Kemp* is, in Professor Haney López's view, the zenith of this “flip-side” of the colorblind philosophy.⁵⁰ In *McCleskey*, the Court “shrugged off the most sophisticated and exhaustive survey of capital sentencing thus far undertaken when it rejected the claim that racism tainted Georgia's death penalty machinery.”⁵¹ *McCleskey* demonstrated that the

⁴² Haney López, *supra* note 9, at 811; *see also* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁴³ *Id.* In *Bakke*, a white male challenged the constitutionality of a medical school's affirmative action program that required that sixteen out of one hundred seats be set aside for minority applicants. 438 U.S. at 269–81 (opinion of Powell, J.).

⁴⁴ *See Bakke*, 438 U.S. at 401 (opinion of Marshall, J.) (“It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.”).

⁴⁵ Haney López, *supra* note 9, at 811.

⁴⁶ *Id.* at 815.

⁴⁷ 442 U.S. 256 (1979).

⁴⁸ *Id.* at 259, 277.

⁴⁹ Haney López, *supra* note 10, at 1786.

⁵⁰ Haney López, *supra* note 9, at 815.

⁵¹ *Id.*

Court did not believe in “structural” or “unconscious” racism.⁵² For the Court, there is no racism without an epithet or a confession of racist intent.⁵³

The 1990s saw the full consolidation of reactionary colorblindness and malicious intent as exemplified in 1993 by *Shaw v. Reno*, in which the Court rejected a redistricting plan that created a majority Black congressional district.⁵⁴ Professor Haney López refers to this consolidation as “intentional blindness.”⁵⁵ For Professor Haney López, *Shaw*’s significance was its emphasis away from the requirement of intentional bias and toward disapproval of any express use of a racial classification.⁵⁶

Then in the 2000s, the Court expanded the doctrine of intentional blindness in 2007 with *Parents Involved in Community School District, No. 1 v. Seattle School District* and again in 2009 with *Ricci v. DeStefano*.⁵⁷ Professor Haney López states that in these cases, “the Court seemed to contemplate that colorblind ignorance should apply every time a government actor expressly considered race,” extending even to basic governmental actions like data collection.⁵⁸

Figure 2 is a (somewhat oversimplified) schematic of the eras that Professors Cho and Haney López described. This schematic is not meant to reduce the complexity and nuance of the work of these two scholars, but meant to help readers see, in context, the rhetorical shifts I point out in this Article. Figure 2.1 is a schematic of the usages of “racism,” “racist,” and “white supremacy” grouped roughly by era to allow comparison between usages and the timelines of Professors Cho and Haney López.

⁵² *See id.*

⁵³ *Id.* (“The majority reasoned as if racial discrimination did not exist unless the record included a racial epithet or a confession of evil intent.”).

⁵⁴ *See* 509 U.S. 630, 647 (1993) (referring to the redistricting plan as “political apartheid” and articulating colorblindness as the ultimate goal of the Constitution); *see also* Haney López, *supra* note 10, at 1868–70 (discussing *Shaw* and how it “converted intent into an ersatz colorblindness rule,” making it likely that any action to promote racial justice would be unconstitutional).

⁵⁵ Haney López, *supra* note 10, at 1870 (stating that *Shaw* and the other voting cases “herald[ed] the full ascent of colorblindness” as a judicial doctrine).

⁵⁶ *See id.* at 1869 (*Shaw*’s “intent test effectively abandoned any concern with intentions” and instead was “solely concerned with the express use of a racial classification”).

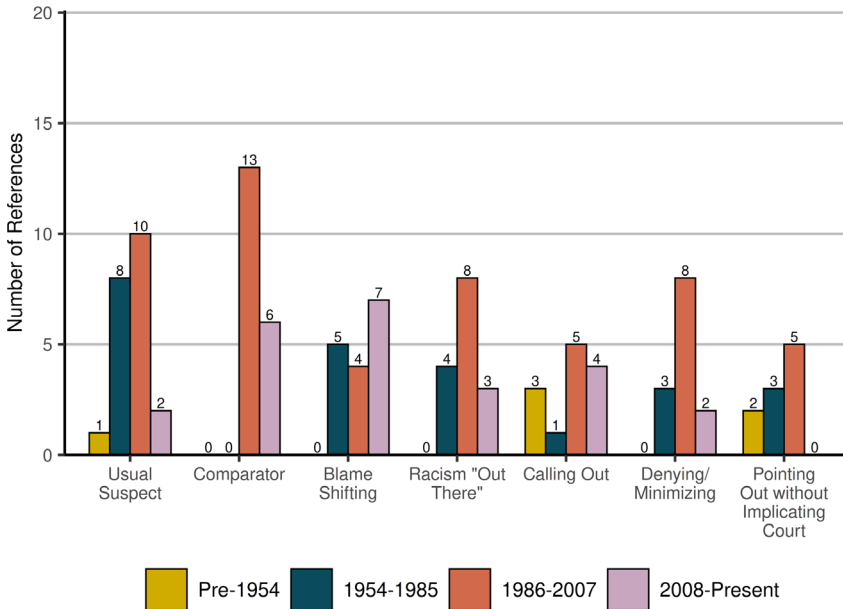
⁵⁷ *See Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) (“[E]xpress, race-based decisionmaking violates Title VII[.] . . .”); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 732 (2007) (Roberts, C.J., plurality opinion) (“Racial balancing is not transformed from ‘patently unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’” (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003))); *see also* Haney López, *supra* note 10, at 1871–74 (arguing that *Parents Involved* imposed “racial blindness across government policymakers generally” and that *Ricci* “goes even further in exporting intentional blindness” to a federal antidiscrimination statute).

⁵⁸ Haney López, *supra* note 10, at 1872.

Figure 2.

	Cho	Haney López
Pre-1954	Racial dictatorship	N/A
1954–1986	Civil Rights Era	<p>Reactionary colorblindness emerges in U.S. District Court (1955). Racial backlash begins (1950s). Policies of white liberals and conservatives foist burden of racial progress onto middle- and working-class whites. (1960s).</p> <p>1970s: Supreme Court’s intent requirement is “contextual intent” (<i>Davis</i>). In 1978, the Supreme Court embraces reactionary colorblindness as a weapon against race-conscious remedies (<i>Bakke</i>).</p> <p>1979: The Court adopts malicious intent standard for proving race discrimination (<i>Feeney</i>).</p>
1986–2007	Post Civil Rights Era (elevation of Rehnquist as Chief Justice)	<p>1987–89: The Court embraces reactionary colorblindness (<i>Croson</i>) + malicious intent standard of “not racism” unless overt and invidious (<i>Mobile v. Bolden</i>; <i>McCleskey</i>).</p> <p>1990s & 2000s: Intentional blindness fully in play: the combination of colorblindness and malicious intent that creates a double bind for those seeking racial justice. (Voting cases; <i>Shaw</i>).</p>
2007–present	Post-Racial Era (election of President Obama; <i>Parents Involved</i>)	2000s continue with “colorblindness rex” (<i>Parents Involved</i> and <i>Ricci</i>).

Figure 2.1.



III. THE CATEGORIES AND RHETORICAL ANALYSIS

The first part of the process involved taking the 107 references and categorizing how the Court used the words “racist,” “racism,” and “white supremacy.” Seven categories emerged with some inevitable overlap between categories. The seven categories are: (1) calling-out references, which call out racism by the law or the Court, thereby implicating the Court or national law or policy in racism; (2) pointing-out references, which do not implicate the Court but point out racism or its harms in cases where the majority missed it or the racism or harm is not obvious; (3) usual-suspects references, where the words are directed at perpetrators of obvious or overt racism, such as the Ku Klux Klan; (4) racism-out-there references, which include passive and abstract references that acknowledge that racism exists but deflect or hide the responsibility for it; (5) denying/minimizing-racism references, which deny that racism was a factor in the legal issue and/or minimize the harms of racism; (6) blame-shifting references, which turn the tables by blaming the victims of racism or their supporters; and (7) comparator references, in which racism is used as a way to make a point about a largely unrelated issue. These categories are discussed more below.

A reference could challenge racism but be weak rhetorically. Therefore, in addition to noting the substance of how the keywords are used, I also evaluated the rhetorical power of the references. I used several criteria to evaluate rhetor-

ical power. The first criterion is the clarity and directness of the reference. I coded references as more powerful if they were clear, declarative sentences with unambiguous meanings. Clarity and directness are, of course, subjective, but I used a number of markers to standardize my evaluation. I almost always coded passive voice as less direct because it hides the doer of the action and deflects responsibility.⁵⁹ Scholars sometimes refer to the passive voice as “dishonest” because it hides or deemphasizes the source of the action.⁶⁰ Passive voice was particularly important to my goals here because I was looking to see whether the Court attributed racism to any specific cause.

Similarly, circumlocution, meaning burdening sentences with excessive filler words, is a primary indirectness strategy.⁶¹ Wordy and overpacked sentences are naturally less direct. Circumlocution and passive voice often go hand in hand and are commonly used when a writer wants to hedge or soften the impact of a sentence.⁶² Scholars sometimes refer to circumlocution as double talk or double speak because of its deceptive qualities.⁶³ Consider the difference between “Bob is a criminal” and “It was found that the criminal law was likely violated in Bob’s case.” The first is more powerful rhetorically.

Second, hedging language such as “seems” or “suggests” or words such as “possibly” or “maybe” also soften rhetoric. These types of hedge words convey the sense that the speaker “is uncertain . . . or cannot vouch for the accuracy of the statement.”⁶⁴ Hedge language also connotes that something unfriendly or potentially offensive is being said and is used to mitigate a negative response.⁶⁵ Similarly, I noted the use of euphemistic language that reduced

⁵⁹ JEANNE FAHNESTOCK, *RHETORICAL STYLE: THE USES OF LANGUAGE IN PERSUASION* 159–60 (2011); see Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction*, 46 *UCLA L. REV.* 75, 97 (1998) (“Within the context of a case holding, the passive voice can deflect attention from the Court’s responsibility for the ruling or hide the identity of those responsible for the actions or processes described.”).

⁶⁰ FAHNESTOCK, *supra* note 59, at 160. The agentless passive (e.g., “the car was hit”) avoids naming the actor entirely and the agentive passive hides the actor in the prepositional clause (e.g., “the car was hit by Jim”). *Id.*

⁶¹ Samuel Gyasi Obeng, *Language and Politics: Indirectness in Political Discourse*, 8 *DISCOURSE & SOC’Y* 49, 55–56 (1997).

⁶² BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH* 53 (2d ed. 2013) (referring to wordiness and passive voice as “sap[ping] the strength” from writing); Obeng, *supra* note 61, at 54–56 (noting that politicians commonly use circumlocution when discussing difficult topics to protect their careers and reputations).

⁶³ *THE RHETORIC OF ARISTOTLE: A TRANSLATION* 157 n.1 (Richard Claverhouse Jebb trans., John Edwin Sandys ed., 1909) (“[T]his circumlocution deludes us with the accumulation of words.”) (quoting EDWARD MEREDITH COPE, 3 *THE RHETORIC OF ARISTOTLE WITH A COMMENTARY* 58 (John Edwin Sandys ed., 1877)).

⁶⁴ ROBIN TOLMACH LAKOFF, *LANGUAGE AND WOMAN’S PLACE: TEXT AND COMMENTARIES* 79 (Mary Bucholtz ed., rev. & expanded ed. 2004).

⁶⁵ *Id.*

“the negative expressive potential” of the reference.⁶⁶ Euphemistic language can be deceptive in that it conceals the truly negative aspects of a disturbing concept (like racism).⁶⁷ For example, describing racism as “unfortunate” is a concealing euphemism because it minimizes the harm of racism while also making it seem as though it is out of the writer’s control.

Third, I evaluated rhetorical power by looking at the use of intensifying adverbs and adjectives or figurative language (like metaphor) to indicate passion or emotion.⁶⁸ Vivid and graphic language is a common method of imbuing rhetoric with emotional power, going back to Cicero and Quintilian.⁶⁹ Particularly in legal discourse, where a dry, neutral tone is expected, any departure from that tone is conspicuous and striking. Describing something as “brutal racism,” for example, is usually more rhetorically powerful than simply saying “racism.”

Finally, I considered the placement of the reference. If it was in the main text, I coded it as more powerful than if it appeared in a footnote or a parenthetical citation.

The Supreme Court first used the phrase “white supremacy” in 1928 in the majority opinion in *New York ex rel. Bryant v. Zimmerman* and the word “racism” in 1944 in a dissent in *Korematsu v. United States*.⁷⁰ So the Court has only been using the words “racist”/“racism” for roughly seventy-five years and the phrase “white supremacy” for roughly ninety years.

Figure 2.2 is a graphic view of the usage of the keywords, grouped by category and time.

⁶⁶ Milica Radulović, *Euphemisms Through Time: The Rhetorical Power of Palliation*, 14 LINGUISTICS & LITERATURE 173, 173–75 (2016) (describing euphemisms as “palliative” and noting their potential for deception).

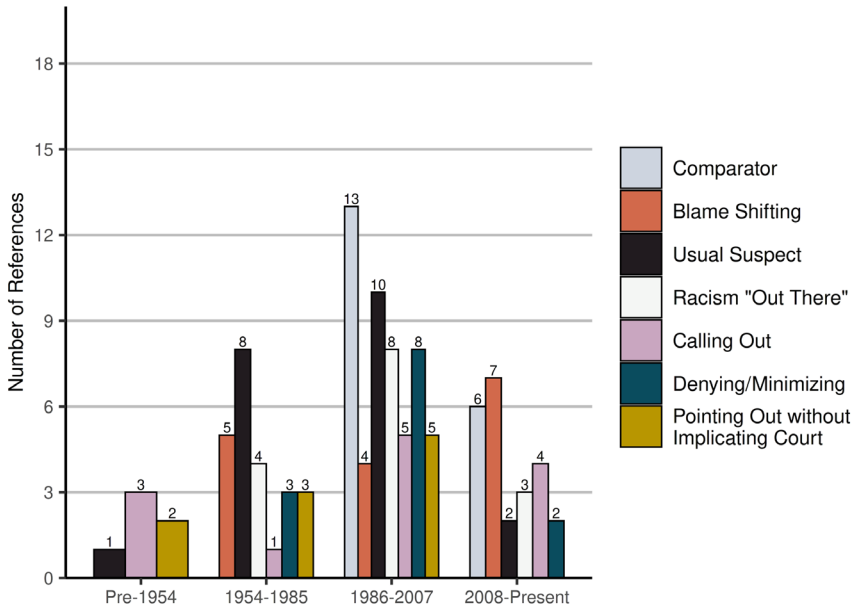
⁶⁷ *Id.* at 182–83.

⁶⁸ See BRIAN L. PORTO, RHETORIC, PERSUASION AND LEGAL WRITING: THE PEN IS MIGHTIER 2–4 (2020) (discussing the power of figurative speech to enhance persuasion); Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS’N LEGAL WRITING DIRS. 129, 133–36 (2006) (same).

⁶⁹ ROBERT COCKCROFT & SUSAN M. COCKCROFT, PERSUADING PEOPLE: AN INTRODUCTION TO RHETORIC 45 (1992).

⁷⁰ See *Korematsu v. United States*, 323 U.S. 214, 233, 242 (1944) (Murphy, J., dissenting), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 76 (1928). If this seems late, it is. The *Oxford English Dictionary* records the first use of “racialism” in 1880 (in the *Michigan City Dispatch*) and the first use of “racism” in 1903. *Racialism*, OXFORD ENGLISH DICTIONARY, *supra* note 2; *Racism*, *id.*, *supra* note 2. But the term did not really enter the popular lexicon until later. See WILLIAMS, *supra* note 4, at 191 (pinpointing “racialism” as precursor to “racism” as appearing in the early 1920s and “racialist” as precursor to “racist” first recorded in 1930); see also *Racism*, WILLIAM SAFIRE, SAFIRE’S POLITICAL DICTIONARY 600 (2008) (noting the heavy use of “racism” in the 1930s and 1940s, usually in reference to fascism).

Figure 2.2.



In the following sections, I discuss each category separately and review noteworthy cases in each category.

A. Calling Out the Court's Complicity in Racism

A reference falls into this first category, calling-out references, if it uses the terms “racism,” “racist,” or “white supremacy” either to implicate the Court as complicit in racism or to implicate the law in a way that changed the definition or scope of the words.⁷¹ Shockingly few references fall within this category. Throughout the Court’s history of using these terms (between seventy-five to ninety years), Justices of the Supreme Court have acknowledged the Court’s complicity in racism only thirteen times.⁷² Only two of these references are in majority opinions.

⁷¹ See KENDI, *supra* note 2, at 9 (“[T]he only way to undo racism is to consistently identify and describe it . . .”).

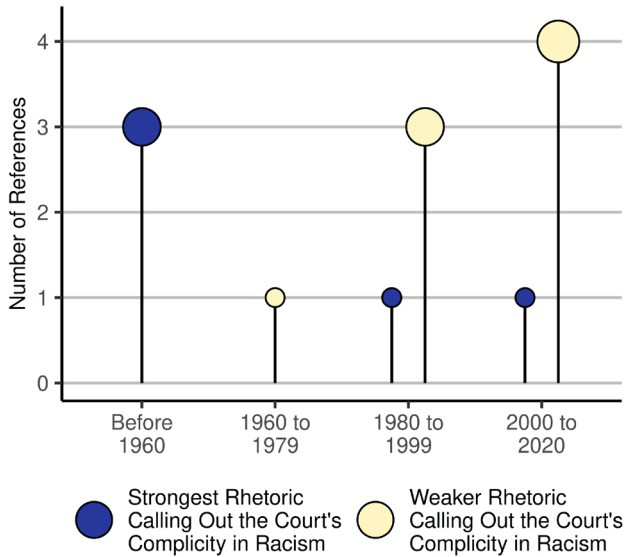
⁷² See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (Gorsuch, J., majority opinion) (“racist”); *id.* at 1417, 1419 (Kavanaugh, J., concurring in part) (“racist”); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1740–48 (2018) (Thomas, J., concurring in part and concurring in judgment) (“racist”); *Silvester v. Becerra*, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from denial of certiorari) (“racist”); *Virginia v. Black*, 538 U.S. 343, 394 (2003) (Thomas, J., dissenting) (“racist”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 272 (1995) (Ginsburg, J., dissenting) (“[w]hite [s]upremacy” (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967))); *Patterson v.*

The cases in this category vary in rhetorical power and are further separated into two subcategories: strong and weak references. Only five out of the thirteen references qualify as strong references. They powerfully and directly challenge the Court for its participation in upholding racism, and all of them are concurrences or dissents. The other eight, which include the two majority opinions, are weaker rhetorically. Although they acknowledge the racism of the law or the Court, they do so very subtly and indirectly or use faulty rhetoric.

Notably, although all of the calling-out cases seem to be spread out over time, the timing of the five strong references reveals a significant decrease in the strength of the rhetoric expressly calling out the Court's racism. Three of the five strong references occurred in the four years between 1944 and 1948. The remaining two strong references were not published for approximately another forty-one and seventy-two years, decided in 1989 and 2020 respectively. Moreover, looking at the rhetorical power of the thirteen references as a whole demonstrates that as the rhetorical force of the stronger references *decreased*, the rhetorically weak references *increased*. This trend can be seen in Figure 3, which shows the forceful references in blue and the weaker references in yellow.

McLean Credit Union, 491 U.S. 164, 212 (1989) (Brennan, J., concurring in part and dissenting in part), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as stated in* Stender v. Lucky Stores, Inc., 780 F. Supp. 1302, 1305–06 (N.D. Cal. 1992); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 551–52, 556 (1989) (Marshall, J., dissenting); McCleskey v. Kemp, 481 U.S. 279, 341–44 (1987) (Brennan, J., dissenting) (“racism”); *Loving*, 388 U.S. at 11 (Warren, C.J., majority opinion); *Oyama v. California*, 332 U.S. 633, 672–74 (1948) (Murphy, J., concurring); *Ex parte Mitsuye Endo*, 323 U.S. 283, 307 (1944) (Murphy, J., concurring); *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392. Note that *Ramos* is counted twice here, once for the majority (using “racism”), and once for Justice Kavanaugh’s concurrence (using “racism”). See *Ramos*, 140 S. Ct. at 1405 (Gorsuch, J., majority opinion); *id.* at 1417, 1419 (Kavanaugh, J., concurring in part). In general, when one opinion used the keywords more than once, I counted it as only one reference, unless the opinions used the keywords to mean substantively different things. So, although Justice Kavanaugh in *Ramos* uses “racist” four times, I counted it as only one reference. The number of times a Justice uses the keywords did factor into my assessment of the strength of the reference, however.

Figure 3.



Because the references in this category are significant in their impact on the law and broader culture, and also vary in their rhetorical force, they are discussed in detail below.

1. The Five Strong References Calling Out the Court's Racism

The five rhetorically strongest opinions that sound an alarm about the complicity of the Court in racist policies fall into this subcategory.⁷³ All of these references occur in non-majority opinions, which means only non-precedential opinions contain the Court's most powerful challenges to racism.

Of these five opinions, the three most powerful occurred between 1944 and 1948 and are all written by Justice Frank Murphy.⁷⁴ In other words, the Court's strongest and most consistent and vociferous antiracist was writing over seventy-five years ago. Justice Murphy's dissent in *Korematsu v. United States* was the first reference to racism in Supreme Court jurisprudence and contains the most rhetorically passionate and powerful use of the word in Supreme Court history.⁷⁵ Justice Murphy became my touchstone in analyzing the rhetoric of other Justices, and few matched him. Of the three Murphy opinions,

⁷³ See *Ramos*, 140 S. Ct. at 1417, 1419 (Kavanaugh, J., concurring); *Croson*, 488 U.S. at 551–52, 556 (Marshall, J., dissenting); *Oyama*, 332 U.S. at 672–74 (Murphy, J., concurring); *Ex parte Endo*, 323 U.S. at 307 (Murphy, J., concurring); *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

⁷⁴ See *Oyama*, 332 U.S. at 672–74 (Murphy, J., concurring); *Ex parte Endo*, 323 U.S. at 307 (Murphy, J., concurring); *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

⁷⁵ *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

his dissent in *Korematsu* is the most rhetorically forceful. For that reason, this discussion focuses on that dissent.

