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THE SUDDEN RISE OF CRITICAL RACE THEORY AS A LINE OF INQUIRY IN SUPREME COURT CONFIRMATION HEARINGS

An Exploration of Changing Rhetoric on Race in the Televised Era

Laurie L. Rice and Steven Brien

INTRODUCTION

Supreme Court nominations may start with a presumption of success (Krutz et al., 1998), but that does not stop confirmation hearings from being contentious affairs, especially in recent years (Caldeira & Smith, 1996; Maltese, 1995). With potentially long time horizons on the Court ahead of the nominees, senators grill them about their approach to jurisprudence and their stances on the most controversial issues of the day. Since C-SPAN coverage of these hearings began in 1981, they also offer senators the opportunity to score political points with their base (Farganis & Wedeking, 2014), potentially positioning themselves for reelection success or television coverage.

During Justice Ketanji Brown Jackson's confirmation hearing, the topic of critical race theory (CRT) was a prominent theme in senators' lines of inquiry, particularly among Republicans. This focus began on the first day of the hearing when in her opening statement, Senator Marsha Blackburn (R-TN) asked Judge Jackson, "Is it your personal hidden agenda to incorporate critical race theory into our legal system?" (C-SPAN, 2022a, 3:27:41). Others, like Senator Ted Cruz (R-TX), instead asked later in the hearing about CRT in schools and in children's books (C-SPAN, 2022b, 1:16:31). While the intent behind these questions deserves further scrutiny, on the surface, the legal theory itself, with roots in law review articles by Derrick Bell (1976, 1980), should be an appropriate line

of questioning for a Supreme Court nominee. After all, questions about jurisprudence feature prominently in senators' questions to nominees during Senate Judiciary Committee hearings. This theory, like other lenses for legal interpretation, might provide fodder for meaningful discussions about legal doctrine and a prospective justice's judicial philosophy.

Neither Jackson nor any of those nominated to the Supreme Court before her had explicitly identified CRT as part of their judicial philosophy.¹ Yet, nominees are routinely questioned about both their own judicial philosophies and those employed by others. For example, in addition to questions about incrementalism and pragmatism, Justice Ruth Bader Ginsburg was questioned repeatedly about originalism, especially with respect to the 14th amendment (*Nomination of Ruth Bader Ginsburg*, 1994). Questions were directed to Justice Neil Gorsuch about judicial activism, as well as originalism and textualism (*Confirmation Hearing*, 2018). If hearings regularly provide a forum for discussion of judicial philosophy, why did CRT, with roots going back more than four decades, not serve as a subject of discussion in confirmation hearings until 2022? While there are likely many contributing factors, we focus in this essay on the role of television and the incentive it provides senators to tailor their statements and questions with an eye toward enhanced media coverage.

To fully understand the sudden emergence of CRT in confirmation hearings, though, it is important to also examine how and how often race is discussed during confirmation hearings in the televised era. We apply several textual analysis tools to confirmation hearings obtained through the C-SPAN Video Library. After a brief overview of the literature on confirmation hearings, we use the C-SPAN Video Library to investigate the frequency and content of discussions about race in Supreme Court confirmation hearings between 1986 and 2022. As our analysis demonstrates, Justice Ketanji Brown Jackson's confirmation hearing stands out, not for its number of mentions of race, but for a distinct difference in the content of those mentions—an emphasis on CRT. Then, to better understand the potential causes of this emergence, in the sections that follow, we provide a brief history of CRT's appearance in major law journals over time. We contrast this with what viewers of two television networks—C-SPAN and Fox News Channel—heard about CRT over time and its emergence. This has much more similarity to how Fox talks about CRT than how law journals (or C-SPAN) cover it. We conclude with a discussion of how these findings fit with the broader literature on confirmation hearings and what they suggest for calls for reform to the process, made by pundits and legal scholars alike.

THE HISTORY AND PURPOSES OF SUPREME COURT CONFIRMATION HEARINGS

Open hearings for Supreme Court nominees where nominees testify did not become routine until relatively recently, and issues involving race were at the center of many of these moves toward increased transparency. While the Senate Judiciary Committee was formed in 1816, the first hearing for a Supreme Court nominee did not occur until 1873, and only three occurred through 1922, amounting to hearings for only about 8% of those nominated to the nation's highest Court during this time frame (Collins & Ringhand, 2016; Rutkus & Bearden, 2009). In this period, deliberations about confirmations occurred largely behind closed doors.²

In 1939, open public hearings became the norm, a move driven by public outcry and American Bar Association calls for increased transparency after senators' confirmation of Justice Hugo Black, who journalists revealed once held a lifetime membership in the KKK (Collins & Ringhand, 2016). Making hearings public made conversations about nominee qualifications, background, and jurisprudence a matter of public record. Then, in 1955, nominee testimony at these hearings became the norm (Collins & Ringhand, 2016). Farganis and Wedeking (2014, pp. 12–13) argue that *Brown v. Board of Education* (decided in 1954) helped usher in the hearings era, where nominee testimony before the Senate Judiciary Committee became the expectation rather than the exception, and where nominees could expect to face substantive questions about their views. Yet these public hearings revealed to journalists and the public not just nominees' views on questions of race in society, but senators' views as well. In the first post-*Brown* public hearings, pro-segregation senators used their chance to ask questions to advertise their opposition to *Brown v. Board of Education* (Collins & Ringhand, 2016; Stone, 2011).