Korematsu involved a constitutional challenge to the order of the United States government requiring all persons of Japanese ancestry, including United States citizens, to relocate to internment camps.⁷⁶ The Supreme Court upheld the constitutionality of the order in a 6–3 decision based on the expansive powers of the executive branch in wartime.⁷⁷ Justice Murphy’s dissent explicitly denounced the Court’s decision as a “legalization of racism.”⁷⁸ Justice Murphy’s rhetoric in *Korematsu* also derives strength from the use of vivid metaphor, as in his description of the Japanese internment law as marking the country’s descent into the “ugly abyss of racism.”⁷⁹

Justice Murphy’s *Korematsu* dissent stands out as the most forceful and direct reference in Supreme Court history using the word “racism” to explicitly accuse the Court of legalizing racism. *Oyama v. California* repeated the charge of legalizing racism, but the language originates from *Korematsu*.⁸⁰ *Oyama*’s independent power emanates from its repetition of the word “racism” seven times and, like *Korematsu*, the use of vivid metaphor describing the California Alien Land Law as “racism in one of its most malignant forms.”⁸¹ In *Ex parte Mitsuye Endo*, Justice Murphy uses the word “racism” to reiterate his position in *Korematsu*.⁸² Reading the opinions together, the reader gets a sense of Justice Murphy screaming into a void, trying to convince his brethren to see the racism in their decisions. But even among these three strong opinions, Justice Murphy’s ringing indictment of the Court’s “legalization of racism” in *Korematsu* is, in my view, the most heartbreakingly powerful.

⁷⁶ *Id.* at 217–18 (Black, J., majority opinion).

⁷⁷ *Id.*

⁷⁸ *Id.* at 242 (Murphy, J., dissenting) (“I dissent, therefore, from this legalization of racism.”). Both Justice Robert Jackson and Justice Owen Roberts also dissented in *Korematsu* and were quite passionate about the implications of the law. Indeed, Justice Roberts called the internment camps “concentration camp[s].” *Id.* at 226 (Roberts, J., dissenting). But neither uses the word “racist” or “racism,” so I am not counting or discussing them here.

⁷⁹ *Id.* at 233 (Murphy, J., dissenting).

⁸⁰ See *Oyama v. California*, 332 U.S. 633, 672 (1948) (Murphy, J., concurring) (“I believe that the prior decisions of this Court giving sanction to this attempt to legalize racism should be overruled.”). In an echo of the coronavirus pandemic, sometimes referred to by former President Trump as the “Chinese virus,” Justice Murphy also pointed out that California’s racist law originated with blaming Asian people for a deadly virus. *Id.* at 651 (“The California Alien Land Law was spawned of the great anti-Oriental virus which, at an early date, infected many persons in that state.”).

⁸¹ See *id.* at 673.

⁸² *Ex parte Mitsuye Endo*, 323 U.S. 283, 307 (1994) (Murphy, J., concurring) (“I am of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive but is another example of the unconstitutional resort to racism inherent in the entire evacuation program.”).

The only two other opinions that come close to matching Justice Murphy's passionate rhetoric occurred in 1989 and 2020 and both of them are less direct in their indictment of the Court: Justice Thurgood Marshall's dissent in *City of Richmond v. J.A. Croson Co.* and Justice Brett Kavanaugh's concurring opinion in *Ramos v. Louisiana*.⁸³ It is worth stopping to think about this: after Justice Murphy's three decisions, it took close to fifty years for any Supreme Court Justice to call out racism strongly and powerfully.⁸⁴

Although *Croson* and *Ramos* lack the directness of Justice Murphy's rhetoric, they are still (compared to many other opinions) rhetorically powerful uses of the words "racist" or "racism" to criticize the Court and its reasoning. In *Croson*, for example, Justice Marshall used the words "racist" or "racism" five times to dissent from the Court's decision to apply strict scrutiny to affirmative action.⁸⁵ Even though Justice Marshall does not explicitly call the Court or its reasoning racist, he comes close, stating:

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice.⁸⁶

Justice Marshall's reference uses vivid adjectives (e.g., "brutal" and "repugnant"). The searing sarcasm of the clause "need no longer preoccupy themselves" makes plain Justice Marshall's anger at the notion that racial justice is some triviality that is a bother to those in power.

⁸³ See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410–20 (2020) (Kavanaugh, J., concurring in part); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 551–52, 556 (1989) (Marshall, J., dissenting). Justice Gorsuch also uses the word "racist" in the *Ramos* majority opinion, but that reference is not as rhetorically powerful and is discussed in the second subcategory as a result. See *Ramos*, 140 S. Ct. at 1405 (Gorsuch, J., majority opinion). Similarly, Justice Sotomayor uses the word "racism" in her concurring opinion in that case, but it is not a calling-out reference (because she is noting the majority's description of the racism underlying the laws at issue), so I do not include it here. *Id.* at 1410 (Sotomayor, J., concurring). Justice Alito also uses the words "racist" and "[r]acism" in his dissent, but those references are coded in the blame-shifting category and I will be discussing them later. *Id.* at 1425–26 (Alito, J., dissenting).

⁸⁴ Note that *Brown v. Board of Education* was decided in 1954, ten years after *Korematsu*, but nowhere in *Brown* do the words "racism," "racist," or "white supremacy" appear. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Similarly, *Palmer v. Thompson*, the 1971 equal protection case that upheld Mississippi's decision to close its public pools instead of integrating them, does not mention these keywords either. See 403 U.S. 217 (1971).

⁸⁵ 488 U.S. at 550–56 (Marshall, J., dissenting).

⁸⁶ *Id.* at 552.

But especially given the doctrinal damage done by *Croson*, Justice Marshall's dissent understated the Court's complicity in upholding racism.⁸⁷ Unlike in Justice Murphy's dissent in *Korematsu*, the word "racism" in *Croson* is used to refer to other governmental actors, not the Court. Justice Marshall's language describes the Court's sin as one of omission rather than active complicity: the Court signaled that racial injustice is over, thereby allowing other government actors to ignore it. As Professor Haney López notes, *Croson* marked the turning point in the use of colorblind ideology to defeat race-conscious remedies; given that, signaling is the least of the Court's sins here.⁸⁸ Years before *Croson* was decided, prominent legal scholars, including Professors Randall Kennedy and Stephen Carter, were vociferously challenging the Court's move toward equating racial remediation with racism.⁸⁹ Why does the dissent not directly challenge the Court's use of strict scrutiny as a way of propping up and sustaining racism?

Justice Kavanaugh's opinion in *Ramos* is similar in tone.⁹⁰ It is strong in some places, and weak in others. *Ramos* involved state laws that permitted non-unanimous juries to convict in criminal cases.⁹¹ *Ramos* found that non-unanimous juries in criminal cases violated the Constitution and overturned *Apodaca v. Oregon*, a 1972 plurality opinion that permitted non-unanimity.⁹²

Justice Kavanaugh, like Justice Marshall, does not directly implicate the Court in his rhetoric. He does not refer to *Apodaca* as racist or as upholding racism—a description that *Apodaca* richly deserves. His use of the keywords refers to the Jim Crow origins of the state laws in *Ramos*, a reference that would seem to place it in the usual-suspects category and not in the strong calling-out category. But the power of Justice Kavanaugh's emotional rhetoric surrounding the words "racism" and "racist" and his indictment of *Apodaca* by implication led to its inclusion in this more forceful category.

Justice Kavanaugh describes the racism of the laws in a highly emotional way, departing from the typical neutral judicial tone. And the aspersions he casts strongly implicate the Court's decision in *Apodaca*, as his whole opinion

⁸⁷ The reasoning of the majority in *Croson* is a paradigmatic example of both post-racialism (i.e., racism is no longer a problem) and the reactionary colorblind philosophy described by Professor Haney López. See Haney López, *supra* note 10, at 1861.

⁸⁸ See *id.* at 1861, 1864 (the approach of the Court to discrimination post-*Croson* was available only to "buttress . . . [w]hite innocence" and "[w]hite victimization").

⁸⁹ See Stephen L. Carter, Comment, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 433–34 (1988); Randall Kennedy, Commentary, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1334–37 (1986); see also Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1033 (1986).

⁹⁰ See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410–20 (2020) (Kavanaugh, J., concurring in part).

⁹¹ *Id.* at 1393–95 (Gorsuch, J., majority opinion).

⁹² *Id.* at 1397.

is about the advisability of overturning that decision. In a relatively short concurrence (about 5000 words), Justice Kavanaugh uses the word “racist” several times—three times in the text and once in a footnote.⁹³ He uses vivid adjectives, referring to the non-unanimity laws as “one pillar of a comprehensive and brutal program of racist Jim Crow measures” and “a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects.”⁹⁴ His use of vivid adjectives (e.g., “comprehensive,” “brutal,” and “thoroughly”), along with his stark acknowledgement of the serious harm done to Black people by the laws, makes the opinion stand out from other usages of the keywords in Supreme Court opinions.

2. The Eight Weak Calling-Out References

Eight of the opinions in the calling-out category implicate the Court or the law in racism but do so less powerfully and effectively than the references in the first subcategory. These eight references consist of just two majority opinions: *Loving v. Virginia*, which uses “white supremacy,” and *Ramos v. Louisiana*, which uses “racist.”⁹⁵ The other six are dissents or concurrences. The minority opinions using “racism” or “racist” include two by Justice William Brennan and three by Justice Clarence Thomas.⁹⁶ The one minority opinion using “white supremacy” is a dissent by Justice Ruth Bader Ginsburg.⁹⁷

None of these references are as rhetorically powerful as Justice Murphy’s language, although several of them, including *Loving* and *Ramos*, arose in contexts in which powerful condemnation of the Court would have been eminently appropriate. Nevertheless, none of these eight references call out the Court for its “legalization of racism” as clearly or directly as Justice Murphy did. In oth-

⁹³ See *id.* at 1417–19 (Kavanaugh, J., concurring in part).

⁹⁴ *Id.* at 1417, 1419.

⁹⁵ See *id.* at 1405 (Gorsuch, J., majority opinion); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (Warren, C.J., majority opinion). The *Ramos* majority also uses “racist” and “racism” in a footnote, but because the substantive use is the same as in the text and the use is marginalized in a footnote, I focus on the use on page 1405.

⁹⁶ See *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1747 (2018) (Thomas, J., concurring in part and concurring in judgment) (“racist”); *Silvester v. Becerra*, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from denial of certiorari) (“racist”); *Virginia v. Black*, 538 U.S. 343, 394 (2003) (Thomas, J., dissenting) (“racist”); *McCleskey v. Kemp*, 481 U.S. 279, 341–44 (1987) (Brennan, J., dissenting) (“racism”).

⁹⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 272 (1995) (Ginsburg, J., dissenting) (“[w]hite [s]upremacy” (quoting *Loving*, 388 U.S. at 11)); *id.* at 274 n.8 (“racism” (quoting Carter, *supra* note 89, at 433–34)). Because Justice Ginsburg’s use of “racism” is both in a footnote and entirely someone else’s language, I did not count *Adarand* as two separate uses of the keywords. Even though Justice Ginsburg’s reference to “[w]hite [s]upremacy” is a partial quote from *Loving*, I counted it as an independent usage because Justice Ginsburg is saying something different (and more powerful) than what was originally said in *Loving*.

er words, in the decades after *Korematsu*, even the Court's most liberal members hesitated to confront the Court's racism directly and passionately. And most of those usages occurred only in non-majority opinions that have little or no precedential weight.

A cultural shift occurred in those twenty-three years between *Korematsu* and *Loving* that made it more difficult for a Supreme Court Justice to directly and powerfully call out the Court or the law as racist.⁹⁸ This led to a series of references in which the use of the keywords is much cover, less direct, and less rhetorically powerful. This tracks closely with Professor Haney López's timeline, which identifies the early 1970s as a turning point in the Court's doctrinal ideology toward race.⁹⁹

This subsection will first analyze two majority opinions, *Loving v. Virginia* and *United States v. Ramos*, because of the obvious importance of the use of the keywords in a majority opinion. I then discuss some significant examples of the weaker calling-out that occurs in concurrences and dissents.

a. *The Majority Opinions: Loving and Ramos*

Loving v. Virginia, which invalidated Virginia's anti-miscegenation law, was a watershed moment in the dismantling of Jim Crow laws, perhaps even overshadowing *Brown v. Board of Education*.¹⁰⁰ The *Loving* decision used the phrase "[w]hite [s]upremacy" twice in making clear that the Fourteenth Amendment abhorred classifications that were based in racist ideology.¹⁰¹ The decision finds itself in the calling-out category, despite the flaws outlined below, because the Court's uses of the phrase "[w]hite [s]upremacy" does a lot of

⁹⁸ See *supra* Figure 3.

⁹⁹ Haney López, *supra* note 10, at 1781 ("Since the end of the civil rights era in the early 1970s, the emancipatory potential of the Fourteenth Amendment has been thoroughly undone."). What Haney López describes in this quote ("the end of the civil rights era") is a little earlier than what Professor Cho describes. See Cho, *supra* note 20, at 1605 ("I define the period from 1986–2007 as the post-civil-rights era . . .").

¹⁰⁰ *Brown* has been the object of much criticism for its reasoning, which some argue did not do enough to undo the damage of Jim Crow racism. See WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 21–25 (Jack Balkin et al. eds., 2001) (summarizing the critiques of *Brown*); Haney López, *supra* note 9, at 809–10 (explaining that the *Brown* court "feared taking on too much too rapidly" and did not choose to dismantle "the emotional core of white supremacy"). Although scholars have also criticized *Loving*, many see it as a decision that created a seismic shift in the country's views of race. See, e.g., Kevin Nobel Maillard, *The Multiracial Epiphany, or How to Erase an Interracial Past*, in *LOVING V. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE* 91 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012) ("*Loving v. Virginia* established a new context for racial possibilities in the United States.>").

¹⁰¹ *Loving v. Virginia*, 388 U.S. 1, 11 & n.1 (1967) (Warren, C.J., majority opinion) (explaining that state objectives must be "independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate").

substantive work in defining and calling out the racism of a (then) popular policy. In particular, *Loving*'s use of "[w]hite [s]upremacy" to reject Virginia's argument that the law was not racist because it burdened Black and white people equally was a significant linguistic move for the Court.

Loving relentlessly laid bare the racism of the Virginia law by quoting the purposes of the Act, which included "preserv[ing] the racial integrity of its citizens" and "prevent[ing] 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,'" and called them "obviously an endorsement of the doctrine of [w]hite [s]upremacy."¹⁰² The Court used the phrase "[w]hite [s]upremacy" again when noting that Virginia's prohibition extended only to white people who intermarried (and not, for example, a Black person who married an Asian person).¹⁰³ By quoting these shameful aspects of Virginia's law and directly labeling them as "[w]hite [s]upremacy," the *Loving* Court significantly shaped the law's definition of white supremacy. The Court's use of the keyword was a ringing rejection of white supremacy as an ideology and a pronouncement that the Equal Protection Clause would "abide no measure" of racism.¹⁰⁴

Despite its momentous impact, *Loving* falls in the weaker calling-out category because its two references to "[w]hite [s]upremacy" never directly call out the Court for its complicity in permitting anti-miscegenation laws. *Loving* does not mention, for example, how the Court allowed the perpetuation of anti-miscegenation laws by declining in 1955 to hear *Naim v. Naim*, a case with facts virtually identical to *Loving*.¹⁰⁵ The Court's refusal to hear *Naim* permitted anti-miscegenation laws to continue for thirteen years after *Brown* and caused serious damage to the civil rights movement and to interracial couples

¹⁰² *Id.* at 7.

¹⁰³ *See id.* at 11. In attacking racism, Chief Justice Warren states:

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy. We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

Id. at 11–12 (footnote omitted).

¹⁰⁴ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 272 (1995) (Ginsburg, J., dissenting). This powerful language in *Loving* was missing in *Brown* and might explain why *Loving* accomplished a broader shift than *Brown*. It is unclear, for example, why Virginia (along with sixteen other states at the time) felt comfortable after *Brown* to continue enforcing its anti-miscegenation laws. What *Brown* left unclear about the constitutionality of racism, *Loving* clarified.

¹⁰⁵ *Naim v. Naim*, 350 U.S. 985 (1956) (per curiam).

who wished to marry and have children.¹⁰⁶ *Loving*'s harsh criticism of *Naim* implicates the Court, but only very indirectly.

Indeed, because the Court in *Loving* reserved its use of "white supremacy" to refer to Virginia's openly racist Jim Crow law, the decision could have fallen in the usual-suspects category. *Loving* identified what was, even at that time, obvious racism.¹⁰⁷ Given that, the rhetoric in *Loving* is surprisingly dry and syllogistic. There is, of course, power in the simple directness of a syllogism.¹⁰⁸ It brooks no argument. But in *Loving*, the simplicity of the prose borders on bloodless in a context (e.g., racism, slavery) in which the legal words, to paraphrase Professor Robert Cover, are drenched in blood.¹⁰⁹ Given the hatred embedded in Virginia's law, and the Court's act in declining to review that law when asked in 1955, the opinion's use of "[w]hite [s]upremacy" is a far cry from the condemnation that it could have been, especially compared to Justice Murphy's use of the keywords in *Korematsu* and *Oyama*.¹¹⁰

After *Loving*, it took the Court another fifty-six years to use the keywords in a majority opinion in a way that even obliquely challenged the Court's responsibility for racism. Like the use of "white supremacy" in *Loving*, Justice Neil Gorsuch's use of "racism" in the majority opinion in *Ramos v. Louisiana* labels a usual suspect (Jim Crow laws) but also implicates the Court in the perpetuation of racism by criticizing and overruling *Apodaca v. Oregon*.¹¹¹ *Ramos* was a close call in terms of categorizing but ended up in the calling-out category because it explicitly references "racism" in criticizing the Court's decision in *Apodaca*. Because so few majority opinions criticize the Court using these keywords, even obliquely, *Ramos* stands out in doing so. But because the *Ramos* decision's criticism of *Apodaca* uses the keyword in an indirect and diffident way, it fell into the rhetorically weaker group of cases. Indeed, that

¹⁰⁶ Richard Delgado, *Naim v. Naim*, 12 NEV. L.J. 525, 527 (2012) (recounting the doctrinal and cultural damage done by the Court's refusal to hear the *Naim* case in 1955). Among other things, Delgado argued that the Court declined to hear *Naim* on a technical procedural ground that it "could easily have circumvented." *Id.* at 525 n.2.

¹⁰⁷ *Id.* at 525–26 (pointing out that invalidating Virginia's anti-miscegenation laws was a "straightforward application" of *Brown* and that at the time *Loving* was decided "the civil rights movement was in full force").

¹⁰⁸ See LINDA L. BERGER & KATHRYN M. STANCHI, *LEGAL PERSUASION: A RHETORICAL APPROACH TO THE SCIENCE* 123–24 (2018).

¹⁰⁹ See Cover, *supra* note 8, at 1601, 1607 ("Legal interpretation takes place in a field of pain and death. . . . Revolutionary constitutional understandings are commonly staked in blood.").

¹¹⁰ In this way, *Loving* exemplifies Professor Sumi Cho's critique of the Warren Court as being primarily concerned with "racial redemption," or, the attempt to exonerate white people and institutions (including the Court) for its complicity in Jim Crow and societal racism. See Cho, *supra* note 20, at 1612 ("The Warren Court . . . [is] much like Lady MacBeth in her futile attempts to wash the blood of complicity from her hands.").

¹¹¹ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (Gorsuch, J., majority opinion) ("*Apodaca* was gravely mistaken . . .").

may be one reason why Justice Kavanaugh chose to write his impassioned concurrence.

Justice Gorsuch uses the word “racist” just once in *Ramos* to criticize the *Apodaca* court for spending “almost no time [in the opinion] grappling with . . . “the racist origins of . . . [the] laws.”¹¹² He does not condemn the *Apodaca* Court’s upholding of a racist law or its complicity in helping states uphold a racist criminal justice system that disproportionately imprisons Black people. The Court’s characterization of *Apodaca*’s transgression as failure to “grappl[e] with” racism greatly minimizes the racist damage done by *Apodaca* in endorsing and supporting the mass incarceration of Black people, many of them innocent.¹¹³ The language surrounding the racism of *Apodaca* is much weaker, for example, than the rhetoric Justice Gorsuch used to condemn the doctrinal problems with *Apodaca*.¹¹⁴ That difference demonstrates that it is acceptable to criticize the Court for its doctrinal mistakes, but less acceptable to accuse it of perpetuating racism.

In sum, although *Loving* and *Ramos* stand out as the only majority opinions that come close to calling out racism, their use of the keywords significantly diminishes the harm wrought by the Court in the perpetuation of racism.

b. The Concurring and Dissenting Opinions

Six minority opinions fall into the category of calling out racism or white supremacy using weak rhetoric. Of these minority opinions, Justice Ginsburg’s dissent in *Adarand* comes closest to criticizing the Court’s complicity in upholding racism. The remaining five references, for a variety of reasons outlined below, are so oblique and indirect that they barely edged into the calling-out category at all.

¹¹² *Id.* Justice Gorsuch also uses “racism” in a footnote to respond to Justice Alito’s dissent, but because the reference is in a footnote and is not definitionally significant, I am not counting it as a separate reference. *See id.* at 1401 n.44.

¹¹³ *See* Aliza B. Kaplan & Amy Saack, *Overturning Apodaca v. Oregon Should Be Easy: Non-unanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1, 36–51 (2016) (explaining how the nonunanimous jury rule contributes to wrongful convictions and to structural racism in the criminal justice system in a variety of ways). *See generally* ALEXANDER, *supra* note 41, at 4–5 (stating that mass incarceration and the criminal justice system are “a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow”).