Further transparency in Supreme Court confirmation hearings was ushered in during Sandra Day O'Connor's 1981 confirmation hearing, when television cameras were first welcomed, and hearings aired on C-SPAN and several PBS affiliates (Farganis & Wedeking, 2011). Public television nationwide joined C-SPAN in airing William Rehnquist's full hearing as chief justice in 1986, and CNN and the broadcast networks joined in for Robert Bork's unsuccessful 1987 hearing (Farganis & Wedeking, 2011, 2014). Since then, the number of media outlets covering Supreme Court confirmation hearings has expanded dramatically. Yet, not all coverage is the same. Some media outlets, like C-SPAN, routinely offer their viewers the chance to watch the complete hearings while others offer

more limited coverage. For example, for the four hearings between 2005 and 2010, C-SPAN and PBS offered complete live coverage of the hearings while the three major cable news networks—CNN, Fox News, and MSNBC—showed a mix of live and mediated coverage (Farganis & Wedeking, 2014).

One purpose of confirmation hearings is to help senators determine a nominee's qualifications before they cast their vote for or against confirmation. To gauge this, senators may ask questions about a nominee's background and legal experience, their familiarity with constitutional issues, prior court rulings, and how they would apply their judicial philosophy in specific situations (Entin, 1993). Yet perceived qualifications alone do not determine how senators vote. Senators' confirmation votes are shaped by their partisanship (Farganis & Wedeking, 2014), the views of their constituents (Hutchings, 2001; Segal et al., 1992), lobbying by interest groups (Caldeira & Wright, 1998; Segal et al., 1992), and their perceptions of the nominee's views, character, and qualifications (Farganis & Wedeking, 2014).

Senators' opportunities to ask nominees questions in written questionnaires, during courtesy calls, and in confirmation hearings can help them ascertain nominees' views and form assessments of their character and qualifications (Farganis & Wedeking, 2014). Yet, senators' line of questioning is not solely influenced by their need to decide whether to vote to confirm. They also seek to influence other senators' votes through the way they attempt to portray the nominee. While supporters often emphasize a nominee's qualifications and temperament, opponents take a markedly different approach. Opponents to a nomination attempt to link the nominee to controversy and use both committee hearings and the mass media to spread this controversy beyond the Senate chambers (Kurtz et al., 1998). According to Gibson and Caldeira (2009, p. 140), frequent opposition contentions include "the nominee is prejudiced, has associated with biased or extremist groups (e.g., memberships in discriminatory clubs), is dogmatic, and/or is outside the broad ideological consensus in the country."³

Confirmation hearings also offer senators a platform to ask questions designed to appeal to their constituents (Farganis & Wedeking, 2011).⁴ Collins and Ringhand (2016) argue that televised hearings offer senators on the Judiciary Committee ample opportunities to engage in the core electoral-minded behaviors identified by Mayhew (1974): advertising, position taking, and credit claiming. Most relevant here, they argue that committee members use the hearings to engage in position taking on both the nominee and on salient issues of the day (Collins & Ringhand, 2016). Evidence suggests senators on the Judiciary Committee have adapted well to these new opportunities provided by televised

hearings. After Justice Sandra Day O'Connor became the first justice to have their confirmation hearing televised, senators began making markedly more comments at hearings. Collins and Ringhand (2016) report that statements at hearings increased from an average of 664 in the decade before O'Connor's hearing, to 868 during O'Connor's hearing, to an average of 1,779 between Rehnquist's 1986 hearing and Kagan's 2010 hearing.⁵

The presence of television cameras, while offering increased transparency, also introduces incentives to perform for the cameras. Further, the choices of media outlets to offer full live coverage of confirmation hearings, fully mediated coverage, where viewers see only carefully curated clips of the hearings paired with summaries and interpretations of them by anchors or pundits, or partial live coverage and partial mediated coverage influences the incentive structure for senators. When hearings are aired live, in their entirety, senators can be assured that they will be seen by those who watch the hearings. Senators may compete with each other for who provides the memorable moments in the hearings, but all who elect to make statements or ask questions have guaranteed airtime when the full hearing is televised live. Meanwhile, when coverage is fully mediated, and viewers only see brief sound bites from the hearings, then senators must compete to receive one of the few coveted sound bites available. This creates strong incentives to pander to the cameras. With common criteria for newsworthiness including conflict and controversy (Parks, 2019), senators who seize on these will heighten their chances of being selected. This may favor opposition voices over those supporting the nominee, and lead media-hungry senators to compete over who can launch the most effective and extreme made-for-TV attacks. This incentive structure reduces the prospects for meaningful discussions of legal doctrine and judicial philosophy.

RACE IN CONFIRMATION HEARINGS IN THE PUBLIC, PRE-TELEvised ERA

Before investigating discussions of race in confirmation hearings during the televised era, a brief review of the literature on discussions of race during the period between 1955, when hearings both contained nominee testimony and were open to the public, and 1981, when they were opened to television cameras, provides useful context. Justice John Harlan, the first post-*Brown* nominee, was opposed by Southern senators, who wanted to delay a pending decision on the implementation of *Brown* (Farganis & Wedeking, 2014, p. 13). While they questioned

him on multiple fronts, some, like Senator Ervin (D-NC), used the public hearing to engage in explicit position taking against the *Brown* decision (Collins & Ringhand, 2016).

Twelve years later, President Lyndon B. Johnson nominated Thurgood Marshall, who had argued *Brown* and 31 other cases before the Supreme Court. Once again, Southern senators, including Ervin, John L. McClellan (D-AR), and Strom Thurmond (R-SC), went on the offensive, this time attacking the first Black nominee to the Supreme Court, while claiming their opposition was on grounds other than race (Overby et al., 1994). While the first two focused their questioning on the rights of those accused of crimes, Thurmond aggressively sought to undermine Marshall through a series of increasingly obscure questions to which Marshall did not know the answers (Heath, 2015; Overby et al., 1994). Other senators saw through Thurmond's charade. Senator Edward Kennedy (D-MA) interjected, "Could we just have some further clarification so all of us can benefit? I really don't understand the question myself" (Heath, 2015). This did not stop Thurmond. To those questions Marshall did answer, Thurmond asked if he wished to add anything to his reply, and to those Marshall did not answer, he sometimes stopped to ask Marshall if he understood the question (Heath, 2015). Afterward, senators such as Philip Hart (D-MI) made public statements affirming that they did not know the answers either (Heath, 2015). Thurmond's merciless attempts to make Marshall appear incompetent before his fellow senators and an audience of newspaper reporters and photographers failed. After all, a lawyer who had argued 32 cases before the Supreme Court with a 90.6% success rate was hardly incompetent. After being subjected to a gauntlet of hostile questioning, Justice Thurgood Marshall was confirmed by the Senate with a 69–11 vote (Overby et al., 1994).

Yet, the next few years saw nominees to the Supreme Court who questioned *Brown*. As part of his Southern strategy, President Richard Nixon nominated two men to the Court with troubling views on race: Clement Haynsworth in 1969 and G. Harrold Carswell in 1970. While Haynsworth was seen by some as taking positions that were seen as too cautious in dismantling segregation and by others as supporting segregation, Carswell had explicitly expressed support for the idea of white supremacy (Entin, 1993; Stone, 2011). With ethical issues also raised for Haynsworth and competence issues raised for Carswell (Stone, 2011), both nominees were defeated, Haynsworth 45–55 and Carswell 45–51 (U.S. Senate, n.d.). Yet, these were not resounding defeats—for the time period in which they occurred, both were relatively close votes. During the same period in which the Senate

confirmed the nation's first Black Supreme Court justice, there were 45 senators willing to vote to accept nominees with troubling records on race. This backdrop of the Senate's track record on issues of race in Supreme Court confirmation hearings during the civil rights movement, before hearings were televised, still potentially has echoes in more recent televised Supreme Court confirmation hearings.

STUDYING RACE IN CONFIRMATION HEARINGS IN THE TELEVISED ERA

To better understand how race has been discussed in Supreme Court confirmation hearings in the televised era, we conducted a search using the C-SPAN API for mentions of race in Supreme Court confirmation hearings. Using the mentions endpoint, we collected transcripts for all mentions of the term "race" from 1980 through July of 2022. Once all mentions of race were collected, we limited the data to mentions occurring during confirmation hearings using the program title metadata returned from the API. Mentions were grouped by hearing according to Supreme Court nominee name and then counted.⁶ The data show the subject has been raised 749 times overall, with significant variation in its level of mentions across hearings. As seen in Figure 1.1, Justice Clarence Thomas, who was nominated to fill Justice Thurgood Marshall's vacancy, had the most mentions of race during his confirmation hearing. The second highest number of mentions came during the failed nomination of Judge Robert Bork, who had once written an article arguing that while racial discrimination is abhorrent, it should not be outlawed by Congress because doing so would result in "a loss in a vital area of personal liberty" (Bork, 1963). The high number of mentions of race during the Bork hearing suggests the Senate subjected these views to intense scrutiny.

Meanwhile, there were more than twice as many mentions of race during the Bork hearing as there were during Justice Ruth Bader Ginsburg's hearing, which had the third most mentions. Justice John Roberts was the only other justice with more than 50 mentions of race during his confirmation hearing. Some confirmation hearings paid very little attention to race, as measured by number of mentions, with the Rehnquist, Scalia, Kennedy, Kagan, and Gorsuch hearings having the fewest numbers of mentions. In contrast, the number of mentions of race during the confirmation of Justice Ketanji Brown Jackson, the first Black woman named to the Supreme Court, is not far from the median number of mentions during the televised era, and just behind the number of mentions of race during

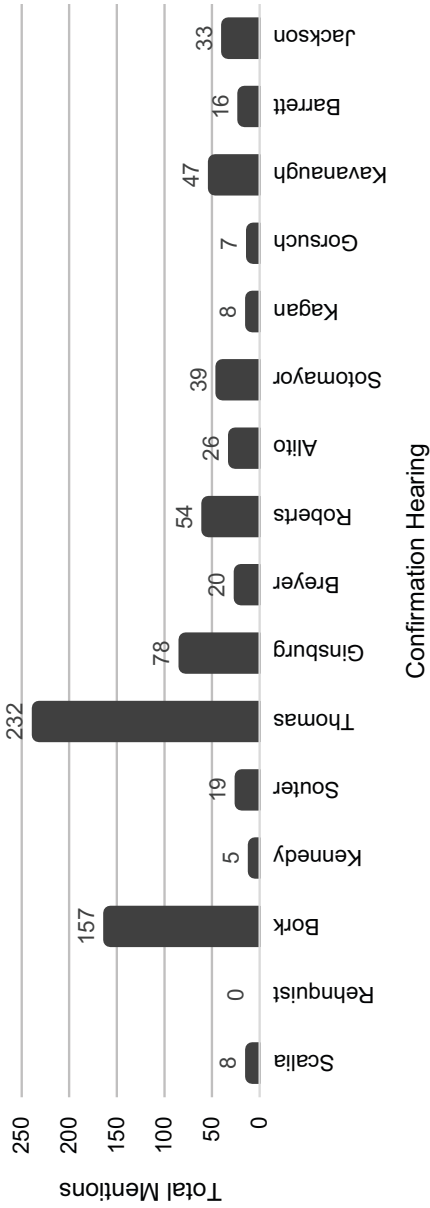


FIGURE 1.1 C-SPAN mentions of race during confirmation hearings.

the confirmation hearing for Justice Sonia Sotomayor, the first Hispanic woman named to the Court. Meanwhile, if we compare mentions of race during the confirmation hearings of the two Black justices on the Supreme Court, nearly 31%, or 232 total mentions, occur during the confirmation of Justice Clarence Thomas, while only 4%, or 33 total mentions, occur during Justice Jackson's confirmation.