¹¹⁴ The majority opinion is scathing in its condemnation of the reasoning of *Apodaca*, describing it as “a breezy cost-benefit analysis,” *Ramos*, 140 S. Ct. at 1401. Additionally, Justice Gorsuch described that case’s reasoning as “dressed up to look like logical proof.” *See id.* at 1404 (Gorsuch, J., joined by Ginsburg & Breyer, JJ., plurality opinion).

Justice Ginsburg's use of "white supremacy" in *Adarand Constructors, Inc. v. Peña* criticizes the Court openly, if indirectly.¹¹⁵ Justice Ginsburg states that it was "[n]ot until *Loving* . . . [that] one could say with security that the Constitution and this Court would abide no measure 'designed to maintain [w]hite [s]upremacy.'"¹¹⁶ Read closely, the sentence says that prior to *Loving*, the Court did "abide . . . measure[s]" designed to maintain white supremacy. As indirect as it is, the reference does call out the Court.

But the sentence is quite oblique. Syntactically, the double negative ("not until *Loving* . . . would abide no measure") along with the disembodied "one" make the reference rhetorically weak. Instead of a challenge, the language reads more like a back-handed compliment (we finally did the right thing in *Loving*—good for us, sort of). It falls far short of the indictment that the Court deserved for the decades in which it endorsed and upheld white supremacy. The circumlocution—abiding measures designed to maintain—further weakens the sentence. Consider a more active, streamlined version—something like "prior to *Loving*, this Court consistently upheld the constitutionality of white supremacy." That would have been more powerful.

The other minority opinions just barely edged into the calling-out category. In three instances, the opinions' challenges to the Court's racism is so oblique that I refer to them as "throwing shade."¹¹⁷ In two others, the authors' uses of the keywords to challenge the Court are obscured by a logical fallacy that makes them sound like a personal grievance.¹¹⁸

¹¹⁵ See 515 U.S. 200, 272 (1995) (Ginsburg, J., dissenting) (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)). Justice Ginsburg also uses the word "racism," but because it is in a footnote and is completely a quotation of the language of a scholar, I did not count it. Unlike the reference to "[w]hite [s]upremacy," none of the language in the footnote is Justice Ginsburg's. See *id.* at 274 n.8 (quoting Carter, *supra* note 89, at 433–34 (1988)).

¹¹⁶ *Id.* at 272 (quoting *Loving*, 388 U.S. at 11). Justice Ginsburg's dissent is, in many ways, passionate and powerful, but not in her use of the words "[w]hite [s]upremacy" or "racism." For example, her dissent implicates the Court in racism without using the word. Instead, she refers to *Korematsu* disapprovingly and quotes the overtly white supremacist aspects of Justice John Marshall Harlan's colorblind reference in *Plessy v. Ferguson*. See *id.* at 272–75 (first citing *Plessy v. Ferguson*, 163 U.S. 537 (1896); and then citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

¹¹⁷ "Throwing shade" is a neologism that refers to a subtle and indirect criticism that falls short of an explicit insult. It arose in the 1980s as part of the Black and Latinx gay community and the drag scene in New York City. *Throwing Shade*, DICTIONARY.COM, <https://www.dictionary.com/e/slang/throwing-shade/> [<https://perma.cc/Y8VT-JUKN>]. The three "throwing shade" opinions are: *Virginia v. Black*, 538 U.S. 343, 394 (2003) (Thomas, J., dissenting); *Patterson v. McLean Credit Union*, 491 U.S. 164, 212 (1989) (Brennan, J., concurring in part and dissenting in part), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as stated in Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302, 1305–06 (N.D. Cal. 1992); and *McCleskey v. Kemp*, 481 U.S. 279, 341–44 (1987) (Brennan, J., dissenting).

¹¹⁸ *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1747 (2018) (Thomas, J., concurring in part and concurring in judgment); *Silvester v. Becerra*, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from denial of certiorari).

The shade-throwing opinions are characterized by subtly insulting rhetoric that requires some thought or time to understand. “Shade” is by its nature very indirect—so indirect that the shade thrower has “plausible deniability.”¹¹⁹ At first, you don’t necessarily see the insult, but upon further inspection, there it is. Justice Clarence Thomas’s dissent in *Virginia v. Black*, for example, is classic shade throwing. He reasons that a statute against cross-burning prohibits conduct, not expression, and so is permitted by the First Amendment. Noting that the statute was passed at a time when segregation was legal in Virginia, Justice Thomas writes that “even segregationists understood the difference between intimidating and terroristic conduct and racist expression.”¹²⁰ Justice Thomas never mentions the Court or his fellow Justices in relation to racism. It looks like a statement about segregationists. But if you read the reference carefully in the context of the majority opinion, which did *not* see the difference that “even segregationists understood,” it is certainly a fair reading that Justice Thomas meant to paint his colleagues in the majority as no better (and perhaps worse) than southern bigots.

In Justice Brennan’s two shade-throwing opinions, the rhetoric is characterized by passive voice, hedge language, and circumlocution. For example, in 1989 in *Patterson v. McLean Credit Union*, the Court read 42 U.S.C. § 1981 so narrowly that it cut off most avenues for redress for minorities subjected to discrimination by their employers.¹²¹ Justice Brennan responded by arguing that “[t]he fact that § 1981 provides a remedy for a type of racism that remains a serious social ill broader than that available under Title VII hardly provides a good reason to see it, as the Court seems to, as a disruptive blot on the legal landscape, a provision to be construed as narrowly as possible.”¹²² Again, the author levies a charge against the Court, but buries it in a subordinate clause (“as the Court seems to”) that is so indirect that a casual reader could miss it. Justice Brennan’s language is also timid and ineffectual. The powerful metaphor of a “disruptive blot” is obscured by a sea of excess verbiage and undermined by hedge language (“seems to”), negative phrasing (“hardly provides a good reason”) and passive construction (“to be construed”). A more direct challenge would look something like: “The Court treats § 1981 as a disruptive

¹¹⁹ Anna Holmes, *The Underground Art of the Insult*, N.Y. TIMES MAG. (May 14, 2015), <https://www.nytimes.com/2015/05/17/magazine/the-underground-art-of-the-insult.html> [<https://perma.cc/2P9Z-J68S>].

¹²⁰ *Black*, 538 U.S. at 394 (Thomas, J., dissenting).

¹²¹ See generally *Patterson*, 491 U.S. 164 (restricting the scope of § 1981 so drastically as to render it useless in protecting employees from racial discrimination in a wide variety of scenarios). *Patterson* was legislatively overruled by the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071; see also *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302, 1305–06 (N.D. Cal. 1992) (acknowledging that the Civil Rights Act of 1991 superseded *Patterson*).

¹²² *Patterson*, 491 U.S. at 212 (Brennan, J., concurring in part and dissenting in part).

blot on the legal landscape instead of an important remedy for a serious and frequent type of racism.”

Justice Brennan’s other shade-throwing dissent in *McCleskey v. Kemp* has similar problems. In that case, the majority heard and discounted a comprehensive study of the racist application of the death penalty. Justice Brennan remarked that McCleskey’s evidence “is . . . disturbing . . . to a society that has formally repudiated racism . . . [and] we ignore him at our peril, for we remain imprisoned by the past as long as we deny its influence in the present.”¹²³ As with *Patterson*, the passivity and circumlocution of this reference distances the Court from wrongdoing and dilutes the Court’s very powerful role in upholding racist death penalty laws. For example, it is unclear to whom “we”—the subject of “ignore”—refers. Who is ignoring the evidence? It could be the Court, but it could also be one of the other actors that Justice Brennan references earlier in the paragraph. Regardless, Justice Brennan’s use of the word “ignore,” much like Justice Gorsuch’s charging the *Apodaca* court with a failure to “grappl[e] with” racism in *Ramos*, greatly diminishes the Court’s responsibility.¹²⁴ The *McCleskey* Court did far more than just “ignore” evidence; to paraphrase Justice Murphy, the Court legalized racist murder.¹²⁵ Along the same lines, the choice to use the word “disturbing” to describe evidence that Georgia imposed the death penalty on Black people who murder white people at *twenty-two times the rate* as Black people who murder other Black people is extraordinarily euphemistic. Of all the cases in which a clear, harsh condemnation of the racism of the Court was warranted, *McCleskey* should be at the top of the list. But none of the Justices saw fit to use the word to describe the Court’s actions in that case.¹²⁶

Justice Thomas authored the final two opinions in this category, using the keywords to point out the Court’s hypocrisy when dealing with race.¹²⁷ Alt-

¹²³ *McCleskey*, 481 U.S. at 344 (Brennan, J., dissenting).

¹²⁴ *See id.*; *see also* *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (Gorsuch, J., majority opinion).

¹²⁵ *See* *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

¹²⁶ Justice Brennan was known as a dealmaker on the Court, and it may be that his dodgy rhetoric was designed to cull votes (or not lose them). *See* SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 545 (2010) (describing Justice Brennan as “extraordinarily successful at building coalitions—even if that sometimes meant sacrificing clarity”). *McCleskey* was decided by a deeply divided Court and Justice Powell was famously on the fence about it. But this is not about blaming Justice Brennan for his rhetoric—he may have had very good reasons for writing about the racism of *McCleskey* the way he did. This paper asks *why* racism is a word that is so radioactive that Justice Brennan could not use it more openly in *McCleskey*.

¹²⁷ *See* *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm’n*, 138 S. Ct. 1719, 1747 (2018) (Thomas, J., concurring in part and concurring in judgment); *Silvester v. Becerra*, 138 S. Ct. 945, 951 (2018) (Thomas, J., dissenting from denial of certiorari).

though in these two opinions Justice Thomas used the keywords as a comparator, I placed them in the calling-out category because they are primarily a criticism of the Court's approach to race (as opposed to making a point about something unrelated to race). Despite their pointed criticism of the Court, I placed these references in the weak calling-out category because although Justice Thomas's language is aggressive, his rhetoric is not persuasive. It relies on a fallacious argumentation strategy called *ignoratio elenchi*, or the "red herring" fallacy, which attempts to make a point by noting that other unrelated examples are worse.¹²⁸ Rhetoric based on this strategy tends to sound more like a bitter personal grievance than an argument.

In 2018 in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, for example, a baker refused to make a wedding cake for a gay couple. Justice Thomas's concurrence takes issue with the various references to the dignity of gay people and the stigma of denying their rights:

[I]t is also hard to see how [the baker's] statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about "dignity" and "stigma" did not carry the day when this Court affirmed the right of white supremacists to burn a 25-foot cross; conduct a rally on Martin Luther King Jr.'s birthday; or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to "Bury the n[*****]s."¹²⁹

Justice Thomas's dissent in *Masterpiece Cakeshop* demonstrates the fallacy clearly. What, exactly, does the Court's tolerance of racism have to do with the dignity of gay people? If we follow Justice Thomas's argument to its

¹²⁸ *Ignoratio elenchi* is sometimes referred to as the fallacy of irrelevancy or "shifting ground." THOMAS FOWLER, *THE ELEMENTS OF DEDUCTIVE LOGIC* 138, 147 (1867). It occurs any time someone makes a point that is unrelated to the original argument or otherwise deflects focus from the original argument. *Id.*; 1 *THE ORGANON, OR LOGICAL TREATISES, OF ARISTOTLE* 222–23 (Octavius Freire Owen trans., 1889) (explaining that *elenchi* are syllogisms of contradiction). This fallacy is related to but not quite the same as the strawman fallacy. DOUGLAS WALTON, *RELEVANCE IN ARGUMENTATION* 50–51 (2004). A classic example of *ignoratio elenchi* is the common response to the Black Lives Matter movement: "why aren't you protesting Black-on-Black crime?" It is the use of a completely off-topic argument that may have a surface appeal but, in reality, is comparing apples and oranges. Shirley Carswell, *What the 'Black-on-Black Crime' Fallacy Misses About Race and Gun Deaths*, *WASH. POST* (July 8, 2020), <https://www.washingtonpost.com/nation/2020/07/08/gun-deaths-affect-more-white-men-than-black-men/> [<https://perma.cc/T5ZC-J846>].

¹²⁹ *Masterpiece Cakeshop*, 138 S. Ct. at 1747 (Thomas, J., concurring in part and concurring in judgment) (citations omitted). Similarly, in *Silvester v. Becerra*, Justice Thomas dissented from the Court's refusal to review a statute requiring a ten-day wait for a firearm, noting "I also suspect that four Members of this Court would vote to review a 10-day waiting period on the publication of racist speech, notwithstanding a State's purported interest in giving the speaker time to calm down." 138 S. Ct. at 951 (Thomas, J., dissenting from denial of certiorari).

logical conclusion, he seems to be saying that because the Court has tolerated racism and racial indignities that it should also tolerate homophobia. Or that the Court should not talk about the dignity of gay people because it has failed in similar contexts to respect the dignity of African Americans. In other words, he is arguing that one wrong should lead to two wrongs, not that both wrongs should be corrected. That is also what makes it seem like a personal grievance: you hurt me, so hurt them, too. Ultimately, the fallacy gives the rhetoric a petulant quality that weakens its point and makes it easy to dismiss.

B. Pointing Out Racism Without Implicating the Court

The second category is pointing-out references; it includes ten references that label racism without implicating the Court, even indirectly. Although the references in this category do not implicate the Court, they do present a deeper understanding of racism than the typical idea of racism as an isolated event of bias by “bad” people. Thus, the references in this category differ from those in the usual-suspects category because they do more than identify the racism of obvious perpetrators, such as white supremacy groups or the Confederacy. Most of these references point out instances of racism in the case that the majority decision missed or ignored.¹³⁰ Along these lines, this category includes some of the very few references in Supreme Court jurisprudence to unconscious racism.¹³¹ Even though references to unconscious racism are significant (especially as they are so rare), because the references do not accuse the Court of unconscious racism, I chose not to place them in the first calling-out category. The ten pointing-out references span a wide timeline from 1944 to 1992 and vary in rhetorical power. All are concurrences or dissents.

All the references in this category are uses of “racism” or “racist.” There are no references to “white supremacy,” which highlights an interesting usage difference. White supremacy is not susceptible to the subtler definition and understanding of racism evidenced by the cases in this category. Somehow,

¹³⁰ See *Callins v. Collins*, 510 U.S. 1141, 1154 (1994) (Blackmun, J., dissenting from denial of certiorari); *Georgia v. McCollum*, 505 U.S. 42, 68–69 (1992) (O’Connor, J., dissenting); *Holland v. Illinois*, 493 U.S. 474, 497 (1990) (Marshall, J., dissenting); *McCleskey v. Kemp*, 481 U.S. 279, 341–44 (1987) (Brennan, J., dissenting); *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring); *Hobby v. United States*, 468 U.S. 339, 353, 358 (1984) (Marshall, J., dissenting); *Carter v. Jury Comm’n*, 396 U.S. 320, 341, 343 (1970) (Douglas, J., dissenting in part); *Powell v. McCormack*, 395 U.S. 486, 553 (1969) (Douglas, J., concurring); *Duncan v. Kahanamoku*, 327 U.S. 304, 334 (1946) (Murphy, J., dissenting); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 209 (1944) (Murphy, J., concurring).

¹³¹ See *Callins*, 510 U.S. at 1153–54 (Blackmun, J., dissenting from denial of certiorari); *McCollum*, 505 U.S. at 68–69 (O’Connor, J., dissenting); *McCleskey*, 481 U.S. at 332–34 (Brennan, J., dissenting); *Batson*, 476 U.S. at 106 (Marshall, J., concurring). Note that *McCollum*, *McCleskey*, and *Callins* are also counted in other categories because of other uses of the keywords.

white supremacy is more of a “we know it when we see it” concept than racism, which has a wide spectrum of uses.

1. Unconscious-Racism References

The Supreme Court refers explicitly to unconscious racism only four times.¹³² The first reference to unconscious racism comes from Justice Thurgood Marshall in a concurring opinion in *Batson v. Kentucky*. That reference is discussed in detail below. The second appears in a dissent by Justice Sandra Day O’Connor in *Georgia v. McCollum*, a case about peremptory challenges based on race.¹³³ The third is by Justice Brennan in *McCleskey*, an opinion that was also counted in the weak calling-out category.¹³⁴ The fourth is from Justice Harry Blackmun’s dissent in the death penalty case *Callins v. Collins*, an opinion that I also count in the racism-out-there category. These references are all clustered in a short, eight-year time period from 1986 to 1994.¹³⁵ They span from the middle of Professor Cho’s Civil Rights Era to her Post-Civil Rights Era.¹³⁶ The references to unconscious racism dry up completely in the middle of the post-civil rights period, as Professor Cho might have predicted. For the

¹³² See *Callins*, 510 U.S. at 1154 (Blackmun, J., dissenting from denial of certiorari); *McCollum*, 505 U.S. at 68 (O’Connor, J., dissenting) (“[C]onscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.”); *McCleskey*, 481 U.S. at 332–34 (Brennan, J., dissenting) (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 327 (1987)); *Batson*, 476 U.S. at 106 (Marshall, J., concurring).

¹³³ Although Justice O’Connor’s *McCollum* reference is a somewhat rhetorically softer reference (“can affect” gives it a maybe quality), she was the only member of the *McCollum* Court who recognized and articulated the serious and deleterious impact the decision could have on minority defendants. See Jeanette M. Boerner, Note, *The Discriminatory Effect of the “Color-Blind” Jury: Georgia v. McCollum*, 112 S. Ct. 2348 (1992), 16 HAMLINE L. REV. 975, 982, 994–95 (1993). Note that I also count Justice O’Connor’s dissent in *McCollum* in the denying/minimizing-racism category because she states that the Constitution “does not give federal judges the reach to wipe all marks of racism from every courtroom.” 505 U.S. at 69 (O’Connor, J., dissenting).

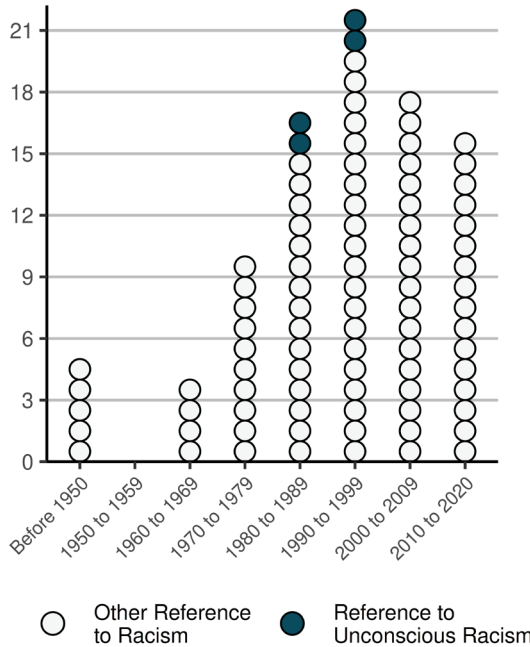
¹³⁴ Whether to double count this opinion was a close call. Justice Brennan uses the phrase “unconscious racism” in his opinion, but it is the title of a cited law review article, which ordinarily I would not count as a substantive reference. See *McCleskey*, 481 U.S. at 332–33 (Brennan, J., dissenting). But because Justice Brennan also includes a quote from the article explaining “unconscious racism,” I decided that it should count here. See *id.* (explaining that unconscious racism is the attachment of “significance to race” in a way that is often “outside . . . awareness” (quoting Lawrence, *supra* note 132, at 327)).

¹³⁵ Justice Blackmun in *Callins* argues that although the Court may “not be capable of devising procedural or substantive rules to prevent the more subtle and often unconscious forms of racism from creeping into the [criminal justice] system,” that should not prevent the Court from abandoning “the *Furman* promise.” *Callins*, 510 U.S. at 1154–55. Note that Justice Blackmun uses the keywords a number of times in different ways in this one opinion, so the opinion also appears in the racism-out-there and denying/minimizing-racism categories.

¹³⁶ Professor Cho defines the Civil Rights Era as the period from 1954 to 1986 and the Post-Civil Rights Era as the time from 1986 to 2007. Cho, *supra* note 20, at 1605.

Supreme Court, unconscious racism does not exist past the mid-1990s. Figure 4 shows the references to unconscious racism by time and by comparison to other references to the keywords.

Figure 4.



Justice Marshall made the first reference to unconscious racism in a Supreme Court opinion in his concurring opinion in *Batson v. Kentucky* in 1986, the well-known case about the constitutionality of using peremptory strikes to remove jurors based on race.¹³⁷

In that case, Justice Marshall highlights the unconscious racism of prosecutors and judges and ends with a blanket indictment of the criminal justice system: “[e]ven if all parties approach the Court’s mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels—a challenge I doubt all of them can meet.”¹³⁸ The words of breadth here—“confront *and* overcome” and “on *all* levels”—skillfully paints a picture of an entrenched problem of great magnitude.¹³⁹ But

¹³⁷ See 476 U.S. at 106 (Marshall, J., concurring).

¹³⁸ *Id.*

¹³⁹ *Id.* (emphasis added). Justice Marshall’s dissent in *Hobby v. United States* similarly describes racism as a problem of great scope and magnitude. In that case, Justice Marshall cautions that “a judge who engages in racist and sexist appointment practices” is just the beginning of a more “widespread region of tainted decisionmaking.” 468 U.S. 339, 353–54 (1984) (Marshall, J., dissenting). The meta-

it is the clause following the em dash, a grammatical flourish that emphasizes Justice Marshall's skepticism about our ability to overcome our racism, that gives the reference its punch. But even here, the passivity is noteworthy. Justice Marshall describes his skepticism about whether prosecutors and judges "can" overcome their racism, not whether they are willing to do the work to overcome it. That frees them from responsibility for doing the hard work they would have to do to overcome it.

The Supreme Court's lack of engagement with unconscious racism and its complete failure to even mention it after 1994 is noteworthy, especially as that concept has increasingly become part of the national conversation on race.¹⁴⁰ As rare as it is for the Supreme Court to acknowledge unconscious racism, it never refers to white supremacy as being "unconscious" or "subtle" (which is consistent with the common understanding of white supremacy). Apparently, one cannot unconsciously "do" white supremacy but somehow one *can* be "unconsciously" racist. Why racism is linguistically different is an interesting rhetorical question. The difference is noteworthy because in English becoming "unconscious" is passive. It is something that happens to us, often because of circumstances typically beyond our control. So, the idea of unconscious racism avoids responsibility; it sidesteps and hides the reality that the lack of consciousness is, of course, the fault of the doer of the racism.¹⁴¹ As Professor Thomas Ross noted, "[t]he rhetoric of [white] innocence draws its power . . . from its connection with 'unconscious racism.'"¹⁴² The passivity of "unconscious" racism also makes the problem of racism seem intractable. Indeed, Jus-

phor "widespread region" illustrates the vastness of the problem, comparing the spread of racism to an endless terrain.

¹⁴⁰ Unconscious racism had entered the mainstream of legal scholarship as early as 1987. See generally Lawrence, *supra* note 132 (explaining the role of unconsciousness in gender and racial discrimination). The concept of unconscious racism, sometimes called implicit bias, has continued to be written about widely in the mainstream media. See, e.g., Sendhil Mullainathan, *Racial Bias, Even When We Have Good Intentions*, N.Y. TIMES (Jan. 3, 2015), <https://www.nytimes.com/2015/01/04/upshot/the-measuring-sticks-of-racial-bias-.html> [<https://perma.cc/U5S6-8L8B>]; Shankar Vedantam, *How to Fight Racial Bias When It's Silent and Subtle*, NPR (July 19, 2013), <https://www.npr.org/sections/codeswitch/2013/07/19/203306999/How-To-Fight-Racial-Bias-When-Its-Silent-And-Subtle> [<https://perma.cc/TPB6-W338>]. Even though my research looked only for the phrase "unconscious racism," a quick look for similar phrases ("implicit bias" and "unconscious bias") showed a similar lack of Supreme Court engagement, with zero references for "implicit bias" and only four references to "unconscious bias." Many thanks to Professor Mary Bowman for pointing this out to me.

¹⁴¹ See, e.g., Lawrence, *supra* note 132, at 326 ("We cannot be individually blamed for unconsciously harboring attitudes that are inescapable in a culture permeated with racism. And without the necessity for blame, our resistance to accepting the need and responsibility for remedy will be lessened."); see also Jules Holroyd, *Responsibility for Implicit Bias*, 43 J. SOC. PHIL. 274, 274 (2012) (acknowledging the philosophical argument that one cannot be faulted for implicit bias and attempting to debunk it).

¹⁴² Ross, *supra* note 27, at 310. Ultimately, Ross concludes that unconscious racism is the undoing of white innocence. *Id.* at 312.

tice Antonin Scalia apparently considered the problem of unconscious racism “an ‘ineradicable’ reality that the courts should ignore.”¹⁴³ As documented here, the Court largely does exactly that.

2. Labeling Racism and Its Harm in Cases Not Involving Usual Suspects

The final six cases in this category consist of minority opinions that point out racism where the Court’s majority ignored or denied it. These opinions span a wide time period from 1944 to 1990. Two are by Justice Murphy, two by Justice William Douglas, and two by Justice Marshall.¹⁴⁴ For example, in *Steele v. Louisville & Nashville Railroad Co.*, Justice Murphy clearly labels the railroad’s behavior as “racism” when the majority refers to it as “discrimination.”¹⁴⁵ He also criticizes the Court for side-stepping the constitutional issue, writing that “[t]he utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation.”¹⁴⁶

Justice Douglas’s 1969 concurring opinion in *Powell v. McCormack* is also noteworthy.¹⁴⁷ In that case, the Court confronted the issue of the United

¹⁴³ Haney López, *supra* note 10, at 1860 (quoting Memorandum from Justice Scalia to the Conference, No. 84-6811—*McCleskey v. Kemp* (Jan. 6, 1987), reprinted in Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 528 (1995)).

¹⁴⁴ See *Holland v. Illinois*, 493 U.S. 474, 497 (1990) (Marshall, J., dissenting) (reminding the Court that using peremptory strikes against Black jurors is a harm not just to the defendant but to the dignity of the Black juror); *Hobby v. United States*, 468 U.S. 339, 353, 358 (1984) (Marshall, J., dissenting); *Carter v. Jury Comm’n*, 396 U.S. 320, 341 (1970) (Douglas, J., dissenting in part) (calling a Southern jury commission an “organ . . . of state law” with “a racist mission”); *Powell v. McCormack*, 395 U.S. 486, 553 (1969) (Douglas, J., concurring) (suggesting that the United States House of Representatives’ refusal to allow the plaintiff to take office had “racist overtones”); *Duncan v. Kahanamoku*, 327 U.S. 304, 334 (1946) (Murphy, J., concurring) (calling it a “deplorable” use of racism to justify military tribunals in Hawaii); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 209 (1944) (Murphy, J., concurring) (referring to the railroad union’s exclusion of Black employees as shrouded in a “cloak of racism” and urging the Court to reach out for constitutional issue). Although *Carter* could be categorized as a usual-suspects case because the actor is the Alabama Jury Commission, a frequent perpetrator of racism, I put Justice Douglas’s dissent in the pointing-out category because the majority opinion in *Carter* let stand a law that is clearly designed to allow whites to exclude Black people from juries by using “good character” and “integrity” as proxies for race. The majority treats this law ahistorically, finding that the statute is not unconstitutional because on its face it does not mention race. See *Carter*, 396 U.S. at 331–36. Justice Douglas is alone in pointing out the racism embedded in the law.

¹⁴⁵ *Compare Steele*, 322 U.S. at 203 (majority opinion) (“Here the discriminations based on race alone are obviously irrelevant and invidious.”), with *id.* at 209 (Murphy, J., concurring) (“The cloak of racism surrounding the actions . . . still remains.”), and *id.* (“Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it wherever it appears in the course of a statutory interpretation.”).

¹⁴⁶ *Id.* at 208 (Murphy, J., concurring).

¹⁴⁷ See 395 U.S. at 553 (Douglas, J., concurring).

States House of Representatives excluding Adam Clayton Powell based on a number of allegations unrelated to the criteria for service listed in Article I of the Constitution.¹⁴⁸ Powell was the first African American to be elected to the House from New York and was a powerful and controversial civil rights figure, which almost certainly figured into his treatment by the House.¹⁴⁹ Justice Douglas concurred in the Court's decision that Powell could not be excluded if he met the Article I criteria and noted the "racist overtones" of the case.¹⁵⁰ This was a subtle reference, to be sure, but significant because one could read the entire majority opinion and not realize that Representative Powell was African American. Powell's race is not mentioned once in the majority opinion.

C. The Usual Suspects

The third category contains twenty-one references in which a Supreme Court opinion uses one of the keywords to label intentional and extreme acts of prejudice by "bad" actors (like referring to Black people using the N-word) or "bad" institutions (like Jim Crow laws).¹⁵¹ I call these usual-suspects refer-

¹⁴⁸ See *id.* at 489–91.

¹⁴⁹ See generally WIL HAYGOOD, *KING OF THE CATS: THE LIFE AND TIMES OF ADAM CLAYTON POWELL, JR.* (2006) (detailing how Powell was both the most "celebrated and controversial" civil rights leader of his time).

¹⁵⁰ *Powell*, 395 U.S. at 553 (Douglas, J., concurring).

¹⁵¹ Sixteen of the twenty-one references use the word "racist" or "racism." See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 862, 871 (2017) (Kennedy, J., majority opinion) (referring to a juror who stated, among other things, that Mexican men were controlling and aggressive with women (quoting *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001))); *Shelby Cnty. v. Holder*, 570 U.S. 529, 584–85 (2013) (Ginsburg, J., dissenting) (referring to remarks of Alabama legislators calling Black people "Aborigines" and implying that Black people are "illiterate"); *Gonzales v. Thomas*, 547 U.S. 183, 184 (2006) (per curiam) (referring to a South African man who mistreated Black workers); *Cutter v. Wilkinson*, 544 U.S. 709, 723 n.11 (2005) (Ginsburg, J., majority opinion) (referring to a prisoner who was a member of the Aryan Nation and his white-supremacist literature); *Johnson v. California*, 543 U.S. 499, 502, 513 (2005) (O'Connor, J., majority opinion) (referring to the number of racists in U.S. prisons (quoting *Johnson v. California*, 336 F.3d 1117, 1120 (9th Cir. 2003) (Ferguson, J., dissenting from denial of rehearing en banc))); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring) (referring to the Ku Klux Klan); *id.* at 772 (O'Connor, J., concurring); *Dawson v. Delaware*, 503 U.S. 159, 170–73 (1992) (Thomas, J., dissenting) (referring to the Aryan Brotherhood); *Andrews v. Shulsen*, 485 U.S. 919, 920, 922 (1988) (Marshall, J., dissenting from denial of certiorari) (labeling a juror's note that said "Hang the N[****]rs"); *Bowers v. Hardwick*, 478 U.S. 186, 210 n.5 (1986) (Blackmun, J., dissenting) (referring to anti-miscegenation laws), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 52, 55 & n.2, 56 (1975) (Marshall, J., majority opinion) (referring to a company's failure to hire and promote Black workers); *Perkins v. Matthews*, 400 U.S. 379, 389 n.8 (1971) (Brennan, J., majority opinion) (referring to Jim Crow laws designed to keep Black people from voting); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 184 (1970) (Douglas, J., dissenting in part) (referring to racial segregation (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 429 (1968))), *superseded by statute*, FED. R. CIV. P. 56 (2010), *as recognized in* *Olivero v. Trek Bicycle Corp.*, 291 F. Supp. 3d 1209 (D. Colo. 2017); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 176, 180

ences because they label racism in circumstances so overt and egregious that labeling them as racist usually does not trigger white fragility. Many race scholars agree both that this is the current, predominant definition of racism and white supremacy in American culture and that it is the one with which most white people are comfortable.¹⁵²

The references identify a surprisingly narrow number of usual suspects. The most commonly mentioned are Southern racists, Jim Crow laws, and the Ku Klux Klan, which account for the majority of the references.¹⁵³ Other usual suspects include the Aryan Brotherhood, white nationalism, apartheid, and people who use language that is openly racist (e.g., the N-word, statements like “all Mexicans are criminals,” and the like).

Justice Potter Stewart’s 1968 majority opinion in *Jones v. Alfred H. Mayer* includes a great example of what qualifies as a usual suspect. There, he rebuked the “racist laws in the former rebel states.”¹⁵⁴ Similarly, the 1995 concurring opinions of both Justice O’Connor and Justice Thomas in *Capitol Square Review & Advisory Board v. Pinette* are usual-suspect references. Although the opinions vote to permit the Ku Klux Klan’s petition to erect a cross

(1968) (Fortas, J., majority opinion) (referring to speech by National States Rights Party targeting Black and Jewish people); *Jones*, 392 U.S. at 413, 429 (Stewart, J., majority opinion) (referring to “racist laws of the former rebel states”); *Brown v. Louisiana*, 383 U.S. 131, 135–37, 142 (1966) (Fortas, J., plurality opinion) (referring to Jim Crow era segregation laws).

Five of the cases use “white supremacy.” See *Virginia v. Black*, 538 U.S. 343, 354–55 (2003) (O’Connor, J., majority opinion) (referring to cross-burning); *Pinette*, 515 U.S. at 770 (Thomas, J., concurring) (referring to the Ku Klux Klan’s erection of a cross); *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (Rehnquist, J., majority opinion) (discussing Alabama law meant to disenfranchise Black people); *Louisiana v. United States*, 380 U.S. 145, 149–50 (1965) (Black, J., majority opinion) (discussing a Louisiana Jim Crow voting law); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 76–77 (1928) (Van Devanter, J., majority opinion) (referring to the Ku Klux Klan).

Note here that *Pinette* makes up three of the total references in the usual-suspects category. Justice O’Connor’s concurrence, which uses the term “racism,” constitutes the first reference. 515 U.S. at 772 (O’Connor, J., concurring). The second and third references are both credited to Justice Thomas’s concurrence, which uses the word “racist” and the phrase “white supremacy” and so is counted twice. *Id.* at 770 (Thomas, J., concurring). When an opinion quotes a keyword from another source (like a party or other court opinion), I generally did not count it unless, in my view, the usage was significant.

¹⁵² See, e.g., DIANGELO, *supra* note 9, at 71–72 (analyzing how “the good/bad binary” of racism first started and its practical impact); Ta-Nehisi Coates, *Playing the Racist Card: Ferraro’s Comments About Obama Were Racist. Why Can’t We Say That?*, SLATE (Mar. 14, 2008), <https://slate.com/news-and-politics/2008/03/ferraro-s-comments-about-obama-were-racist-why-can-t-we-say-that.html> [<https://perma.cc/FPW5-7X3L>] (“[I]n the popular vocabulary, the racist is not so much an actual person but a monster, an outcast thug who leads the lynch mob and keeps *Mein Kampf* in his back pocket.”); see also Haney López, *supra* note 9, at 815 (stating that the Supreme Court adopted this view of racism in *McCleskey v. Kemp*).

¹⁵³ Nine of the usual-suspect references use the term “racist” or “racism” to refer to Southern racists, Jim Crow laws, or the Ku Klux Klan. Similarly, all five opinions to use the phrase “white supremacy” were referring to Jim Crow laws or the Klan. See *supra* note 151 and accompanying text.

¹⁵⁴ *Jones*, 392 U.S. at 429.

on a statehouse plaza, both Justices acknowledged that the Klan and the symbolism of its cross are racist.¹⁵⁵

This category contains some noteworthy timing. The first usual-suspect reference to “racism” or “racist” was in 1966 and broke an almost twenty-year silence on the appearance of those words in Supreme Court jurisprudence.¹⁵⁶ The 1966 reference appeared in a plurality opinion by Justice Abe Fortas in a case about Jim Crow laws in Louisiana.¹⁵⁷ The first usual-suspect reference to “white supremacy” occurred in 1928, obviously much earlier than 1966 when the first usual-suspect reference to “racism” appeared. The 1928 reference to “white supremacy” appeared in Justice Willis Van Devanter’s opinion in *New York ex rel. Bryant v. Zimmerman* in which he uses that label to describe the ideology of the Ku Klux Klan.¹⁵⁸ And, similar to “racism,” there was a long gap after 1928 in which the Supreme Court was silent on white supremacy for almost forty years. Then, in 1965, Justice Hugo Black used the phrase “white supremacy” in *Louisiana v. United States*—another Louisiana case—to refer to a law enacted by Louisiana’s Segregation Committee designed to keep Black people from voting.¹⁵⁹

No Court opinion labeled a usual suspect as racist until 1966, and, other than the outlier reference in *Zimmerman*, none mentioned “white supremacy” until 1965.¹⁶⁰ Both of these references occur right smack in the middle of Professor Cho’s Civil Rights Era.

Usual-suspect references peaked during the 1960s and 1970s, when the Court was active in attempting to dismantle Jim Crow laws.¹⁶¹ The use of the

¹⁵⁵ See *Pinette*, 515 U.S. at 770 (Thomas, J., concurring); *id.* at 772 (O’Connor, J., concurring).

¹⁵⁶ Before the 1966 usual-suspect reference, the last reference to racism was in 1948 in *Oyama v. California*, which was a calling-out reference. See 332 U.S. 633, 672–74 (1948) (Murphy, J., concurring); see also *supra* notes 80–81 and accompanying text.

¹⁵⁷ See *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (Fortas, J., plurality opinion).

¹⁵⁸ *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 76–77 (1928) (Van Devanter, J., majority opinion).

¹⁵⁹ See *Louisiana v. United States*, 380 U.S. 145, 149, 152 (1965) (Black, J., majority opinion) (referring to both “white supremacy” and “white political supremacy”). In Justice Black’s majority opinion in *Louisiana v. United States*, he referred to the discriminatory voting requirements imposed by Louisiana’s Segregation Committee as designed “to preserve white supremacy.” *Id.* at 149.

¹⁶⁰ Before 1966, the only references to racism are by Justice Murphy and those references are discussed in the calling-out category. So, if we take Justice Murphy and his unusual antiracism out of the calculation, no Supreme Court opinion labels racism until 1966.

¹⁶¹ See *Perkins v. Matthews*, 400 U.S. 379, 389 n.8 (1971) (Brennan, J., majority opinion) (changing voting procedures without following federally mandated approval protocols was unlawful and likely done with a racially discriminatory purpose); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 184 (1970) (Douglas, J., dissenting in part) (segregating races at restaurants due to state-enforced custom (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 429 (1968)), *superseded by statute*, FED. R. CIV. P. 56 (2010), *as stated in* *Olivero v. Trek Bicycle Corp.*, 291 F. Supp. 3d 1209 (D. Colo. 2017); *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 176 (1968) (Fortas, J., majority opinion) (reviewing whether a restraining order issued against the National States Rights Party for

words “racist” and “white supremacy” in these decades was, of course, somewhat different than the usage of the 1990s and 2000s. It was no doubt more politically difficult to refer to Jim Crow laws as racist in those early decades. The last years of the Second Reconstruction in the 1960s and early 1970s, was a period of significant racial turmoil in the country, with political and legal victories for Black people offset by white violence and resistance.¹⁶² Alabama Governor George Wallace and his explicit message of segregation was still a winning mindset in the South. Three civil rights workers in Mississippi were murdered by the Ku Klux Klan in 1964, and law enforcement’s response was feeble.¹⁶³ Martin Luther King was assassinated in 1968.¹⁶⁴

But during this time, the Court was actively deciding civil rights cases. It decided not only *Loving* during this period, but also key civil rights cases *Boydton v. Virginia* (segregation) and *Swann v. Charlotte-Mecklenberg Board of Education* (busing).¹⁶⁵ It was a time of turmoil, but also a time when the Court had ample opportunity to stake out clear rhetorical ground on the issues of segregation and racism.

It staked out a rhetorical ground that was based on a very narrow definition of racism. In terms of rhetorical analysis and how the meaning of particular words evolved, the Court’s early and frequent use of the words “racism” and “white supremacy” almost exclusively in reference to the Ku Klux Klan and Jim Crow laws likely significantly contributed to American culture’s narrowing of these terms to only these most egregious, overt contexts. As scholars

making racist speeches over the government’s public address system was improper); *Jones*, 392 U.S. at 429 (Stewart, J., majority opinion) (upholding statute barring racial discrimination in the sale of private property); *Brown v. Louisiana*, 383 U.S. at 142 (Fortas, J., plurality opinion) (conducting a peaceful protest at a library with racially discriminatory lending practices); see also Cho, *supra* note 20, at 1611–12 (“Following World War II, the second reconstruction or mid-twentieth-century civil-rights movement ushered in liberal legal reforms designed to eradicate explicit discrimination imposed on racial grounds.”).

¹⁶² See MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION, at xii–xiv (Clive Webb ed., 2005) (providing a chronological overview of major civil rights and legal events from the 1950s).

¹⁶³ See *This Day in History: August 04, 1964: Slain Civil Rights Workers Found*, HISTORY, <https://www.history.com/this-day-in-history/slain-civil-rights-workers-found> [<https://perma.cc/VGA5-ML8G>]. Although the federal response to the killings was marginally better than the response of Mississippi law enforcement, it was still far short of what such brutal and brazen murders warranted. For example, it took years and considerable pressure to bring the suspects to trial in federal court. The trial judge was an ardent segregationist, and the jury was all white. Only seven of the nineteen indicted were convicted, and none of those seven served more than six years for the crime. *Id.*

¹⁶⁴ *Martin Luther King, Jr. Assassination*, HISTORY, <https://www.history.com/topics/black-history/martin-luther-king-jr-assassination> [<https://perma.cc/MS4V-YSMF>] (Jan. 26, 2021).

¹⁶⁵ See generally *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (endorsing busing as a means to end school desegregation); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia’s anti-miscegenation statute); *Boydton v. Virginia*, 364 U.S. 454 (1960) (overturning a trespass violation of Black man in a “whites only” area).

have noted, the law and racial politics in this country define racism as only “clear proof of racial bias by a particularly bad actor.”¹⁶⁶ The Supreme Court’s rhetoric bears significant responsibility for the current predominance of this meaning.

The rhetoric is closely connected with the Court’s doctrinal struggles with affirmative action, colorblindness, and the notion that only intentional discrimination is actionable.¹⁶⁷ So, even though the Court’s use of “racist” or “white supremacy” in the 1960s and 1970s may have been more forward-thinking and part of the Court’s effort to dismantle a particularly virulent form of racism, I stand by the label of usual suspect for these references because of the impact it had on the evolution of the language.

The timing of the usual-suspect references merits analysis. First, the Court used the words “racist,” “racism,” and “white supremacy” to refer to usual suspects frequently in the 1960s and early 1970s, then stopped for about a decade. From 1965 to 1975, Justices used these keywords to refer to usual suspects seven times.¹⁶⁸ Then, from 1975 to 1984, no usual suspects references popped up at all. Then, the references to the usual suspects resumed frequency in the period from 1986 to 2017, with thirteen references.¹⁶⁹

¹⁶⁶ See Haney López, *supra* note 9, at 815. Haney López calls this the “flip-side of colorblindness” in referring to the labeling as *not* racist anything “not expressly predicated on race, no matter how closely correlated with racial hierarchy.” *Id.*; see also DIANGELO, *supra* note 9, at 71–72 (noting that racism has come to be defined as only acts by “bad” people, mostly Southerners).

¹⁶⁷ See generally Haney López, *supra* note 9 (explaining how the Court’s willingness, or lack thereof, to acknowledge and attack racism in its opinions has influenced the public’s perception of what it means to be racist).

¹⁶⁸ See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 55 & n.2 (1975) (“racist”); *Perkins v. Matthews*, 400 U.S. 379, 389 n.8 (1971) (“racist”); *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 176 (1968) (“racist”); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 184 (1970) (Douglas, J., dissenting in part) (“racist” (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 429 (1968)), *superseded by statute*, FED. R. CIV. P. 56 (2010), *as stated in* *Olivero v. Trek Bicycle Corp.*, 291 F. Supp. 3d 1209 (D. Colo. 2017)); *Jones*, 392 U.S. at 429 (“racist”); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (Fortas, J., plurality opinion) (“racism”); *Louisiana v. United States*, 380 U.S. 145, 149, 152 (1965) (“white supremacy”).