To gain insight into how race was discussed in confirmation hearings between 1986 and 2022, we considered the most common three-word phrases, or trigrams, used in those hearings. Trigrams are a tool of natural language processing that can be used to identify common themes in textual data. We use them to identify the words and topics most commonly used in conjunction with race or critical race theory. To do so we removed stop words, found all possible combinations of three consecutive words, counted their frequency, and ranked them from those that occur most to those that occur least. We then plotted the 25 most frequent trigrams and the number of times they occur as an indicator of the context and meaning of mentions of race and critical race theory.

Figures 1.2 and 1.3 compare the trigrams for mentions of race in the confirmation hearings available on C-SPAN prior to Ketanji Brown Jackson's hearing (Figure 1.2) to those during her confirmation hearing (Figure 1.3). They reveal distinct differences. As Figure 1.2 shows, before Justice Jackson's hearing, race is most commonly mentioned in conjunction with the Constitution's equal protection clause, the Civil Rights Act, *Brown v. Board of Education*, the Voting Rights Act, discrimination on the basis of race and gender, and constitutional and civil rights. These trigrams suggest Senate interest in civil rights cases and how prospective justices will rule on issues involving the interplay between race, discrimination, and the law. In contrast, as Figure 1.3 shows, the vast majority of references to race during Justice Jackson's confirmation hearing involved critical race theory, with references to Justice Jackson as the first Black woman on the Court a distant second. The Voting Rights Act was mentioned in conjunction with race a scant three times during Jackson's hearing, and none of the other topics most commonly referenced with race in confirmation hearings from Rehnquist to Barrett appear in the most common trigrams for Jackson. Given the frequency counts in the Jackson hearing trigrams, this indicates these topics were either mentioned only once or never when race was discussed during her confirmation hearing. This marks a significant departure from prior confirmation hearings.

To further assess the differences between discussions of race during Justice Jackson's confirmation compared to previous justices nominated during the televised era, we also examined trigram collocations, or sets of three words that



Most Common Trigrams

FIGURE 1.2 Common trigrams associated with mentions of race during all confirmation hearings except Jackson.

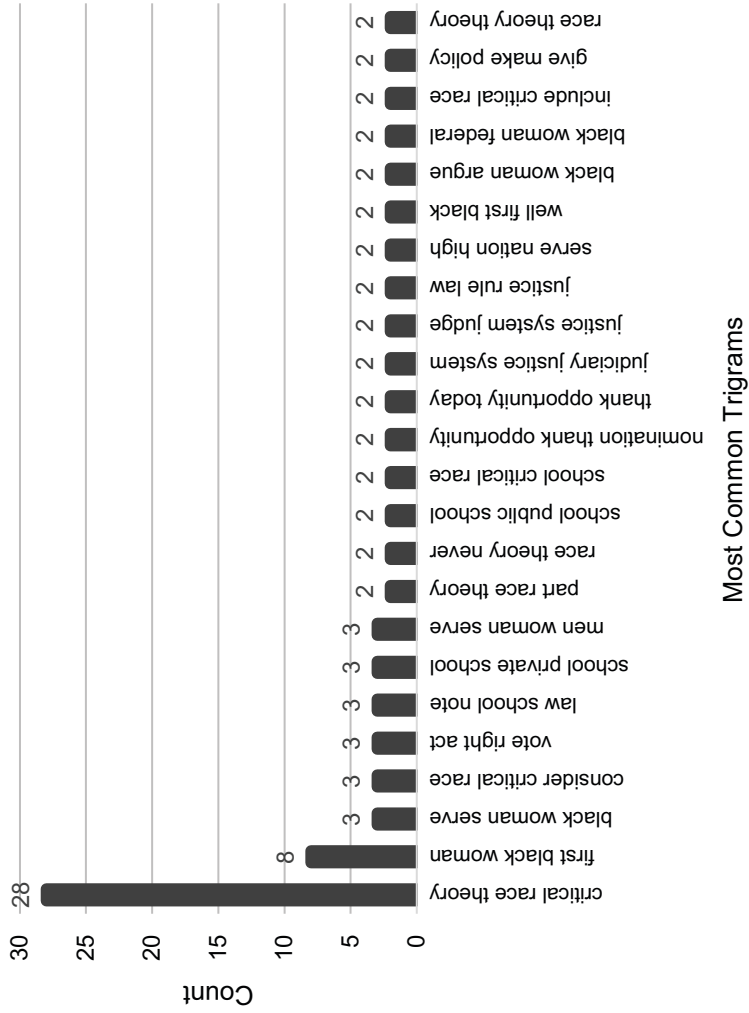


FIGURE 1.3 Common trigrams associated with mentions of race during Jackson confirmation hearing.

appear close to each other in the text, regardless of intervening words. To find collocations, we first combined all text from transcripts that mention race in the Jackson confirmation hearing into a single text corpus. We then programmatically examined the entire corpus, considering a moving window of 10 words at a time. Collocations were identified using a likelihood ratio, which is a comparison of the probability of words appearing near each other against the probability that those words appear independently. Words that are more likely to appear together have a higher likelihood ratio score. The same process for finding collocations was repeated using transcripts of all other hearings apart from Jackson's.

The collocations indicate, again, that race was discussed quite differently in Jackson's hearing than in prior hearings. Both the most common and most likely collocation appearing during the Jackson hearing was "critical race theory," occurring at a rate 21 times that of "equal protection clause." In contrast, the collocation with the highest likelihood score in all other hearings was "equal protection clause," and the most frequent was "race gender discrimination," while the trigram collocation "critical race theory" is not identified at all in prior hearings according to the likelihood measure. When comparing the rate of occurrence of collocations between the Jackson hearing and all prior hearings, collocations containing the words "race" and "theory" appear at a rate between 16 and 81 times their rate of appearance in all other hearings, as shown in Table 1.1. These ratios

TABLE 1.1 *Comparing Collocations in the Jackson Hearing to Prior Hearings*

Trigram collocation	Rate of use in Jackson hearing/ rate of use in all other hearings
race theory say	16.33
race theory opinion	16.33
race theory way	81.64
way race theory	16.33
one race theory	32.66
student race theory	48.99
race theory may	16.33
race theory personal	16.33
say race theory	32.66
race theory write	16.33

confirm the distinctiveness of Justice Jackson's confirmation hearing. The appearance of words in these collocations such as "say," "opinion," "way," and "personal" seem to indicate a strong interest in Justice Jackson's views on CRT and whether she would apply it on the bench. The one clear outlier in these collocations—"student"—may suggest significant interest in CRT in schools.