¹⁶⁹ See Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 871 (2017) (“racist” (quoting *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001))); *Shelby Cnty. v. Holder*, 570 U.S. 529, 584–85 (2013) (Ginsburg, J., dissenting) (“racist” and “racism”); *Gonzales v. Thomas*, 547 U.S. 183, 184 (2006) (per curiam) (“racist”); *Cutter v. Wilkinson*, 544 U.S. 709, 723 n.11 (2005) (“racist”); *Johnson v. California*, 543 U.S. 499, 513 (2005) (“racists” (quoting *Johnson v. California*, 336 F.3d 1117, 1120 (9th Cir. 2003) (Ferguson, J., dissenting from denial of rehearing en banc)); *Virginia v. Black*, 538 U.S. 343, 354 (2003) (O’Connor, J., majority opinion) (“[w]hite [s]upremacy”); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring) (“racist” and “white supremacy”); *id.* at 772 (O’Connor, J., concurring) (“racism”); *Andrews v. Shulson*, 485 U.S. 919, 920, 922 (1988) (Marshall, J., dissenting from denial of certiorari) (“racist” and “racism”); *Bowers v. Hardwick*, 478 U.S. 186, 210 n.5 (1986) (Blackmun, J., dissenting) (“racism”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (“racism” and “white supremacy”). Note that *Pinette* created two keyword references: one for Justice O’Connor’s

The other noteworthy pattern was that in the 1960s and 1970s, of the seven references to usual suspects, six were in majority opinions.¹⁷⁰ The outlier was a partial dissent by Justice Douglas in *Adickes v. S.H. Kress & Co.*¹⁷¹ Then, starting in 1985, things changed. Of the thirteen references after 1985, six were in majority opinions and seven were in separate opinions, either concurrences or dissents.¹⁷² Therefore, even in cases involving the usual suspects, the Court was less likely to use the words “racism” or “white supremacy” in a majority opinion to refer to those usual suspects after 1985. This rhetorical timeline tracked almost exactly with Professor Cho’s Post-Racial Era (starting in 1986) and Professor Haney López’s identification of the start of the Court’s “reactionary colorblindness.” Figure 5 shows a timeline of both majority and non-majority opinions in usual-suspects cases.

use of “racism” and another for Justice Thomas’s use of both “racist” and “white supremacy.” Justice Rehnquist’s use of “racism” in the majority opinion of *Hunter* is not counted because he is quoting the district court.

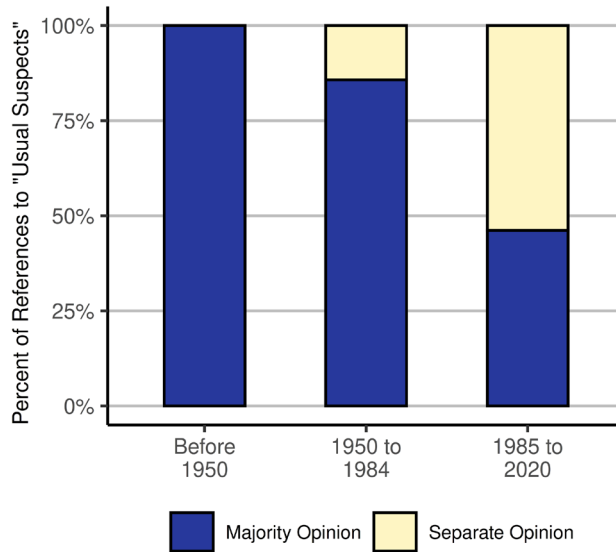
¹⁷⁰ See *Emporium Capwell*, 420 U.S. 55 & n.2; *Perkins*, 400 U.S. at 389 n.8; *Carroll*, 393 U.S. at 176; *Jones*, 392 U.S. at 429; *Brown v. Louisiana*, 383 U.S. at 142; *Louisiana v. United States*, 380 U.S. at 149–52.

¹⁷¹ See *Adickes*, 398 U.S. at 184 (Douglas, J., dissenting in part) (quoting *Jones*, 392 U.S. at 429).

¹⁷² Six references occur in majority opinions. See *Peña-Rodriguez*, 137 S. Ct. at 871 (Kennedy, J., majority opinion) (obliquely referring to juror’s comments about Mexicans as “racist” (quoting *United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001))); *Gonzales*, 547 U.S. at 184 (per curiam) (“racist”); *Cutter*, 544 U.S. at 723 n.11 (Ginsburg, J., majority opinion) (“racist”); *Johnson v. California*, 543 U.S. at 513 (O’Connor, J., majority opinion) (“racists” (quoting *Johnson v. California*, 336 F.3d at 1120 (Ferguson, J., dissenting from denial of rehearing en banc)); *Black*, 538 U.S. at 354 (O’Connor, J., majority opinion) (“[w]hite [s]upremacy”); *Hunter*, 471 U.S. at 229 (Rehnquist, J., majority opinion) (“white supremacy”).

And seven references occur in minority opinions. See *Shelby Cnty.*, 570 U.S. at 584–85 (Ginsburg, J., dissenting) (“racist” and “racism”); *Pinette*, 515 U.S. at 770 (Thomas, J., concurring) (“racist” and “white supremacy”); *id.* at 772 (O’Connor, J., concurring) (“racism”); *Dawson v. Delaware*, 503 U.S. 159, 170–73 (1992) (Thomas, J., dissenting) (referring to Aryan Brotherhood); *Andrews*, 485 U.S. at 920–22 (Marshall, J., dissenting from denial of certiorari) (“racist” and “racism”); *Bowers*, 478 U.S. at 210 n.5 (Blackmun, J., dissenting) (“racism”). *Pinette* contains each of the keywords and therefore counts as three references. Note here that although Justice Marshall uses both “racist” and “racism” in *Andrews*, I counted *Andrews* only once because I counted multiple usages of the keywords in one opinion as one usage, unless the usage involved a significantly different meaning.

Figure 5.



But even what Professors Cho and Haney López identify as “post-racialism” or “reactionary colorblindness” does not entirely account for a Court that is unwilling to call even undeniably racist entities, like the Ku Klux Klan or Jim Crow laws, racist. Around 1985, at the end of Professor Cho’s Civil Rights Era, the Court shifted from one in which majority opinions called overtly racist laws or acts “racist” to one where this was done largely in separate opinions that did not represent the voice of the majority of the Justices, and where these words did not appear in the opinion that stood as precedent. This rhetorical shift might have marked the beginning of the change in the meaning of “racism” to, as Ibram X. Kendi notes, “a vicious pejorative,” “a slur,” and “the worst word in the English language,” equivalent to the “N word.”¹⁷³

The 1995 case *Pinette*, for example, involved a lawsuit over the Capitol Square Review and Advisory Board’s denial of the Ku Klux Klan’s application to erect a large cross near the Ohio State Capitol.¹⁷⁴ The majority opinion held that the denial of the permit violated the Klan’s First Amendment rights.¹⁷⁵ Nowhere in the majority opinion do the words “racist,” or “racism” or “white supremacy” appear to describe the Ku Klux Klan. The Court only describes the

¹⁷³ KENDI, *supra* note 2, at 9, 46–47.

¹⁷⁴ 515 U.S. at 757–58.

¹⁷⁵ *Id.*

Ku Klux Klan using these words in two concurring opinions, one by Justice O'Connor and one by Justice Thomas.¹⁷⁶

Another example was Justice Marshall's dissent from the denial of certiorari in 1989 in *Andrews*, where an all-white jury sentenced a Black defendant to death.¹⁷⁷ In the middle of the trial, one juror had handed the bailiff a napkin on which had been written "Hang the N[****]rs."¹⁷⁸ The Court can deny certiorari for many reasons, of course, but this case presented a particularly egregious example of a capital case tainted by racism. Only Justice Marshall (joined by Justice Brennan) saw a constitutional violation here and was willing to label the juror's statement as racism.¹⁷⁹

D. Racism "Out There"

The fourth category are references to racism "out there." These references acknowledge racism's existence in the world but fail to identify the perpetrators of the racism. In fact, some references in this category have failed to acknowledge the Court as a perpetrator of racism even when the Court's was blatantly complicit in upholding racist policies. Racism-out-there references are vague and passive; they suggest that racism simply *happens* as opposed to being purposefully created.¹⁸⁰

References to racism "out there" allow the Court and the law to divorce themselves from responsibility in the construction of racism.¹⁸¹ To quote Professor Richard Thompson Ford, these references to racism suggest "racial injury *without* racists."¹⁸² In this way, racism-out-there references create and support the notion of white innocence.¹⁸³

¹⁷⁶ See *id.* at 770 (Thomas, J., concurring) ("[T]he Klan's main objective is to establish a racist white government . . . [T]he cross is a symbol of white supremacy . . ."); *id.* at 772 (O'Connor, J., concurring) ("Despite the messages of bigotry and racism that may be conveyed along with religious connotations by the display of a Ku Klux Klan cross, at bottom this case must be understood . . . as a case about private religious expression . . ." (citation omitted)).

¹⁷⁷ See 485 U.S. at 920–22 (Marshall, J., dissenting from denial of certiorari).

¹⁷⁸ *Id.* at 920.

¹⁷⁹ Justice Marshall drafted the only dissent in this case, which Justice Brennan joined.

¹⁸⁰ See Ross, *supra* note 27, at 304 (noting that references to "societal discrimination" are "weak and abstract, practiced by no one in particular against no one in particular").

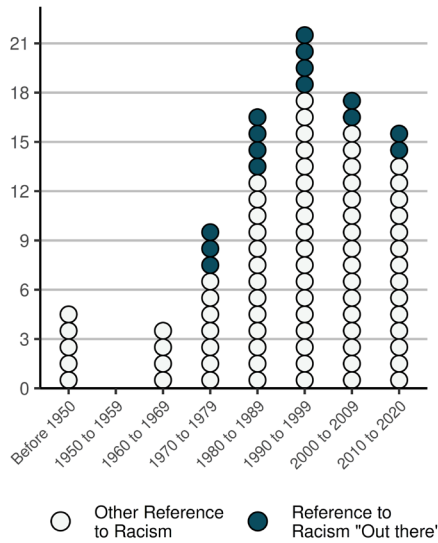
¹⁸¹ See Sarita Srivastava, "You're Calling Me a Racist?" *The Moral and Emotional Regulation of Antiracism and Feminism*, 31 J. WOMEN CULTURE & SOC'Y 29, 40 (2005) (defining a "nonracist" as someone who acknowledges that racism exists in the world but denies personal involvement).

¹⁸² FORD, *supra* note 1, at 58; see Bracey, *supra* note 1, at 91, 102 (discussing Professor's Ford's formulation); Coates, *supra* note 152 ("America has lots of racism but few actual racists . . .").

¹⁸³ See Ross, *supra* note 27, at 304 (commenting that references to "'societal discrimination' . . . [are] an important variant of the rhetoric of innocence" (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (Powell, J., plurality opinion))).

The fifteen references in this category span from 1972 to 2019.¹⁸⁴ Interestingly, there were no racism-out-there references prior to 1972; the generalized reference to racism seems to be a more modern rhetorical phenomenon. Moreover, only three references—two of which were in the same opinion—occurred before 1984; the bulk of the references (twelve of fifteen) were between 1984 and 2019.¹⁸⁵ Figure 6 depicts a timeline for racism-out-there references as compared to other categories, showing a peak in the 1980s and 1990s and a small dip after that.

Figure 6.



¹⁸⁴ See *Tharpe v. Ford*, 139 S. Ct. 911, 912–13 (2019) (Sotomayor, J., respecting denial of certiorari); *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291, 314 (2014) (Kennedy, J., plurality opinion); *Ricci v. DeStefano*, 557 U.S. 557, 609 (2009) (Ginsburg, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting); *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (Souter, J., majority opinion); *Callins v. Collins*, 510 U.S. 1141, 1148, 1153–54 (1994) (Blackmun, J., dissenting from denial of certiorari); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 n.4 (1992) (Scalia, J., majority opinion); *Georgia v. McCollum*, 505 U.S. 42, 58 (1992) (Blackmun, J., majority opinion); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 677 (1987) (Brennan, J., concurring in part and dissenting in part), *superseded by statute* 28 U.S.C. § 1658, *as stated in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 371 (2004); *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (Brennan, J., majority opinion); *id.* 71–72 (Brennan, J., plurality opinion); *Turner v. Murray*, 476 U.S. 28, 39 (1986) (Brennan, J., concurring in part and dissenting in part); *Press-Enter. Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 521 (1984) (Marshall, J., concurring in judgment); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 400 (1978) (Marshall, J., concurring in part and dissenting in part); *id.* at 407 (Blackmun, J., concurring); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 183 n.4 (1972) (Douglas, J., dissenting). Note here that *Bakke* is counted twice, as Justices Marshall and Blackmun both referred to “racism” generally in their separate opinions. Also note that *Thornburg* is counted once.

¹⁸⁵ See *supra* note 184 and accompanying text.

All of these references were to “racism” or “racist;” none are to “white supremacy.” There seems to be no such thing as white supremacy “out there,” which is interesting in and of itself. Why is it that we are comfortable referring to racism so obliquely and abstractly, but it would seem silly to do so with white supremacy? This is almost certainly related to the results noted earlier about the dearth of white supremacy references in the pointing-out category and the absence of any concept of “unconscious” white supremacy.

Justice David Souter’s 1994 majority opinion in *Johnson v. De Grandy* is an example of the passivity and abstraction of typical racism-out-there references. Justice Souter stated that Congress intended the Voting Rights Act to “hasten the waning of racism in American politics.”¹⁸⁶ The reference contained no acknowledgment of the involvement of the law or the Court in the disenfranchisement of Black people. Moreover, referring to the Voting Rights Act as seeking to “*hasten the waning*” of racism was exceptionally euphemistic. First of all, *waning* suggests that racism was diminishing when Congress passed the Voting Rights Act, which is historically inaccurate.¹⁸⁷ And the notion that an Act that is considered one of the most effective civil rights laws ever passed by Congress was merely meant to “*hasten*” the demise of racism is a gross understatement.¹⁸⁸ Overall, this quote *looks like* the Court was acknowledging the reality of racism, but in fact it euphemized the magnitude of the problem of racism in voting, ignoring the Court’s complicity in making the Voting Rights Act necessary, and referred to racism passively.

Another example of racism “out there” is Justice Blackmun’s dissent from the Court’s denial of certiorari in a death penalty petition in *Callins v. Collins*.¹⁸⁹ I hate to criticize this opinion because it is such a beautifully written condemnation of the death penalty.¹⁹⁰ But rhetorically, the use of the word “racism” here is deeply problematic. Justice Blackmun referred to racism four times in his dissent and used the vivid metaphor of a virus to describe the prob-

¹⁸⁶ 512 U.S. at 1020.

¹⁸⁷ The Voting Rights Act was passed in August of 1965. *History of Federal Voting Rights Laws*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/history-federal-voting-rights-laws> [<https://perma.cc/A3WR-PQWN>] (July 28, 2017). The civil rights movement was in full swing, but to say that racism was “waning” ignores the violence and strong resistance that met the movement during that time. As an example, just a few months before the Voting Rights Act was passed, state troopers had responded violently to a largely peaceful civil rights march in Selma, Alabama by the Southern Christian Leadership Campaign, killing one marcher and injuring others. See WEBB, *supra* note 162, at xiv.

¹⁸⁸ See *Introduction to Federal Voting Rights Laws*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/introduction-federal-voting-rights-laws-0> [<https://perma.cc/MA34-VGKF>] (June 19, 2009) (“The Voting Rights Act itself has been called the single most effective piece of civil rights legislation ever passed by Congress.”).

¹⁸⁹ See 510 U.S. at 1148 (Blackmun, J., dissenting from denial of certiorari).

¹⁹⁰ Justice Blackmun’s statement that he will “no longer tinker with the machinery of death” is some of the most affecting Supreme Court rhetoric in history. See *id.* at 1145.

lem of racism in sentencing.¹⁹¹ But none of the references held the Court accountable for its participation in consistently upholding a racist system that disproportionately kills Black people. As vivid as it is, the virus metaphor contributes to the ethereal quality of the racism described in the opinion—a virus is something over which humans have little agency. It infects us and spreads against our will. It is literally *in the air*.

Justice Blackmun's dissent alternates between praising the Court for trying its best and absolving it for its complicity in allowing and supporting the notoriously racist application of the death penalty. When Justice Blackmun ascribed agency to the Court, he did so to show how well-meaning the Court was. For example, in referring to *Furman v. Georgia*, Justice Blackmun notes that the Court “aspired to eliminate the vestiges of racism” in capital sentencing.¹⁹² Similarly, the Court was “apparently troubled by the fact that Georgia had instituted more procedural and substantive safeguards than most other States since *Furman*, but was still unable to stamp out the virus of racism.”¹⁹³ The Court was “troubled” by racism and “aspires” to end it. To Justice Blackmun, the Court was not racist; it was well-meaning and trying hard: the essence of white innocence.¹⁹⁴

In addition to portraying the Court as well-meaning, Justice Blackmun's prose erased the Court's power to fix racism, painting the problem of racism as simply too difficult.¹⁹⁵ He later noted that despite its aspirations, the Court “may not be capable of devising procedural or substantive rules to prevent the

¹⁹¹ See *id.* at 1148, 1153–54 (describing racism as a “virus” that “infect[s]” the criminal justice system and needs to be “stamp[ed] out”). Note that Justice Blackmun's dissent in *Callins* is also referenced in the unconscious-racism category (a type of pointing-out reference) and the denying/mimimizing-racism category, for reasons discussed *supra* and *infra*.

¹⁹² *Callins*, 510 U.S. at 1148 (Blackmun, J., dissenting from denial of certiorari) (citing *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam)). Like Justice Souter's use of “waning” in *De Grandy*, Justice Blackmun's use of “vestiges” in this quote suggests that at the time *Furman* was decided, only small traces of racism in sentencing remained, which is false.

¹⁹³ *Id.* at 1154.

¹⁹⁴ Justice Blackmun's rhetoric here is reflective of the definition of white innocence described by Professor Neil Gotanda, a kind of “Aha! Moment” where the writer sees “the light” because of evidence that was not previously available. See Neil Gotanda, *Reflections on Korematsu, Brown and White Innocence*, 13 TEMP. POL. & C.R. L. REV. 663, 669–70 (2004) (arguing that the decision in *Brown v. Board of Education* exhibits this form of white innocence). *Callins* is Justice Blackmun's “Aha! Moment.” What Justice Blackmun describes as the Court's process mirrors most closely the definition of white innocence propounded by Professor David Simson in which a legal “move” makes “persistent racial hierarchy grounded in white supremacy” square with “American egalitarian aspirations.” Simson, *supra* note 27, at 689.

¹⁹⁵ This calls to mind the Justice Scalia's argument in his internal memorandum regarding the *McCleskey* decision that identifying and fixing unconscious racism is too difficult, and so it should be ignored. See *supra* note 143 and accompanying text. For this reason, Justice Blackmun's dissent in *Callins* is also placed in the denying/minimizing-racism category, for his rhetoric denying that the Court can fix racism.

more subtle and often unconscious forms of racism.”¹⁹⁶ Racism in the death penalty was not the fault of the well-intentioned Court; it was just that racism “out there” is so difficult and intractable.

Justice Blackmun’s criticism of the majority opinion in *McCleskey v. Kemp* is also problematic, as he stopped far short of accusing the *McCleskey* Court of racism or of tolerating racism. He referred to the *McCleskey* decision as *documenting* a “renowned example of racism” in capital sentencing as if the Court were merely an observer.¹⁹⁷ The starkest criticism is his description of the Court as having “turned its back on McCleskey’s claims.”¹⁹⁸ This paints the *McCleskey* Court passively—the Court “documented” the racism “out there” in capital sentencing but then “turned its back.” Recall that this is similar to both Justice Gorsuch’s rhetoric in *Ramos* that the *Apodaca* Court failed to grapple with racism and Justice Brennan’s characterization of the Court in *McCleskey* as “ignoring” evidence of racism.¹⁹⁹ Rhetorically, it seems that the style of criticism permitted of the Court was that the Court ignored it, a charge that significantly downplayed the Court’s power and responsibility.

Given the egregious harm wrought by the *McCleskey* decision, and the Court’s active participation in perpetuating and downplaying the problem of racism in death penalty cases, characterizing what the Court did in that case as “turning its back on . . . claims” was beyond euphemistic. There was nothing that came close to Justice Murphy’s charge of legalized racism—and it would have been eminently fair to call *McCleskey v. Kemp* legalized racism. Where is the Justice Murphy-like charge that the *McCleskey* court had legalized the state-sanctioned killing of innocent Black people? Not in this dissent.

E. Denying/Minimizing Racism

The fifth category includes thirteen references that explicitly deny racism, minimize its harms, or accept it as inevitable.²⁰⁰ References in this category

¹⁹⁶ *Callins*, 510 U.S. at 1154–55 (Blackmun, J., dissenting from denial of certiorari).

¹⁹⁷ *Id.* at 1153.

¹⁹⁸ *Id.* at 1154.

¹⁹⁹ See *supra* notes 111–114 and accompanying text (discussing the *Ramos* majority opinion); *supra* note 123 and accompanying text (discussing of Justice Brennan’s dissent in *McCleskey*).

²⁰⁰ See *Tharpe v. Sellers*, 138 S. Ct. 545, 547, 553 (2018) (Thomas, J., dissenting); *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011) (Scalia, J., majority opinion); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 n.14 (2007) (Roberts, C.J., plurality opinion) (citation omitted); *id.* at 781 n.30 (Thomas, J., concurring) (citation omitted); *Grutter v. Bollinger*, 539 U.S. 306, 377 (2003) (Thomas, J., concurring in part); *Callins*, 510 U.S. at 1154 (Blackmun, J., dissenting from denial of certiorari) (stating that the Court “may not be capable of devising procedural or substantive rules to prevent . . . racism”); *Georgia v. McCollum*, 505 U.S. 42, 69 (1992) (O’Connor, J., dissenting) (“[T]he Constitution does not give federal judges the reach to wipe all marks of racism from every courtroom”); *Dawson v. Delaware*, 503 U.S. 159, 162, 165–66 (1992) (Rehnquist, C.J., majority opinion) (referring to any racist beliefs the Aryan Brotherhood “might hold” and quali-

span from 1971 to 2018 and use the word “racism” or “racist.” Apparently, white supremacy is not something that can be easily denied or minimized.

One of the earliest examples of this was by Justice Lewis Powell in 1972 in *Johnson v. Louisiana*, where he dismissed the argument that juries might be racist: “[s]uch fears [about racism] materialize only when the jury’s majority, responding to these extraneous pressures, ignores the evidence and the instructions of the court as well as the rational arguments of the minority.”²⁰¹ Another Justice Powell reference occurred in 1979 in *Columbus Board of Education v. Penick*, a case dealing with racial segregation in public schools, where he argued: “It would be unfair and misleading to attribute [white flight] to a racist response to integration *per se*. It is at least as likely that the exodus is in substantial part a natural reaction to the displacement of professional and local control that occurs when courts go into the business of restructuring and operating school systems.”²⁰² Justice Powell’s adherence to the ideology of white innocence is well documented in the scholarship, and not surprisingly, his rhetoric reflects that ideology.²⁰³

A more recent example was Justice Thomas’s dissenting opinion in *Grutter v. Bollinger*, the 2003 University of Michigan affirmative action case. In that dissent, Justice Thomas referred to institutional racism as a belief held by “conspiracy theorist[s]” who maintain “that ‘institutional racism’ is at fault for every racial disparity in our society.”²⁰⁴ This reference could also be seen as blame-shifting because it labeled those who call out institutional racism as “conspiracy theorist[s],” but I labeled it as a denying/minimizing-racism refer-

fying the group’s beliefs by noting “[e]ven if the [Aryan Brotherhood] . . . is racist”); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 643 (1991) (O’Connor, J., dissenting); *Powers v. Ohio*, 499 U.S. 400, 431 (1991) (Scalia, J., dissenting); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 485 (1979) (Powell, J., dissenting); *Johnson v. Louisiana*, 406 U.S. 356, 378 (1972) (Powell, J., concurring in judgment), *abrogated by Ramos v. Louisiana*, 140 S. Ct. 1390 (2020); *Dyson v. Stein*, 401 U.S. 200, 211–12 (1971) (Douglas, J., dissenting).

Note here that *Parents Involved* is counted twice, as both Chief Justice John Roberts and Justice Thomas use keywords in separate opinions. This was a close call because both Justices use the identical quote from the Seattle School District’s website to criticize the School District’s definition of “cultural racism.” But because two different Justices use the word, I counted it as two references. Justice Blackmun’s dissent in *Callins* is counted here as well as in the unconscious-racism category (a subcategory of pointing-out references) and the racism-out-there category because of the different usages for the keywords in that opinion. Similarly, Justice O’Connor’s dissent in *McCullum*, which is also counted in the unconscious-racism category, is counted here as well because of her language denying that the Court can fix racism.

²⁰¹ 406 U.S. at 378–79 (Powell, J., concurring in judgment).

²⁰² 443 U.S. at 485 (Powell, J., dissenting).

²⁰³ See Ross, *supra* note 27, at 302–03 (summarizing Justice’s Powell’s responses in school desegregation cases).

²⁰⁴ *Grutter*, 539 U.S. at 377 (Thomas, J., concurring in part).

ence because its overall thrust was to show disdain for those who believe that structural racism exists in society.

Almost half of the references in this category explicitly downplayed the Court's power by stating that the law or the Court cannot fix racism.²⁰⁵ This denial of the law's power, or "power evasiveness" in sociologist Ruth Frankenberg's terms, is a particularly noxious form of judicial obfuscation that denies and forsakes the law's responsibility for racism.²⁰⁶ Robert Cover refers to this paradoxical rhetoric as the "judicial 'can't'" because the judge's rhetoric simultaneously recognizes the immorality of the law but insists that the law prevents the rectification of it.²⁰⁷

The subcategory of references explicitly denying that laws can fix racism spanned a wide period of time between 1971 and 2018, but a majority of them occurred from 1991–2018, so this idea is more openly expressed in modern times.

A particularly clear example is Justice O'Connor's 1991 dissenting opinion in *Edmonson v. Leesville Concrete Co.*, the case that extended *Batson* to civil cases.²⁰⁸ *Edmonson* involved an African American construction worker injured in a workplace accident who sued his company, Leesville, for negligence.²⁰⁹ Leesville used peremptory strikes to remove two Black jurors from the jury, leaving a jury comprised of eleven white individuals and one Black individual.²¹⁰ This jury awarded the plaintiff only \$18,000, an amount well below his medical bills, in part because they found him to be contributorily negligent.²¹¹

In some ways, Justice O'Connor's reference looks the most sympathetic to the harms of racism, but that very quality is what makes it harmful, a rhetorical wolf in sheep's clothing. Justice O'Connor lulls the reader into thinking that a certain result is coming by at first decrying the harm of racism, but then abruptly reversing course. The anticlimax of her disappointing conclusion along with the explicit repudiation of the law's power makes this reference quite troubling. It is worth here reproducing the entire quote:

²⁰⁵ See *Sellers*, 138 S. Ct. at 547, 553 (Thomas, J., dissenting); *Ent. Merchs. Ass'n*, 564 U.S. at 799 (Scalia, J., majority opinion); *Callins*, 410 U.S. at 1154 (Blackmun, J., dissenting from denial of certiorari); *McCullum*, 505 U.S. at 68–69 (O'Connor, J., dissenting); *Edmonson*, 500 U.S. at 643 (O'Connor, J., dissenting); *Dyson*, 401 U.S. at 211–12 (Douglas, J., dissenting).

²⁰⁶ See RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS 14–15 (1999) (discussing the struggle between power evasion and "race cognizance").

²⁰⁷ ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS, 119–20, 121 (1975) (noting that "judicial pronouncements of helplessness before the law" were very frequent in cases involving slavery).

²⁰⁸ See 500 U.S. 614, 643–44 (1991) (O'Connor, J., dissenting).

²⁰⁹ *Id.* at 616–17 (Kennedy, J., majority opinion).

²¹⁰ *Id.*

²¹¹ *Id.*; see Brief of Petitioner at 6, *id.* (No. 89-7743), 1990 WL 10012951.

Racism is a terrible thing. It is irrational, destructive, and mean. Arbitrary discrimination based on race is particularly abhorrent when manifest in a courtroom, a forum established by the government for the resolution of disputes through “quiet rationality.” But not every opprobrious and inequitable act is a constitutional violation.²¹²

Another example occurred in 2018 in *Tharpe v. Sellers*, a jury selection case involving a sworn affidavit in which a juror admitted to several overtly racist ideas about Black people, including revealing that he believed that there were “good” Black people and “n[*****]s,” that defendant was not one of the “good” Black people, and that he “wondered if Black people even have souls.”²¹³ The U.S. District Court for the Western District of Louisiana and the U.S. Court of Appeals for the Fifth Circuit had, somewhat inexplicably, found that defendant had failed to show the harm caused by the jury service of the author of that extraordinary affidavit.²¹⁴ The Court majority, per curiam, remanded the case for reconsideration. In his dissenting opinion, Justice Thomas labeled the Court’s act of remanding the case “a useless do-over” and an exercise in “ceremonial handwriting,” suggesting that the Court could not do anything that would truly help the defendant avoid execution in this case.²¹⁵

F. Blame-Shifting Rhetoric

The sixth category covers all the uses of the terms in which the power of whiteness is minimized or ignored and blame is shifted to people of color. Blame-shifting is a kind of “moral disengagement” in which responsibility for a problem is denied and then diverted to a marginalized group.²¹⁶ It is a psy-

²¹² *Edmonson*, 500 U.S. at 643–44 (O’Connor, J., dissenting) (citation omitted).

²¹³ *See* 138 S. Ct. 545, 548 (2018) (Thomas, J., dissenting) (citation omitted).

²¹⁴ *See id.* at 546 (per curiam).

²¹⁵ *Id.* at 547, 553 (Thomas, J., dissenting) (calling the Court’s remand “pointless” and “useless”). But there is also a lot more going on in this passage rhetorically. Like much of Justice Thomas’s rhetoric about race, the passage shows a striking disdain for his brethren and their views on race. In the last paragraph of his dissent, Justice Thomas muses that “[t]he Court must be disturbed by the racist rhetoric in that affidavit, and must want to do something about it.” *Id.* at 553. He also quotes the Court’s characterization of the case as involving “unusual facts.” *Id.* (quoting *id.* at 546 (majority opinion) (per curiam)). Justice Thomas’s language, including the odd choice of saying “must be disturbed” (not, for example, understandably or naturally disturbed) and placing “unusual facts” in quotations, suggests that Justice Thomas did not find the facts all that unusual or disturbing. One interpretation of the tone is that Justice Thomas believes that his white colleagues lead lives sheltered from the ugliness of racism and so find racism “unusual” and “disturbing.” His disdain for his brethren is also apparent in his characterization of the Court’s decision as “no profile in moral courage” and “ceremonial handwriting.” *Id.*

²¹⁶ Clive Hamilton, *What History Can Teach Us About Climate Change Denial*, in *ENGAGING WITH CLIMATE CHANGE: PSYCHOANALYTIC AND INTERDISCIPLINARY PERSPECTIVES* 19 (Sally Weintrobe ed., 2013); *see* Julie C. Suk, *Race Without Cards?*, 5 *STAN. J. C.R. & C.L.* 111, 117 (2009)

chological fear response that is designed to protect the self, or a dearly held institution, from challenges to morality or basic goodness.²¹⁷

The references in this category are particularly damaging, because in addition to reifying white innocence, they also specifically reinscribe people of color as “bad” people.²¹⁸ Blame- or power-shifting is a way of controlling discourse and keeping others off-balance. It is also a rhetorical fallacy in that it does not engage with the argument, but uses anger, blame, or *ad hominem* attacks as a deflection.

There are three different kinds of blame-shifting references in this category: (1) references to “reverse racism” and references explicitly extolling the notion of “colorblindness” in a way that seeks to defeat racial justice; (2) references that depict Black civil rights leaders as irrational, violent, unjust, and/or discriminatory; and (3) references that criticize an argument calling out racism as uncivil, divisive, or hostile.

Blame-shifting references occurred sixteen times.²¹⁹ An overwhelming majority of these references (thirteen) used only the words “racism” or “racist.” One used all three keywords. And one used “white supremacy” alone,

(reviewing FORD, *supra* note 1) (“The ‘race card’ card is played when, in response to the slightest allusion to racism, past or present, the speaker is accused of playing the race card, and this new allegation is used to deflect attention away from legitimate complaints of racial justice.”).

²¹⁷ See Cooper, *supra* note 1, at 38 (“Racism has become such a grave incivility and is presumed so rare, that accusing someone of racism can be a significant political move.”); Suk, *supra* note 216, at 114–16 (someone accused of racism can “feel compelled to do whatever it takes to shake off such an odious label”).

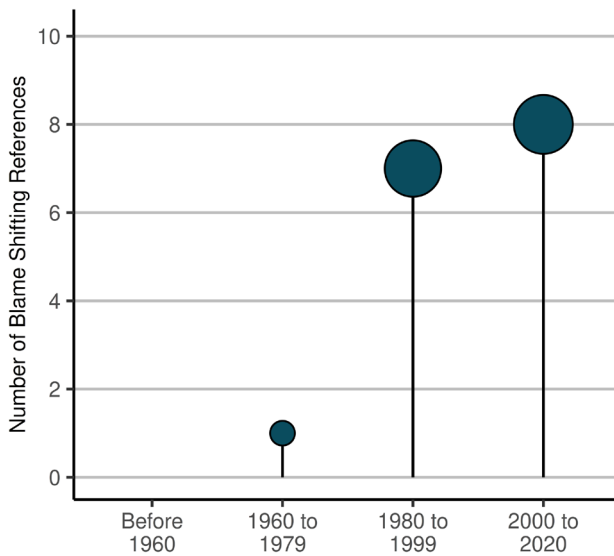
²¹⁸ See Cooper, *supra* note 1, at 39–42 (describing the post-racial phenomenon where people of color who allege racism are then viewed as the “true racist[s]”).

²¹⁹ See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425–27, 1433 (2020) (Alito, J., dissenting) (“racist,” “racism,” and “white supremacy”); *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2596 (2019) (Alito, J., concurring in part and dissenting in part) (“racist”); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2265 n.9 (2019) (Thomas, J., dissenting) (“racism”); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 884 n.15 (2017) (Alito, J., dissenting) (“racist”); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 325, 329 (2013) (Thomas, J., concurring) (“racist” and “racism” (citation omitted)); *Ricci v. DeStefano*, 557 U.S. 557, 598 (2009) (Alito, J., concurring) (“racist” (citation omitted)); *Miller-El v. Dretke*, 545 U.S. 231, 306–07 (2005) (Thomas, J. dissenting) (“racist” and “racism”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 215 n* (1995) (O’Connor, J., majority opinion) (“racism” (quoting *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J. dissenting), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018))); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 801 (1994) (Scalia, J., concurring in judgment in part and dissenting in part) (“racist” (citation omitted)); *Johnson v. Transp. Agency*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (“racism”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982) (Stevens, J., majority opinion) (“racist” (citation omitted)); *id.* at 935–36 (appendix to majority opinion of Stevens, J.) (same); *Bd. of Educ. v. Pico*, 457 U.S. 853, 897 (1982) (Powell, J., dissenting) (“racist” and “racism”); *Owen v. City of Independence*, 445 U.S. 622, 670 n.11 (1980) (Powell, J., dissenting) (“racism” (citation omitted)); *Fullilove v. Klutznick*, 448 U.S. 448, 522–32 (1980) (Stewart, J., dissenting) (“racism”); *Walker v. City of Birmingham*, 388 U.S. 307, 320 (1967) (Stewart, J., majority opinion) (“[w]hite [s]upremacy”). Justice Alito’s dissent in *Ramos* uses all three keywords in the same blame-shifting way, but because this usage was significant in its conflation of racism and white supremacy, I counted it as two references.

without using “racism” or “racist.” Thus, most of the time, blame-shifting is about the labels “racism” or “racist.” “White supremacy,” it seems, is less susceptible to denial and deflection.

All but three of these references were in dissents and concurrences.²²⁰ They spanned a wide period of time from 1967 to 2020, but Justice Stewart’s 1967 majority opinion was something of a temporal outlier. After *Walker v. City of Birmingham*, the 1967 opinion that depicted civil rights protestors as law-breakers, blame-shifting disappeared until 1980.²²¹ The timing of the references in this category shows that blame-shifting is a relatively modern rhetorical phenomenon. In the 1980s, the Court’s opinions contained five blame-shifting references to racism, but then in the 1990s the rhetoric slowed down to two. Starting in 2005, there was a noticeable uptick, with eight out of the sixteen blame-shifting references occurring in the fifteen years between 2005 and 2020. Figure 7 shows the rising trajectory of blame-shifting rhetoric starting in the 1980s and the further uptick in the 2000s.

Figure 7.



²²⁰ See *Adarand*, 515 U.S. at 215 n* (O’Connor, J., majority opinion) (quoting *Korematsu*, 323 U.S. at 233 (Murphy, J. dissenting)); *Claiborne Hardware*, 458 U.S. at 902 (Stevens, J., majority opinion); *id.* at 935–36 (appendix to majority opinion of Stevens, J.); *Walker*, 388 U.S. at 320 (Stewart, J., majority opinion).

²²¹ 388 U.S. at 320. *Walker* upheld the convictions of civil rights protestors, including Martin Luther King, Jr., for ignoring Alabama’s injunction against protesting. This reference is in the blame-shifting category because Justice Stewart supports his decision by analogizing the civil rights protestors to a white supremacist organization that had similarly disobeyed an injunction. See *id.*

This timeline is consistent with the timelines advanced by Professor Cho and Professor Haney López, but the rhetoric reveals some nuances. The first cluster of blame-shifting rhetoric started in 1980, a bit earlier than Professor Cho's Post-Civil Rights Era (1986). The very first reference in 1967 also pre-dates the start of Professor Haney López's reactionary colorblindness era (1979) by a decade. This suggests that the rhetoric started changing before the doctrine—that there was a kind of rhetorical foreshadowing of the doctrinal problems to come.

The other nuance added by this study was the uptick in blame-shifting in the 2000s. This suggested a rhetorical—and possibly doctrinal—turn in the 2000s, in which the Court explicitly denied the existence of racism and further that it has become inappropriate and uncivil to call out racism. The rhetoric has been turned on its head, so that pointing out racism has become racist.²²²

1. Reverse Racism and Colorblindness

I categorize a reference as “reverse racism” if the Court or Justices charge people of color with racism against white people or argue that affirmative action for people of color is racist. There are four references to reverse racism that use the word “racist” or “racism.” They begin in 1980 with Justice Stewart's dissent in *Fullilove v. Klutznick* and culminate in 2013 with Justice Thomas's dissent in *Fisher v. University of Texas at Austin*.²²³

Reverse racism is a typical kind of passive-aggressive defensive maneuver designed to hide the power of whiteness and turn the blame on those with less social power.²²⁴ Reverse racism often appears alongside references to the notion that the Constitution is colorblind. Used in this way, colorblindness serves as a tool “to preserv[e] a status quo of continued white dominance.”²²⁵ As Professor Haney López argues, colorblindness in the Post-Civil Rights Era is a purposeful strategy that “provide[s] cover for reactionary opposition to racial reform” and is the “strongest rhetorical weapon in the battle against race-conscious remedies.”²²⁶ Relatedly, Professor Cho discusses the “moral

²²² Haney López, *supra* note 9, at 829; see Cooper, *supra* note 1, at 27–30 (explaining that Henry Louis Gates, a Black Harvard University professor who was mistaken for a burglar while entering his own home, was described as a racist for calling his arrest “racial profiling”).

²²³ See *Fisher*, 570 U.S. at 325, 329 (Thomas, J., concurring) (citation omitted); *Adarand Constructors*, 515 U.S. at 215 n.* (O'Connor, J., majority opinion) (quoting *Korematsu*, 323 U.S. at 233 (Murphy, J. dissenting)); *Johnson v. Transp. Agency*, 480 U.S. at 677 (Scalia, J., dissenting); *Fullilove*, 448 U.S. at 532 (Stewart, J., dissenting).

²²⁴ Reverse racism is an interesting phrase in that it suggests that racism flows—or should flow—in only one direction. See DIANGELO, *supra* note 9, at 24.

²²⁵ Haney López, *supra* note 9, at 828.

²²⁶ IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 158 (rev. ed. 2006).

equivalence” move of post-racialism, wherein racism becomes the moral equivalent of strategies to stop racism.²²⁷ Sociologist Ruth Frankenberg calls colorblindness “a double move toward power evasiveness and color evasiveness.”²²⁸ She refuses to use the term “colorblind” because it suggests passivity; in her view, colorblindness is a specific, deliberate strategy used by white people to avoid acknowledging racism.²²⁹

In the affirmative action context, several of the opinions that reference reverse racism show starkly how the concept of colorblindness has been weaponized. For example, Justice Scalia’s 1987 dissent in *Johnson v. Transportation Agency*, the first Supreme Court case addressing gender-based affirmative action, attacked the Court for “convert[ing]” Title VII, turning “[a] statute designed to establish a color-blind and gender-blind workplace . . . into a powerful engine of racism and sexism.”²³⁰ Justice Scalia condemned the Court for failing “the Johnsons of the country,” labeling it an “irony” that they “suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.”²³¹ The opinion exhibits Justice Scalia’s trademark rhetorical flair, using the colorful term “inverted,” a term that means upside down and inside out, but also an archaic word for homosexuality.²³² Similarly, the metaphor of “a powerful engine” connotes something large and unstoppable that will run over “the Johnsons of the country.”

Justice Stewart’s 1980 dissent in *Fullilove v. Klutznick*, an Equal Protection Clause case centered around a congressional spending program, was not as rhetorically skillful, but neatly encapsulated how reverse racism and colorblindness work in tandem to bolster white innocence and undercut remedies for discrimination.²³³ Justice Stewart’s dissent criticized the majority opinion that minority set-asides are a constitutional exercise of congressional power: “There are those who think that we need a new Constitution, and their views

²²⁷ See Cho, *supra* note 20, at 1600, 1603, 1620–26 (noting that post-racialism has four central features, one of which is moral equivalence).

²²⁸ FRANKENBERG, *supra* note 206, at 14, 15.

²²⁹ See *id.* at 142–43.

²³⁰ 480 U.S. 616, 677 (1987) (Scalia, J., dissenting).

²³¹ *Id.*

²³² See *id.*; Alex Bollinger, *5 Old-Timey Words for Gay, Lesbian, & Bi People That You Should Know*, LGBTQ NATION (Oct. 8, 2017), <https://www.lgbtqnation.com/2017/10/5-old-timey-words-gay-lesbian-bi-people-know/2/> [<https://perma.cc/JV93-N3ZE>]. Justice Scalia was such a master rhetorician that I believe he must have seen the sexual connotations of both the word “inverted” and the phrase “the Johnsons of the country.” In particular, Justice Scalia’s use of “inverted” in a case about women seeking what many think of as a “man’s” job reads like a linguistic code for the fear that decisions like *Johnson* will turn women into men and men into sissies. See *Johnson v. Transp. Agency*, 480 U.S. at 677.

²³³ See 448 U.S. 448, 522–32 (1980) (Stewart, J., dissenting); Simson, *supra* note 27, at 639–41 (defining the concept of whiteness as innocence).

may someday prevail. But under the Constitution we have, one practice in which government may never engage is the practice of racism—not even ‘temporarily,’ and not even as an ‘experiment.’”²³⁴ Unlike Justice Scalia’s more acerbic writing, Justice Stewart’s dissent has a folksy, nostalgic feeling to it. At the same time, the reference has an ominous feel, not unlike Justice Scalia’s warning to “the Johnsons of the country.” Justice Stewart was afraid that those who think we need a new Constitution “may someday prevail.”