Meanwhile, if we compare trigrams for mentions of race in Jackson's confirmation hearing to those of Justice Clarence Thomas, some clear similarities and distinct differences emerge. The trigrams suggest that during both confirmation hearings, their potential contributions as Black justices received a lot of attention. In Jackson's hearing, common phrases in conjunction with race include "first black woman," "black woman serve," "black woman argue," and multiple references to judges and the justice system. In Thomas's hearing, the most common words used together with race were "Judge Clarence Thomas." Word combinations such as "Judge Thomas record" and "Judge Thomas say" also appeared frequently with race. We then filtered out these references to Clarence Thomas himself to see what common words and themes emerged. These are displayed in Figure 1.4. In comparison to the trigrams for Justice Jackson's confirmation hearing, these trigrams suggest senators devoted significant attention to how Justice Thomas might rule on issues related to race. There are 10 references to race and the Civil Rights Act, and a series of phrases indicating senators' interest in how he might rule on cases involving discrimination on the basis of race and gender and on affirmative action policies. The common phrases also suggest he was asked about specific legal tests he might use in such cases as well as his legal theory.

We also examined trigrams for words used most frequently in conjunction with race (not shown here) for each of the other nominees' confirmation hearings. Among the trigrams for the 15 confirmation hearings before Jackson's, 10 had equal protection, discrimination, or both appearing prominently. All but 2 of the remaining justices were still asked about related themes. Justice Sotomayor's confirmation hearing trigrams lacked references to equal protection or discrimination, but her most common trigrams included references to *Brown v. Board of Education* as well as references to gender in conjunction with race. Justice Kennedy's trigrams did not feature these words but did include multiple references to woman and to school boards. Justice Scalia's confirmation hearing trigrams also include multiple references to woman and racial justice. Justice Breyer's trigrams lack all of these references, but the trigrams make clear that he was asked how he might rule in a particular case involving race or whether he agreed with a past majority decision.⁷ In contrast, Justice Jackson's trigrams reveal that little

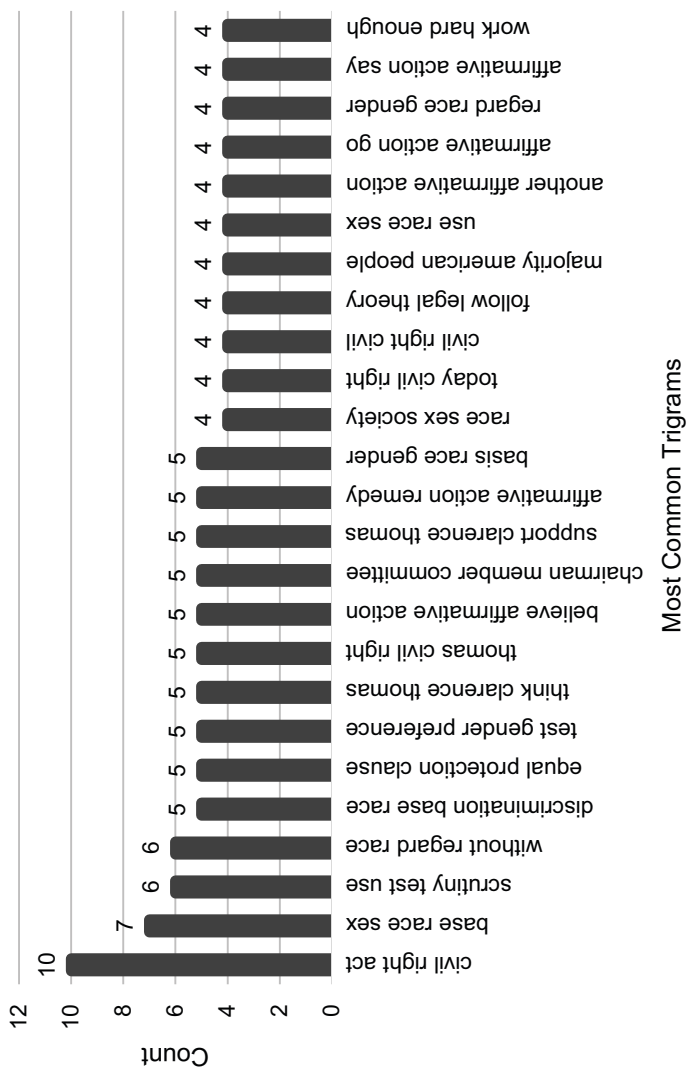


FIGURE 1.4 Common trigrams associated with mentions of race during Thomas's confirmation hearing.

attention was paid to her views on specific cases or how she would rule on legal issues related to race, aside from questions about CRT.

Past research suggests several reasons why Justice Ketanji Brown Jackson's confirmation hearing may have been an outlier. Female nominees to the nation's highest court are questioned more about their judicial philosophy than their male counterparts (Boyd et al., 2018). Table 1.1 shows mentions of "race" in conjunction with "theory" occurring between 16 and 81 times more often in Justice Jackson's confirmation hearing than in prior televised confirmation hearings, which certainly fits that pattern of heightened attention to judicial philosophy. Evidence also suggests that female members of racial minority groups may face even more enhanced scrutiny of their approach to interpreting the law, especially by senators of the opposite political party as the president (Boyd et al., 2018). For example, Bennett's (2018, pp. 266–267) analysis of rhetoric during Justice Sonia Sotomayor's confirmation hearing posits the presence of implicit and explicit racism in the comments and questioning advanced by senators from the opposing party. Yet, the differential treatment of female nominees and female nominees of color alone cannot explain why CRT suddenly became a focal point in Justice Jackson's hearing.

So where did this sudden emphasis on CRT come from? We explore several potential sources for this sudden shift in focus. First, we trace attention to CRT over time within the field of law. Then, we trace attention to CRT on television, contrasting coverage on C-SPAN and Fox News. We then compare the content of this attention to how CRT was talked about during Justice Ketanji Brown Jackson's confirmation hearing.

CRITICAL RACE THEORY AND THE FIELD OF LAW

While critical race theory first appeared by name in confirmation hearings in 2022, the theory itself is not new. CRT is used today in a variety of fields, including political science, education, and sociology. Yet, CRT began as a legal theory, emerging out of the field of critical legal studies (Crenshaw, 2011). While many of its ideas were grounded in the work of Derrick Bell (see, e.g., Bell, 1976, 1980), the first CRT workshop, a gathering of 24 scholars at the University of Wisconsin Law School, was not held until 1989 (Crenshaw, 2011; Delgado & Stefancic, 1998). Legal scholars in this developing field were met with a range of responses from law schools, ranging from hostile to welcoming (Crenshaw, 2011).

It takes time for new theories and subfields to gain influence over a discipline, such as the field of law. Thus, it is reasonable to expect some delay between the emergence of the theory and its discussion in Supreme Court confirmation hearings. If a shift in prominence of CRT in legal theory explains why CRT was mentioned so frequently during Justice Ketanji Brown Jackson's confirmation hearing and not before, then we would expect to see a growing amount of attention to CRT by those institutions that serve as the gatekeepers of legal interpretation. To assess this, we gathered the number of mentions over time of CRT in law journals available through JSTOR that are affiliated with some of the nation's most highly ranked law schools, from 1990, the year after the first CRT workshop was held (Crenshaw, 2011), to 2022. Using JSTOR's advanced search tool, we searched these select journals for articles containing the keywords "critical race theory." The resulting documents were downloaded as PDFs and programmatically converted to plain text data. Metadata, such as journal title and date of publication, were combined with the plain text and stored in a tabular dataset for analysis. The count of mentions of CRT is a sum of total journal articles that mention the topic per month between 1990 and 2022.

Figure 1.5 displays the number of mentions of CRT in prominent law journals over time. The law schools affiliated with these journals produce most of the nation's Supreme Court justices as well as a disproportionate share of their law clerks. They also count many U.S. senators among their alumni. As Figure 1.5 shows, while there was a growth in attention through the mid-1990s, attention to CRT has declined since then in these journals. This suggests that these gatekeepers in the field of law were not increasingly turning their attention to this legal theory. If anything, they had begun to turn their attention away from it.⁸ Thus, it seems unlikely that senators were taking cues from them in suddenly directing their attention to CRT. The trend displayed in Figure 1.5 instead suggests responding to law journal cues would have been more likely to occur in the late 1990s or early 2000s, when CRT seems to have made its most significant inroads into these law journals.

ATTENTION TO CRITICAL RACE THEORY ON TELEVISION

We also collected the number of mentions of critical race theory on C-SPAN using the C-SPAN API and on Fox News Channel using the GDELT Television Explorer API. Figure 1.6 displays the number of mentions of CRT on C-SPAN over a similar time period as the law journals and Figure 1.7 displays the number of

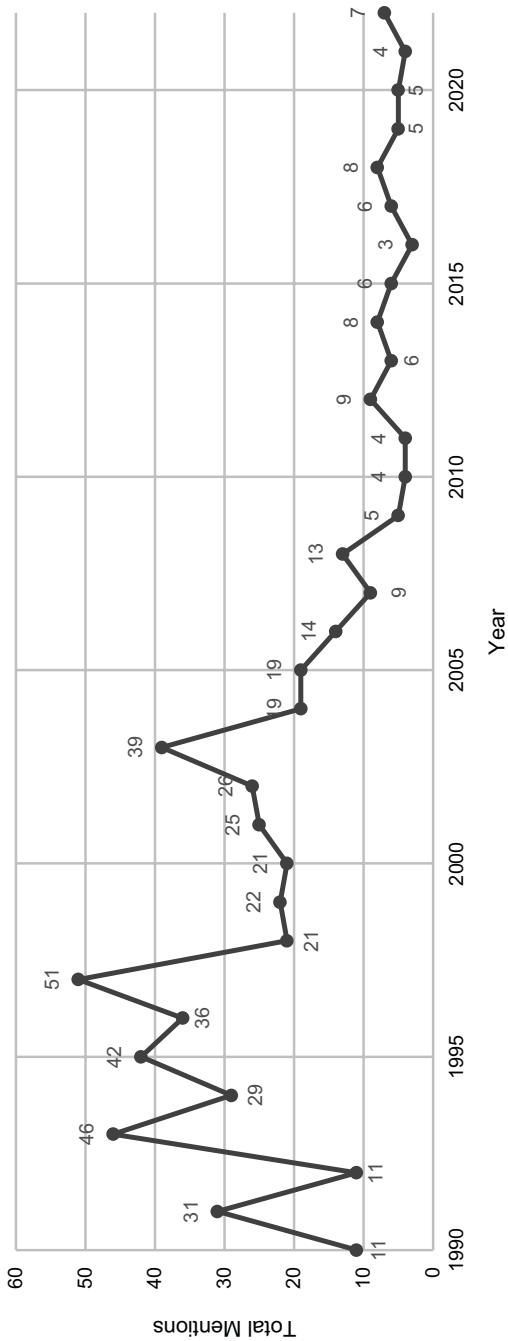


FIGURE 1.5 Mentions of CRT in low journals over time.