2. Discrediting Black Civil Rights Leaders

The second kind of blame-shifting references portray Black civil rights leaders as violent or racist.²³⁵ It is a close cousin of charging “reverse racism” but is more directly *ad hominem*. Professor Haney López notes this political strategy as starting as soon as the civil rights movement began.²³⁶ My data supports this, showing how the rhetoric moved from the political branches (Congress and the Executive) to become enshrined in the law by the Supreme Court.

Two of the references, one by Justice John Paul Stevens and one by Justice Scalia, quote similar passages from the rhetoric of American politician Charles Evers, a nationally known civil rights leader and organizer and the brother of civil rights activist Medgar Evers.²³⁷ These references span a wide timeline from 1967 (*Walker v. City of Birmingham*) to 2009 (*Ricci v. DeStefano*), demonstrating that this category reflects a long, enduring image of Black men as violent and criminal, and a key rhetorical strategy for undercutting the credibility of civil rights leaders.

Justice Stevens’s 1982 majority opinion in *NAACP v. Claiborne Hardware Co.*, for example, quoted Charles Evers’s fiery rhetoric in the opinion and reproduced at length in the appendix.²³⁸ The case was about white merchants who complained about vandalism and violence resulting from the NAACP

²³⁴ *Fullilove*, 448 U.S. at 532 (Stewart, J., dissenting).

²³⁵ See *Ricci v. DeStefano*, 557 U.S. 557, 598 (2009) (Alito, J., concurring); *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 801 (1994) (Scalia, J., concurring in judgment in part and dissenting in part); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 902 (1982) (Stevens, J., majority opinion); *id.* at 935–36 (appendix to majority opinion of Stevens, J.); *Bd. of Educ. v. Pico*, 457 U.S. 853, 897 (1982) (Powell, J., dissenting); *Walker v. City of Birmingham*, 388 U.S. 307, 320 (1967) (Stewart, J., majority opinion).

²³⁶ See Haney López, *supra* note 9, at 812–13.

²³⁷ See *Madsen*, 512 U.S. at 800–01 (Scalia, J., concurring in judgment in part and dissenting in part); *Claiborne Hardware Co.*, 458 U.S. at 902 (Stevens, J., majority opinion); see also ARAM GOUDSOUZIAN, *DOWN TO THE CROSSROADS: CIVIL RIGHTS, BLACK POWER, AND THE MEREDITH MARCH AGAINST FEAR 72–75* (2014) (describing Charles Evers’s civil rights organizing).

²³⁸ See 458 U.S. at 902 (Stevens, J., majority opinion); *id.* at 935–36 (appendix to majority opinion of Stevens, J.).

boycotts of white businesses. *Claiborne* held that the economic boycotts of white merchants in Mississippi by the NAACP were protected First Amendment activity.²³⁹ *Claiborne* was an important doctrinal victory for civil rights, but the opinion's use of the word "racist" in the opinion is problematic. The entire case was about Black individuals boycotting racist white merchants in Mississippi, yet Justice Stevens never used the word "racism" in the opinion to condemn the behavior of the merchants.

Instead, Justice Stevens's only references to racism were quotes from Black civil rights leaders and protestors, including Evers. For example, Justice Stevens quoted Evers as saying, "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck."²⁴⁰ The Court's reproduction of Evers's speech in a lengthy appendix to the opinion was also unusual. The speech painted the NAACP and civil rights protestors in a way likely to trigger white fear and fragility.

Indeed, twelve years after *Claiborne*, Justice Scalia used the material in the appendix in 1994 in *Madsen v. Women's Health Center, Inc.* to paint civil rights protestors as thuggish and violent.²⁴¹ The sole purpose of this reference was to use civil rights protestors as a foil to the (allegedly) more peaceful, law-abiding anti-abortion protestors.²⁴²

Though it did not involve Evers, Justice Samuel Alito's concurring opinion in *Ricci v. DeStefano* used the term "racist" similarly, applying it to a Black civil rights leader.²⁴³ There, the Court addressed whether the city of New Haven improperly discarded the results of a qualifying examination for promotion in the city's fire department after recognizing that white and Hispanic firefighters significantly outperformed Black candidates.²⁴⁴ The majority opinion concluded that the city's actions were improper unless it could provide a valid defense on remand.²⁴⁵ Justice Alito wrote separately for the singular purpose of charging that New Haven adopted the affirmative action plan because the New Haven mayor feared alienating a "politically powerful" Black preacher who

²³⁹ *Id.* at 926–27.

²⁴⁰ *Id.* at 902.

²⁴¹ 512 U.S. 753, 800–01 (1994) (Scalia, J., concurring in judgment in part and dissenting in part).

²⁴² This means that this reference also bleeds into the seventh category, comparator references. Nevertheless, it is primarily blame-shifting because the substantive purpose and effect of the passage is to show Charles Evers and the boycotters to be violent and retaliatory. Justice Scalia cherry-picks among the worst of Evers's rhetoric and the boycott facts to show how the Court treats civil rights protestors better than it treats "the disfavored class of abortion protestors." *Id.* at 800. Justice Scalia's point is that the Court indulges the behavior of Black people, even violent ones, while condemning good white (Christian) abortion protestors.

²⁴³ *Ricci v. DeStefano*, 557 U.S. 557, 562–63 (2009).

²⁴⁴ *Id.* at 562–63.

²⁴⁵ *Id.* at 579.

called any white person “racist if they question[ed] his actions.”²⁴⁶ This reference depicted the Black preacher as bringing an entire city to heel by “playing the race card.”²⁴⁷ Justice Alito’s language paints a picture of a world in which Black people command outsized political power wielded by labeling white people “racist.”²⁴⁸

Another reference occurred in 1982 in *Board of Education v. Pico*, a plurality opinion addressing whether a local school board had violated students’ First Amendment rights in removing books it deemed antithetical to its religious and political views. Justice Powell’s opinion was subtle but still worth mentioning because it reflects white fear of Black people.²⁴⁹ In his dissent, Justice Powell argued that the Constitution allows school districts to ban books that are “vulgar or racist” or that “promote ideas and values repugnant to a democratic society” or “teach such values to children.”²⁵⁰ Justice Powell listed the books that fall within these parameters, along with selected quotes in an appendix to his dissent. A significant number of books on that list were works by lauded Black authors.²⁵¹ Although it is unclear if Justice Powell included them because he thought they were racist as opposed to vulgar, the inclusion of so many works by esteemed Black writers as well as an entire anthology by Black writers starkly portrayed African Americans in a negative light.

3. Calling Out Racism as Uncivil

The third kind of blame-shifting references rail against the use of the word “racist” or “racism” as uncivil, intemperate, or hurtful to the country. Other versions of this subcategory accuse people of seeing racism where none

²⁴⁶ *Id.* at 598 (Alito, J., concurring) (citation omitted).

²⁴⁷ *See* Cooper, *supra* note 1, at 35–39 (citation omitted); *see also id.* at 38 (“Persons who perceive themselves accused of racism may in turn accuse their interlocutors of ‘playing the race card.’ They play the ‘retaliatory “race card” card.’ The “race card” card is played to avoid engaging the merits of a claim of racial prejudice or injustice.” (citations omitted)).

²⁴⁸ *See Ricci*, 575 U.S. at 598 (Alito, J., concurring) (citation omitted).

²⁴⁹ *See Bd. of Educ. v. Pico*, 457 U.S. 853, 897 (1982) (Powell, J., dissenting).

²⁵⁰ *Id.* (emphasis omitted).

²⁵¹ *See id.* at 897–98, 902 (appendix to opinion of Powell, J., dissenting). The list prohibited works written by well-known African American writers like Alice Childress, Richard Wright, and Eldridge Cleaver. The list also banned “The Best Short Stories by Negro Writers,” an anthology edited Langston Hughes. *Id.* at 897–902. Both Wright and Hughes were Guggenheim Fellows, an honor awarded to those “who have already demonstrated exceptional capacity for productive scholarship or exceptional creative ability in the arts,” and the latter was also inducted into the National Institute of Arts and Letters. *About the Fellowship*, JOHN SIMON GUGGENHEIM MEM’L FOUND., <https://www.gf.org/about/fellowship/> [<https://perma.cc/L2C9-M8DK>]. A few award-winning white authors like Kurt Vonnegut, Jr. and Bernard Malamud were also included on Justice Powell’s list. *Pico*, 457 U.S. at 897–98, 902.

exists and “playing the race card” as a political “dirty trick.”²⁵² They are grounded in white innocence and the ideology that white supremacy is the result of normal societal operations like merit and talent.²⁵³ And, they turn the rhetoric of racism on its head so that the *real* racists become the people who call out racism.²⁵⁴

There are seven references in this subcategory; all of them included the words “racism” or “racist” and one (by Justice Alito in *Ramos*) used all three keywords.²⁵⁵ The numbers thus suggest that “racism” and “racist” are the primary trigger words for the backlash response.²⁵⁶ All of these references occurred in separate opinions, mostly dissents.

The most disturbing trend here is timing. References angrily objecting to charges of racism as uncivil or damaging to American culture are on a clear upswing. The first reference, by Justice Powell, appeared in 1980 and the last, by Justice Alito, in 2020. Justice Powell’s 1980 reference was the weakest rhetorically (and in a footnote); it was also a temporal outlier, coming twenty-five years or more before the other references.²⁵⁷ The other references in this cate-

²⁵² See Cho, *supra* note 20, at 1602–03, 1634–36; Cooper, *supra* note 1, at 36, 39.

²⁵³ Cooper, *supra* note 1, at 35 (building upon Professor Haney López’s argument—that centuries of linking crime control to race has led to a belief that major institutions are racially equitable—by suggesting that the perceived lack of explicit racism encourages individuals to view any residual racial disparities as natural or inevitable (citing Haney López, *supra* note 36, at 1063–64)).

²⁵⁴ See Cho, *supra* note 20, at 1595, 1635–36 (“Under post-racialism . . . one who points out racial inequities risks being characterized as an obsessed-with-race racist . . .”); Cooper, *supra* note 1, at 39–42 (applying critical race theory to the Gates controversy to demonstrate how colorblindness and post-racialism make it easier to see those who call out racial injustice as the “[r]ue” racists).

²⁵⁵ See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1425–27, 1433 (2020) (Alito, J., dissenting) (“racist,” “racism,” and “white supremacy”); *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2596 (2019) (Alito, J., concurring in part and dissenting in part) (“racist”); *Flowers v. Mississippi*, 139 S. Ct. 2228, 2265 n.9 (2019) (Thomas, J., dissenting) (“racism”); *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 884 n.15 (2017) (Alito, J., dissenting) (“racist”); *Miller-El v. Dretke*, 545 U.S. 231, 306–07 (2005) (Thomas, J., dissenting) (“racist” and “racism”); *Owen v. City of Independence*, 445 U.S. 622, 670 n.11 (1980) (Powell, J., dissenting) (“racism” (citation omitted)).

²⁵⁶ Justice Alito’s dissenting opinion in *Ramos* uses all the keywords to mean essentially the same thing. This is interesting because although there is overlap between “racism” and “white supremacy,” the Court’s usage of these terms is not always the same. For example, “white supremacy” covers narrower ground (judging by the rarity of its usage) and is more intentional and therefore easily identifiable (judging by the absence of the phrase in racism-out-there references and the fact that we never talk about “unconscious” white supremacy). But Justice Alito’s conflation of the meanings of the keywords serves his rhetorical purposes. By conflating them, the narrower and more intentional “white supremacy” is equated with racism and makes his *reductio ad absurdum* argument (are all these people *really* white supremacists?) stronger.

²⁵⁷ In *Owen*, Justice Powell refers to “ruinous judgments” that “imperil local governments,” elaborating in a footnote that the \$500,000 judgment involved a municipality that had removed a police officer, without due process, for “racism and brutality.” 445 U.S. at 670 & n.11. Although certainly not as direct or powerful as Justice Alito’s rhetoric, I placed this reference in the blame-shifting category because the choice of that particular example implies that antiracism efforts were the cause of the

gory occurred in the 2000s, and the majority occurred in the brief, recent period between 2017 and 2020. In addition to the uptick in frequency, the condemnatory rhetoric of these references is becoming stronger and more vituperative.

Of the references in the 2000s, the most recent, Justice Alito's 2020 reference in *Ramos v. Louisiana*, was the strongest and most accusatory in tone. This opinion contained some of his most passionate judicial writing and reflected his anger at the use of the word "racism" by the other Justices. In his dissent, Justice Alito castigated his brethren for what he characterized as *ad hominem* rhetoric that "add[s] insult to injury" and "tars Louisiana and Oregon with the charge of racism for permitting nonunanimous verdicts."²⁵⁸ The anger in the writing is palpable, particularly in the charge of *ad hominem* rhetoric (Alito is clearly referring to the "abusive" *ad hominem*) and the tarring metaphor.²⁵⁹ The association of tarring with vigilantism made clear that Justice Alito saw the charge of racism as a form of mob vengeance.

But that was not the end of Justice Alito's rebuke of the Court. Justice Alito's rhetoric built as he decried the injustice that the majority inflicts on Louisiana and Oregon:

Some years ago the British Parliament enacted a law allowing non-unanimous verdicts. Was Parliament under the sway of the Klan? The Constitution of Puerto Rico permits non-unanimous verdicts. Were the framers of that Constitution racists? Non-unanimous verdicts were once advocated by the American Law Institute and the American Bar Association. Was their aim to promote white supremacy? And how about the prominent scholars who have taken the same position? Racists all? Of course not. So all the talk about the Klan, etc., is entirely out of place. We should set an example of ra-

"ruinous judgments." The only words Justice Powell chose to put in quotations in the passage are the words "racism and brutality," as if to suggest disbelief or skepticism.

²⁵⁸ *Ramos*, 140 S. Ct. at 1425 (Alito, J., dissenting).

²⁵⁹ In the "abusive" *ad hominem* argument, the arguer tries to shut down the argument by attacking the speaker personally, not the argument itself. See DOUGLAS WALTON, *AD HOMINEM ARGUMENTS* 2–4 (1998). The abusive *ad hominem* thus attempts to deny the speaker the freedom to advance an argument based on the speaker's personal characteristics. See Frans H. van Eemeren et al., *The Disguised Abusive Ad Hominem Empirically Investigated: Strategic Manoeuvring with Direct Personal Attacks*, 18 *THINKING & REASONING* 344, 346–47, 350 (2012). This type of *ad hominem* violates several of the rules of argumentation, is often considered fallacious and many also consider it unprincipled. See *id.* at 346–47, 350 (noting that "*abusive ad hominem* shuts down the discussion before it really starts" and therefore violates the "Freedom Rule" of argumentation). Tarring is a colonial (and feudal) form of public torture and punishment that involves painting a person with hot wood tar. Janet Burns, *A Brief, Sticky History of Tarring and Feathering*, MENTAL FLOSS (Aug. 6, 2015), <https://www.mentalfloss.com/article/66830/brief-sticky-history-tarring-and-feathering> [<https://perma.cc/W5FJ-TKX4>].

tional and civil discourse instead of contributing to the worst current trends. . . . Now to what matters.²⁶⁰

The tone of this paragraph is rhetorically fascinating. The use of the rhetorical questions to create irony, coupled with the parallelism, adds to the contemptuous and aggressive tone of the passage. Similarly, the *argumentum ad absurdum* and appeal to extremes creates a defiant and combative tone; Justice Alito challenged, even dared, the Court (and the reader) to label these venerable people and institutions racist. The series of questions is a rhetorical shove to the chest. When Justice Alito eventually gave the reader the answer, even his answer was laden with contempt: “Of course not.”²⁶¹ Similarly, the words “[n]ow to what matters” imply that issues of racism and the law are silly trifles.²⁶² Shame on you, Justice Alito was saying, for “contributing to the worst current trends.”²⁶³

Justice Alito was similarly outraged in his opinion in *Department of Commerce v. New York*, a 2019 case addressing the reinstatement of a citizenship question on the then-upcoming census questionnaire.²⁶⁴ Again, he decried the charge of racism that surrounds the case, lamenting that:

It is a sign of our time that the inclusion of a question about citizenship on the census has become a subject of bitter public controversy and has led to today’s regrettable decision. While the decision to place such a question on the 2020 census questionnaire is attacked as racist, there is a broad international consensus that inquiring about citizenship on a census is not just appropriate but advisable.²⁶⁵

His rhetoric was softer here, but Justice Alito still regarded it as an unfortunate “sign of our time” that something with “broad international consensus” could be seen as “racist.” He blamed the Court’s “regrettable decision” and the “bitter public controversy” not on racism itself, but on the baseless charge of racism. The references to time in both opinions made clear that Justice Alito believed that things were better before the Court started using the word “racist” so much.²⁶⁶

²⁶⁰ *Ramos*, 140 S. Ct. at 1427 (Alito, J., dissenting) (footnotes omitted).

²⁶¹ *See id.* (emphasis added).

²⁶² *See id.*

²⁶³ *See id.*

²⁶⁴ *See* 139 S. Ct. 2551, 2596 (2019) (Alito, J., concurring in part and dissenting in part).

²⁶⁵ *Id.*

²⁶⁶ The third reference by Justice Alito occurs in a footnote in 2017 in *Peña-Rodriguez v. Colorado* and straddles both this category and the comparator category. 137 S. Ct. 855, 884 n.15 (2017) (Alito, J., dissenting). In his dissent, Justice Alito spins a number of hypothetical problems with the majority’s singling-out of racism as a particular societal problem. Among other things, he worries that

The other references in this category are less rhetorically interesting but show the clear backlash against the words “racism” and “racist.” In 2005 in *Miller-El v. Dretke*, Justice Thomas scolded the majority for “simply assum[ing] that all Dallas County prosecutors were racist and remained that way through the mid-1980’s.”²⁶⁷ Justice Thomas used the word “racism” in the same way in 2019 in his dissent in *Flowers v. Mississippi*.²⁶⁸ Justice Thomas chastised the majority for “blithely imput[ing] single-minded racism to others” because it “cheapens actual cases of discrimination.”²⁶⁹ The blithe imputation that Justice Thomas was referring to involved the prosecution’s striking of forty-one of the forty-two Black jurors in a case that the Mississippi Supreme Court termed “as strong a prima facie case of racial discrimination as we have ever seen in the context of a *Batson* challenge.”²⁷⁰

G. Use of Racism as a Comparator

The final category contains references that use “racist,” “racism,” or “white supremacy” as a comparator. The references define these terms only as they compare to something else or use them hypothetically. The most common rhetorical uses in this category are “racism” or “white supremacy” as a hypothetical or as an analogy. Thirteen references to “racist” or “racism” and six references to “white supremacy” fall into this category, for a total of nineteen references.²⁷¹

attorneys will illegally attempt to contact jurors in an effort to find evidence of racism that can overturn a conviction. *Id.*

²⁶⁷ *Miller-El v. Dretke*, 545 U.S. 231, 305–06 (2005) (Thomas, J., dissenting). Like Justice Alito, Justice Thomas uses the verb “tars” to describe the majority’s insult to Dallas prosecutors and treats the majority’s charge of racism as spurious. See *Ramos*, 140 S. Ct. at 1425 (Alito, J., dissenting); *Miller-El*, 545 U.S. at 305 (Thomas, J., dissenting).

²⁶⁸ See 139 S. Ct. 2228, 2265 n.9 (2019) (Thomas, J., dissenting).

²⁶⁹ *Id.* at 2265 n.9.

²⁷⁰ Compare *id.* at 2235, 2237, 2245 (majority opinion) (emphasizing this position), with *id.* at 2267 n.10 (Thomas, J., dissenting) (taking issue with the majority’s characterization).

²⁷¹ See *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018) (Alito, J., majority opinion) (“white supremacy”); *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Alito, J., majority opinion) (“racists”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2614 (2015) (Roberts, C.J., dissenting) (“[w]hite [s]upremacy” (citation omitted)); *id.* at 2636 n.5 (Thomas, J., dissenting) (“white supremacy” (citation omitted)); *Crawford v. Metro. Gov’t*, 555 U.S. 271, 276 (2009) (Souter, J., majority opinion) (“racist”); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 468 (2008) (Scalia, J., dissenting) (“racist”); *Rita v. United States*, 551 U.S. 338, 371 (2007) (Scalia, J., concurring in part and concurring in judgment) (“racist”); *Garcetti v. Ceballos*, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting) (“racist” (citation omitted)); *Lawrence v. Texas*, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) (“[w]hite [s]upremacy” (citation omitted)); *Virginia v. Black*, 538 U.S. 343, 381–84 (2003) (Souter, J., concurring in judgment in part and dissenting in part) (“[w]hite [s]upremacy” (citation omitted)); *Hill v. Colorado*, 530 U.S. 703, 724 (2000) (Stevens, J., majority opinion) (“racist” (citation omitted)); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 593 (2000) (Stevens, J., dissenting) (“white supremacy”); *id.* (“racist”); *Troxel v. Granville*, 530 U.S. 57, 79 n.4 (2000) (Souter, J., concurring in judgment) (“rac-

Like some of the other categories, racism as a comparator is a relatively modern phenomenon, appearing for the first time in 1993; white supremacy as a comparator does not appear until 2000. But the references in the 1990s were minimal; overall, comparator racism peaked in the 2000s, with the vast majority of references appearing in the years between 2000 and 2018.²⁷² There were more concurring and dissenting opinions in this category than majority opinions overall, but no timing or other pattern emerged in terms of separate versus majority opinions.