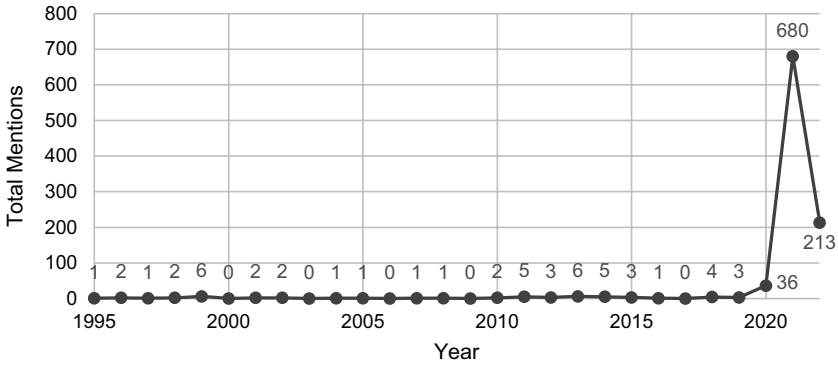


FIGURE 1.6 Mentions of CRT on C-SPAN over time.

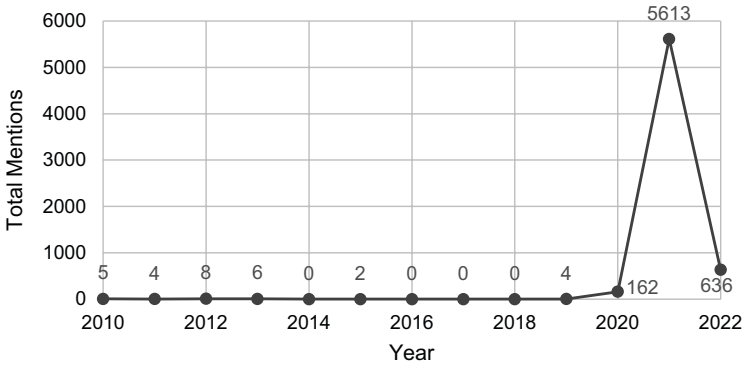


FIGURE 1.7 Fox News mentions of CRT over time.

mentions of CRT on Fox News from 2009 to the present.⁹ Through the C-SPAN API, we located mentions of CRT airing on C-SPAN as early as 1995. While sporadic mentions continued over the next two decades, over 90% of its mentions of CRT occurred after 2019. While data for Fox News is available for a much shorter time period, as Figure 1.7 shows, Fox News mentioned CRT only a handful of times prior to 2020, with nearly all mentions occurring in 2021 and 2022.

When we use GDELT data to normalize these mentions as percentage of airtime, as displayed in Figure 1.8, it is clear that attention to CRT on Fox News during the period of 2020 to 2022 far eclipses attention to the topic on C-SPAN. Between June 2009 and June 2022, the percentage of overall airtime Fox News devoted to CRT is 4.4 times higher than the percentage of overall airtime C-SPAN

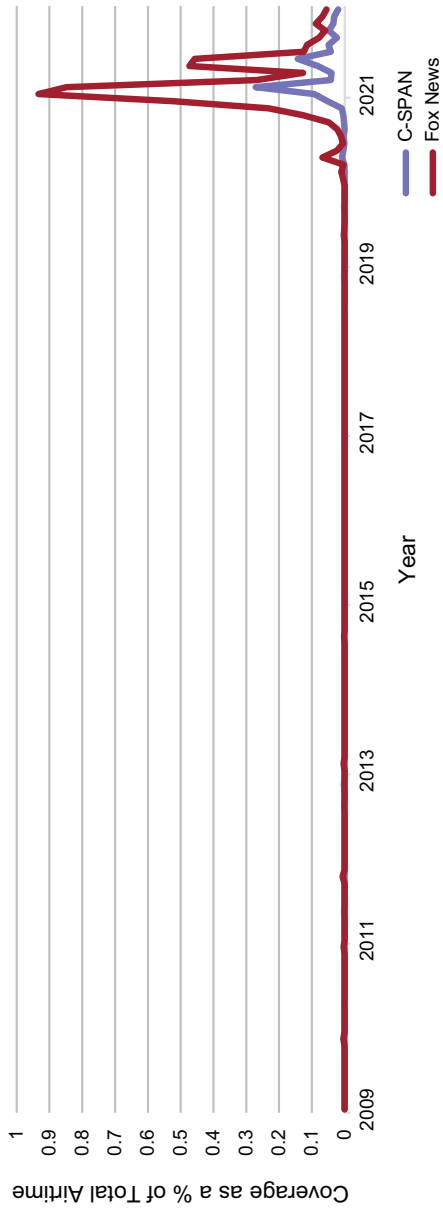


FIGURE 1.8 Coverage of CRT on Fox News and C-SPAN over time.

devoted to this topic. Thus, trends in levels of attention to CRT on television, and especially on Fox News, are far more consistent with senators' sudden attention to CRT in Justice Jackson's confirmation hearing than are attention levels in law journals.

EXPLORING THE SUBSTANCE OF MENTIONS OF CRITICAL RACE THEORY

While comparing the number of mentions of critical race theory over time suggests television, rather than the field of law, was driving the sudden emergence of CRT at Justice Jackson's confirmation hearing, the question remains, What was influencing the substance of these mentions? To further trace the sources of this emergence, we first explore the substance of mentions over time of CRT in law journals, comparing this both to discussions of race across confirmation hearings and to mentions of CRT at Justice Jackson's confirmation hearing. We then do the same for C-SPAN, followed by Fox News, for the time period for which data are available. Finally, by comparing the substance of mentions of CRT during Jackson's confirmation hearing to how each of these sources talk about CRT, we gain deeper insights into the causes of its emergence as a line of questioning.