Some of the references that I chose to put in other categories also used racism as a comparator. What differentiated the comparator references is the comparison was the primary thrust of the usage. The usage of the keywords in these references was predominantly a means of making a point about something else. The use of the keywords is unnecessary and not germane to the legal issue in the case. For example, only three of the references in this category involved cases in which race was a central issue.²⁷³ Because race was not a central issue in most of these cases, it is important to ask why racism or white

ist" (citation omitted); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 806 (1996) (Kennedy, J., concurring in part, concurring in judgment in part, and dissenting in part) ("racist"); *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 700 (1996) (Scalia, J., dissenting) ("racist"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995) (Kennedy, J., majority opinion) (using "racism" in a hypothetical); *id.* at 899 (Souter, J., dissenting) ("racism"); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 274 (1993) (Scalia, J., majority opinion) ("racism"). Notably, four of the nineteen total references in this category come from just two cases. In *Obergefell*, both Chief Justice Roberts and Justice Thomas used the phrase "white supremacy," resulting in two separate references. *See* 135 S. Ct. at 2614 (2015) (Roberts, C.J., dissenting); *id.* at 2636 n.5 (Thomas, J., dissenting). Additionally, in *California Democratic Party v. Jones*, Justice Stevens used both the word "racist" and the phrase "white supremacy" in his hypotheticals. *See* 530 U.S. at 593 (Stevens, J., dissenting). Although it is unclear whether Justice Stevens was using "racist" and "white supremacy" to mean the same or different things, I counted this as two references. By contrast, in *Rosenberger*, both Justice Anthony Kennedy and Justice Souter used the word "racism" several times to describe the topic of the Christian literature at issue in the case. *See, e.g.*, 515 U.S. at 831 (Kennedy, J., majority opinion); *id.* at 899 (Souter, J., dissenting). I counted the separate opinions as two references, even though "racism" was used several times in each opinion. Because the usage in these references was simply echoing the description in the literature itself, I did not count the multiple uses in the opinions as a separate references. Finally, Justice Souter's use of "white supremacy" to refer to cross-burning and the Klan in his opinion in *Black* is counted as a comparator (and not a usual-suspect) reference because the references are phrased as hypotheticals. *See Black*, 538 U.S. at 383–84 (Souter, J., concurring in judgment in part and dissenting in part).

²⁷² *See supra* note 271 and accompanying text.

²⁷³ *See Abbott*, 138 S. Ct. at 2330 (evaluating whether the state of Texas had used unconstitutional gerrymandering to dilute the voting power of Latinos and African Americans when it redrew its districts in response to the 2010 census results); *Matal*, 137 S. Ct. at 1751 (reviewing whether an Asian American rock band could trademark their moniker "THE SLANTS"); *Black*, 538 U.S. at 384–87 (considering whether a statute prohibiting cross-burning done with the intent to intimidate others violates the First Amendment). All but one of the references are by white Justices. The only African American Justice to make a comparator reference is Justice Thomas in *Obergefell*. *See* 135 S. Ct. at 2636 n.5 (Thomas, J., dissenting).

supremacy was raised at all, and what rhetorical work the keywords were doing in these references.

The references fell loosely into three subcategories: using racism to deny remedies to others (usually women); twisting or deflecting the harms of racism; and extolling the tolerance of racism as a positive.

1. Using Racism to Deny Remedies to Women and Gay People

The references to racism in this subcategory tend to use “racism” as an extreme example of “how bad things are” for Black people, as a way of denying that others experienced harm.²⁷⁴ In many of these examples, a Justice resists a remedial outcome by noting that the situation is simply not “as bad” as racism. This rhetorical sleight of hand simultaneously pays lip service to the notion of racism as a terrible thing while using it as a way to deprive others of rights.²⁷⁵

Using racism as a foil in sex-discrimination cases to deny or minimize the harm of sex discrimination was a signature move for Justice Scalia.²⁷⁶ For example, in 1993 in *Bray v. Alexandria Women’s Health Center*, Justice Scalia used a comparison to racism to dismiss the notion that the behavior of anti-abortion activists is based in animosity toward women as a class.²⁷⁷ In Justice

²⁷⁴ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 596 (1990) (“Silent and suffering, [Black women] are trotted onto the page . . . as the ultimate example of how bad things are.”).

²⁷⁵ I say “lip service” because the references using racism to deny remedies to others often come from Justices who otherwise tend to disfavor laws, like affirmative action, designed to alleviate racism and/or who appear in the denying/minimizing category in this Article. See *supra* Part III.E. In this way, the Justices who use this tactic magnify the harm of racism when it allows them to deny rights to others, but downplay racism when race discrimination is the central issue. Compare *Bray*, 506 U.S. at 274 (Scalia, J., majority opinion) (comparing anti-abortion protestors to racists is inappropriate because racism is much worse than what the anti-abortion protestors do to women), with Anemona Hartocollis, *With Remarks in Affirmative Action Case, Scalia Steps into ‘Mismatch’ Debate*, N.Y. TIMES (Dec. 10, 2015), <https://www.nytimes.com/2015/12/11/us/with-remarks-in-affirmative-action-case-scalia-steps-into-mismatch-debate.html> [<https://perma.cc/BY8Q-WSHE>] (noting Justice Scalia’s remarks during argument in the *Fisher v. University of Texas* case that Black students should maybe go to “slower track school[s]”). Compare also *Obergefell v. Hodges*, 135 S. Ct. at 2636 n.5 (2015) (Thomas, J., dissenting) (insulting to compare homophobia to racism, implying racism is much worse), with *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 315 (2013) (Thomas, J., concurring) (arguing that Court should have held that any affirmative action in higher education is prohibited), and *Tharpe v. Sellars*, 138 S. Ct. 545, 548 (2018) (Thomas, J., dissenting) (severely criticizing Court’s remanding of capital case against Black defendant because of juror racism).

²⁷⁶ See, e.g., *Bray*, 506 U.S. at 274 (Scalia, J., majority opinion).

²⁷⁷ See *id.* Justice Scalia used a similar tactic in two other cases about women’s equality that were instead included in the blame-shifting category. See *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 800–01 (1994) (Scalia, J., concurring in judgment in part and dissenting in part) (portraying civil rights protestors as violent thugs in an attempt to make anti-abortion protestors appear law-abiding and more peaceful); *Johnson v. Transp. Agency*, 480 U.S. 616, 660 (1987) (Scalia, J., dissenting)

Scalia's view, the anti-abortion protestors, whose tactics included blocking entrances and exits to the clinics, strewing nails in the parking lot, and vandalizing the clinic building, did "not remotely qualify for such harsh description, and for such derogatory association with racism."²⁷⁸ It is unclear whether Black women exist for Justice Scalia, because the reference suggests that racism and misogyny can be neatly severed.²⁷⁹ At no point did Justice Scalia consider whether the women using the abortion clinic might be Black.

Similarly, white supremacy is used as a comparator in two modern gay civil rights cases.²⁸⁰ The comparator usage in the cases is similar to the usage in the sex-discrimination cases and, indeed, Justice Scalia is the author of one of the references. In both cases, the argument is that white supremacy is not comparable to heteronormativity. Justice Thomas put the point most strongly in 2015 in *Obergefell v. Hodges*, writing that the comparison between anti-miscegenation statutes and laws prohibiting gay marriage was "both offensive and inaccurate" because the laws do not share the "sordid history" of slavery.²⁸¹ Justice Thomas does not mention the extensive history of discrimination and violence against gays, including, in some countries, the criminalization of their very existence and then refers to slavery as if to suggest that LGBT+ individuals do not need legal protection.²⁸²

2. Distorting the Harm of Racism Through Hypotheticals

In the second subcategory, Supreme Court Justices refer to racism as a way of sidestepping or twisting its harms. They typically do this by way of hypothetical examples, which add drama rhetorically but are generally consid-

(suggesting that individuals who are often racially discriminated against will be harmed by the majority's decision to uphold a gender-based affirmative action plan).

²⁷⁸ *Bray*, 506 U.S. at 274.

²⁷⁹ See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=ucflf> [<https://perma.cc/X9HY-3H2H>] (discussing the intersectionality of race and gender).

²⁸⁰ See *Obergefell v. Hodges*, 135 S. Ct. at 2636 n.5 (2015) (Thomas, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting).

²⁸¹ 135 S. Ct. at 2636 n.5. Justice Thomas's point is that anti-miscegenation laws were created hand-in-hand with laws permitting slavery, so the comparison between anti-miscegenation laws and laws prohibiting gay marriage are akin to comparing the treatment of gay people to slavery. For Justice Thomas, the underlying comparison (treatment of gay people to treatment of Black people under slavery) is implied by the overarching one (gay marriage to interracial marriage). For this reason, Justice Thomas finds the analogy "offensive and inaccurate." *Id.*

²⁸² See Lucy Rodgers et al., *Where Is It Illegal to Be Gay?*, BBC NEWS (Feb. 10, 2014), <https://www.bbc.com/news/world-25927595> [<https://perma.cc/VV4J-RS52>] (summarizing the legal status of same-sex relationships in each country).

ered unpersuasive because they are not real examples; the further the hypothetical is from reality, the less persuasive it is.²⁸³

For example, it was a common tactic of Justice Scalia's to trot out race as a strawman or hypothetical to score a point. Often for Justice Scalia, racism was an intensifier that could be used to show the silly or harmful consequences of a law.²⁸⁴ For example, in 2008 in *Washington State Grange v. Washington Republican Party*, the Court upheld a law allowing candidates to select the political party that would appear next to their name on a voting ballot.²⁸⁵ The Washington Republican Party had sued, arguing that the law violated the Party's associational rights by depriving the Party of the right to choose the candidates with which the Party would be associated.²⁸⁶ Justice Scalia's hypothetical in his dissent involved a "notorious and despised racist" who chooses to be on the ballot under the banner of a political party that disavows him, thus distorting and ruining the "image" of that political party.²⁸⁷ The use of racism here is an appeal to extremes designed to make the consequences of the Court's decision seem ridiculous.²⁸⁸ Justice Scalia's hypothetical shifts the harm of rac-

²⁸³ See KARLYN KOHRS CAMPBELL ET AL., *THE RHETORICAL ACT: THINKING, SPEAKING, AND WRITING CRITICALLY* 89–90 (5th ed. 2015) (stating that the best stories, even if hypothetical, require detail and must conform with reality and everyday experiences).

²⁸⁴ See generally Harris, *supra* note 274, at 596 (“[B]lack women are something less than women [T]he word ‘black,’ applied to women, is an intensifier”).

²⁸⁵ 552 U.S. 442, 458–59 (2008) (Scalia, J., dissenting).

²⁸⁶ *Id.* at 448 (majority opinion). Interestingly, David Duke, whom the Anti-Defamation League calls “America’s most well-known racist and anti-Semite,” has run as both a Democrat and Republican. *David Duke*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/profiles/david-duke> [<https://perma.cc/QC9S-5RSM>]; see *David Duke*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/david-duke> [<https://perma.cc/F44H-W2UE>]. Justice Scalia wrote this dissent almost ten years before Donald Trump became President, fully backed by the Republican Party. For a variety of reasons, President Trump’s policies and rhetoric were consistently labeled racist. See David A. Graham et al., *An Oral History of Trump’s Bigotry*, THE ATLANTIC (June 2019), <https://www.theatlantic.com/magazine/archive/2019/06/trump-racism-comments/588067/> [<https://perma.cc/6TRK-943C>] (outlining four decades of racism perpetrated by Donald Trump); Vanessa Williamson & Isabella Gelfand, *Trump and Racism: What Do the Data Say?*, BROOKINGS (Aug. 14, 2019), <https://www.brookings.edu/blog/fixgov/2019/08/14/trump-and-racism-what-do-the-data-say/> [<https://perma.cc/435P-UTV6>] (listing President Trump’s rhetoric against Muslim and Mexican immigrants and the rise in hate crimes during Trump’s presidency as evidence of Trump’s racism). Given the Party’s support for a candidate widely believed to be racist, Justice Scalia’s hypothetical seems far-fetched only because it presumes that the political party “disavow[s]” the racist. *Wash. State Grange*, 552 U.S. at 470 (Scalia, J., dissenting).

²⁸⁷ *Wash. State Grange*, 552 U.S. at 468. Justice Scalia uses a similar rhetorical tactic in *Rita v. United States*, a case involving the sentencing guidelines. See 551 U.S. 338, 371 (2007) (Scalia, J., concurring in part and concurring in judgment). He describes an elaborate hypothetical involving two brothers, one “racist” and one “nonracist,” who rob a bank. *Id.*

²⁸⁸ An appeal to extremes is a fallacious argument strategy in which the extreme is used to make an otherwise reasonable argument look absurd. BO BENNETT, *LOGICALLY FALLACIOUS: THE ULTIMATE COLLECTION OF OVER 300 LOGICAL FALLACIES* 84–85 (2017).

ism so that the “victim” is a powerful political party that has ample resources to remediate its image and its message.

Similarly, in 2017 in *Matal v. Tam*, a case in which an Asian American rock band attempted to reclaim a racist slur by trademarking their name, “THE SLANTS,” Justice Alito used a hypothetical about racism that distorted history. It used racism (and sexism and homophobia) to support the Court’s decision to strike down the disparagement clause of the Lanham Act.²⁸⁹ Justice Alito noted that the clause was not “narrowly drawn” because it would also apply to trademarks such as “Down with racists,” “Down with sexists,” “Down with homophobes,” and “Slavery is an evil institution.”²⁹⁰ But Justice Alito’s use of race here, like Justice Scalia’s in *Washington Republican Party*, was a clever rhetorical tool. Justice Alito turned this argument back on its proponents by writing as though the history of race in this country was one of people desperately trying to trademark signs like “Down with racism” instead of the reality of our history, which is replete with signs like “No Dogs N****s Mexicans” and “Positively No Filipinos Allowed.”²⁹¹

3. Tolerance of Racism Is What Makes This Country Great

References from the third subcategory show a kind of legal and cultural pride in the American constitutional commitment to free speech by picking the most extreme and repugnant examples of racism and noting that they would be protected speech. It is a version of the fallacious appeal to extremes. These references accept without criticism—and even celebrate—that the law of free speech outweighs the harm of racism. They highlight but do not address the serious and enduring problem with First Amendment regulation of some speech (e.g., obscenity) but not other speech (e.g., racist speech).²⁹²

In 2000 in *Hill v. Colorado*, for example, the Court addressed the constitutionality of a Colorado statute regulating free speech outside of health clin-

²⁸⁹ See *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Alito, J., majority opinion); see also 15 U.S.C. § 1052(a) (“No trademark . . . shall be refused registration . . . unless it . . . may disparage or falsely suggest a connection with persons . . .”).

²⁹⁰ *Matal*, 137 S. Ct. at 1751, 1764–65. The disparagement clause of the Lanham Act could have been the basis to disallow racist trademarks like “the Redskins,” which explains why the Fred Korematsu Law Center and the Organization of Native Americans filed amici briefs in support of the law. See Brief for the Fred T. Korematsu Center for Law and Equality et al. as Amici Curiae Supporting Petitioner at 21–22, *id.* (No. 15-1293), 2016 WL 6833411.

²⁹¹ Brief for the Fred T. Korematsu Center for Law and Equality et al., *supra* note 290, at 6.

²⁹² For examples of the critique of First Amendment treatment of racist hate speech, see Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865, 877–79 (1998); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Hate Speech on Campus*, 1990 DUKE L.J. 431, 435–36.

ics.²⁹³ Justice Stevens, writing for the majority, upheld the statute, reasoning that it was content-neutral and satisfied strict scrutiny.²⁹⁴ In so doing, he used racism to make a point about what makes a law content-based. He wrote that a “statute making it a misdemeanor to sit at a lunch counter for an hour without ordering any food would also not be ‘content based’ even if it were enacted by a racist legislature that hated civil rights protesters.”²⁹⁵ Similarly, in 2000 in *California Democratic Party v. Jones*, Justice Stevens used a race hypothetical in his dissent to make the point that political parties are constitutionally permitted to advocate white supremacy and support only candidates that follow their racist views.²⁹⁶

CONCLUSION

This examination of the Supreme Court’s rhetoric surrounding racism reveals a number of patterns in both the definition of the words “racism,” “racist,” and “white supremacy” and the Court’s relationship to racism.

Definitionally, the predominant substantive usage of the words “racism” and “racist” occur in references from the usual-suspects and racism-out-there categories. The definition that emerges is one in which racism occurs only in extreme intentional instances (often where the racism is open or admitted) or passively and nebulously, as something that just *happens*. Only spotty references acknowledge unconscious racism, and these references disappeared over a quarter century ago. References labeling racism in cases not involving extreme or intentional bias are similarly spotty and declining, with the last reference of this kind in 1994.

The trend in usage suggests that even this narrow definition may be shrinking. The Court is less likely in modern times (post 1986) to label even the usual suspects such as the Ku Klux Klan or Jim Crow laws as racist in majority opinions. This decrease in usage combined with the sharp rise in references attacking the use of these words suggests an emerging definition of racism in which very little behavior warrants the label.

This narrow definition has been further distorted by the increasing number of usages that flip the meaning of “racism.” The opinions explicitly denying or minimizing racism, coupled with the opinions using “racism” (or “racist”) to refer to bias against whites, corrupt the definition of “racism” into a

²⁹³ 530 U.S. 703, 707 (2000).

²⁹⁴ *Id.* at 714.

²⁹⁵ *Id.* at 724.

²⁹⁶ See 530 U.S. 567, 593 (2000) (Stevens, J., dissenting). It is fascinating that in 2000 and 2008, during the Obama Presidency, but well before President Trump was even a candidate for President, the specter of a political party’s racism was raised, seemingly out of nowhere, in two separate cases by two very different Justices.

powerful false myth that Black people use racism to unfairly harm white people. This definition is most clearly seen when the Court's opinions use the keywords "racist" or "racism" in situations that disadvantage whites or depict whites as the truly down-trodden, depict Black civil rights leaders as the "real racists," or decry any charge of racism as uncivil.

The definition of "white supremacy" is similarly narrow, although it is harder to determine because the Court so rarely uses the term. The most frequent use of "white supremacy" is to refer to usual suspects (as with "racism," almost always mentioning the Klan or Jim Crow) or as a comparator. Likely because it was the term used in *Loving*, "white supremacy" as a comparator surfaces in two major gay rights cases, *Obergefell* and *Lawrence*. In those two cases, the Court used the term to minimize the harm of homophobia.

Finally, using "racism" and "white supremacy" as comparators is also among the most common uses and further degrades the definition of these terms. In these references, the Court opinions use the keywords in hypotheticals and strawman references to deny rights to others and as tools for white people's linguistic exploitation. The Court uses these terms to deny rights to others by employing definitions of "racism" and "white supremacy" that create competition among marginalized communities.²⁹⁷ Similarly, the comparator references that celebrate tolerance of racism as a positive constitutional value (as in the cross-burning cases) are also damaging. If the Court constructs tolerance of racism as not just constitutional but as a positive cultural value, then advocates fighting racism face the significant hurdle of having to attack that cultural value. All of these different uses of "racism" and "white supremacy" chip away at the substance and strength of the definitions.

The Court's use of "racist" and "racism" in its jurisprudence makes clear that it accepts little responsibility for racism and white supremacy in America. First, although the Court's history of upholding white supremacy and fostering racism cannot be denied, the Court majority never directly acknowledges its role by using the words "racism" or "white supremacy." The Court certainly never apologizes for its upholding and constructing racism in the law, not in *Korematsu* or in *Dred Scott v. Sanford* or in *Plessy v. Ferguson*.²⁹⁸ Second, alt-

²⁹⁷ See Teri A. McMurtry-Chubb, *There Are No Outsiders Here: Rethinking Intersectionality as Hegemonic Discourse in the Age of #MeToo*, 16 LEGAL COMMUN & RHETORIC 1, 38 (2019) (calling on critical race theory "to reimagine and destroy 'dichotomous oppositional difference'" so that the marginalized are not left "divided and fighting each other over the scraps that white supremacy, patriarchy, and capitalism throw at [their] respective communities").

²⁹⁸ The United States Supreme Court has never apologized for the repercussions of any of its terrible decisions. But this is not outside the realm of possibility. In its decision striking down India's sodomy law, the Supreme Court of India said that history owed an apology to LGBTQ people and their families. See *Navtej Singh Johar v. Union of India* Thr. Secretary Ministry of Law and Justice, W.P., AIR 2018 SC 4321.

though some Justices have called out the Court's complicity in racism or white supremacy in separate opinions, these instances are rare. The most forceful calling-out of the Court's racism, Justice Murphy's direct charge over seventy-five years ago in *Korematsu* that the majority opinion "legalized racism," has never been duplicated. Moreover, the rhetoric in the later calling-out opinions was typically weak or indirect, even when the Court's responsibility is indisputable. The rhetorical trend is to accuse the Court of negligence—of ignoring or overlooking racism, rather than causing it or tolerating it. This trend goes hand in hand with the Court's denial that it can fix racism, together eroding the Court's potential as a source for racial justice.

Because the warped definitions of "racism" and "white supremacy" are deeply embedded in the Court's opinions and, perhaps more disturbing, have found their way into the opinions of even those Justices who support antiracist laws and policies, advocates seeking racial justice from the Court will find it increasingly difficult to effect change. Advocates attempting to make antiracist arguments face a decision-making body that does not accept anything but the narrowest and responsibility-avoidant use of the term. They also face a Court that embraces definitions of these terms that embolden claims of white innocence and encourage white fragility.

If this Article shows that the Court has fallen short in its approach to defining and identifying racism, it also stands as a challenge to those Justices who seek to fight racism: call out racism when you see it and do so directly and unequivocally. Call the Court to account for past decisions that enabled racism. Using the words is part of the hard work of fighting racism. That work can be done by the majority, but also by those who are writing separately. Important rhetorical work can be done in separate opinions.²⁹⁹

When the Court takes responsibility for its role in perpetuating racism, it opens up rhetorical space for the law to become part of the solution. Calling out racism also provides a foothold (and a citation) for advocates trying to achieve racial justice. Finally, for the victims of racism, calling out the law's complicity in racism is of great significance, not just as a matter of law but as a matter of cultural and social importance.

²⁹⁹ Mark A. Hannah & Susie Salmon, *Against the Grain: The Secret Role of Dissents in Integrating Rhetoric Across the Curriculum*, 20 NEV. L.J. 935, 936–37 (2020).

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