Critical Race Theory in Law Journals

Critical race theory, like most lenses for analysis, has evolved, developed, and expanded over time. Thus, exploring whether evidence exists on how the journals of some of the nation's most prestigious law schools discuss CRT influences senators' lines of questioning about race during Supreme Court confirmation hearings requires first looking more closely at how these law journals address CRT over time. Using the results of the JSTOR advanced search for "critical race theory," we prepared the article text data for analysis by removing common stop words and domain-specific language that did not contribute to the meaning of the articles, such as JSTOR copyright notices. Within the cleaned text data, we programmatically found and counted all sets of three consecutive words appearing in the documents. Figures 1.9 to 1.12 display the most common trigrams associated with mentions of CRT in these law journals by decade from the 1990s to the 2020s.¹⁰ In the 1990s, CRT appeared most commonly with "equal protection clause," followed by "affirmative action program," "prima facie case," "gender



FIGURE 1.9 Common trigrams associated with mentions of CRT in law journals, 1990s.

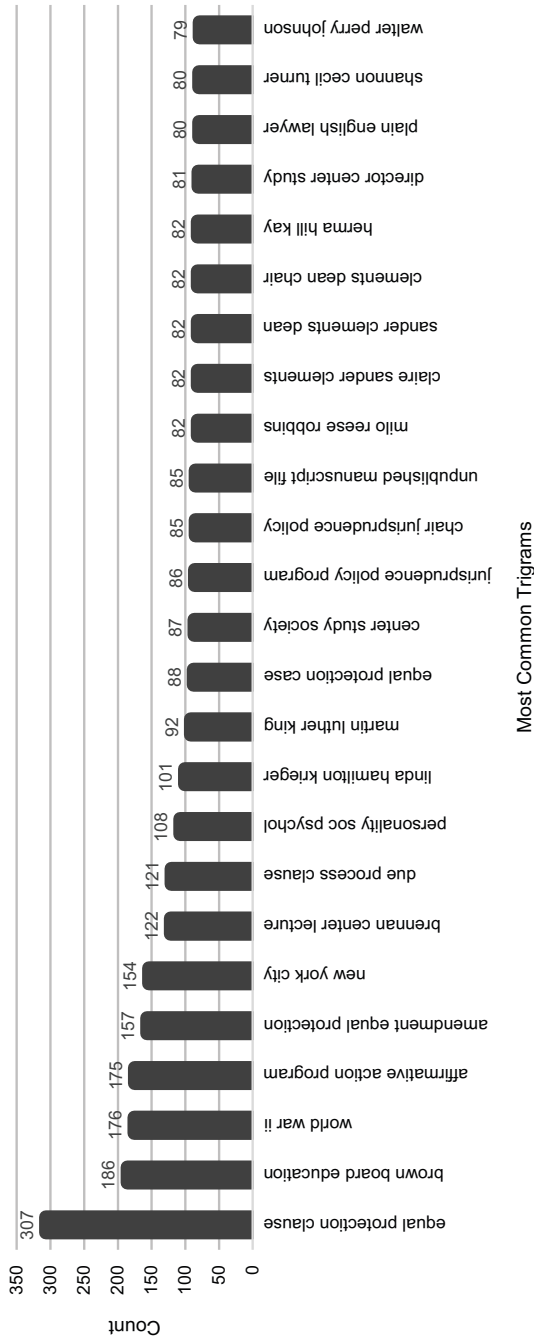


FIGURE 1.10 Common trigrams associated with mentions of CRT in law journals, 2000s.

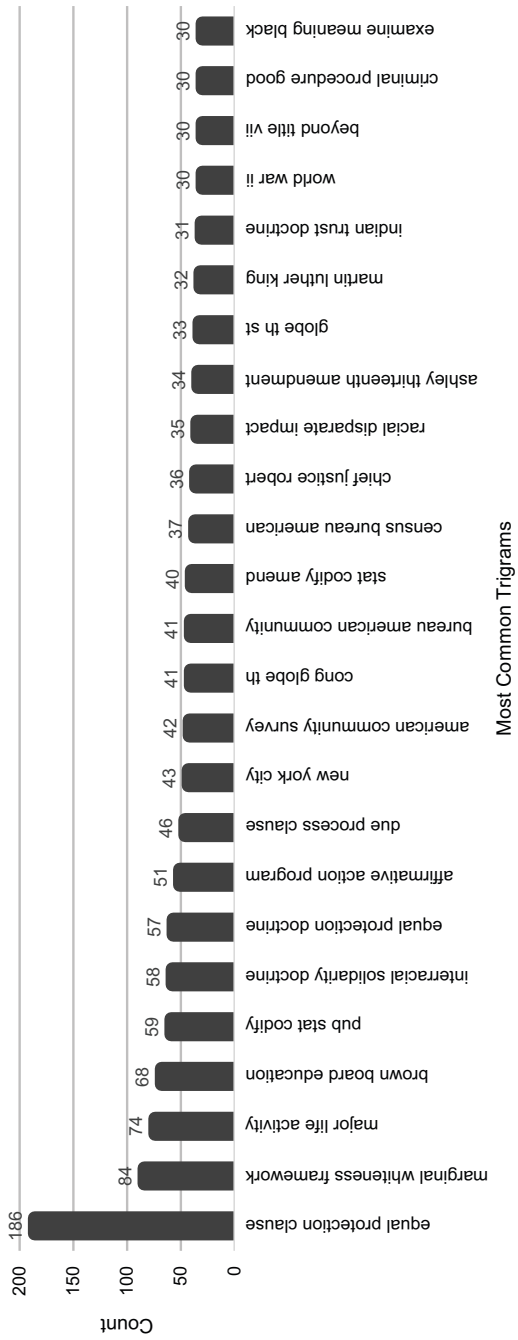


FIGURE 1.11 Common trigrams associated with mentions of CRT in law journals, 2010s.

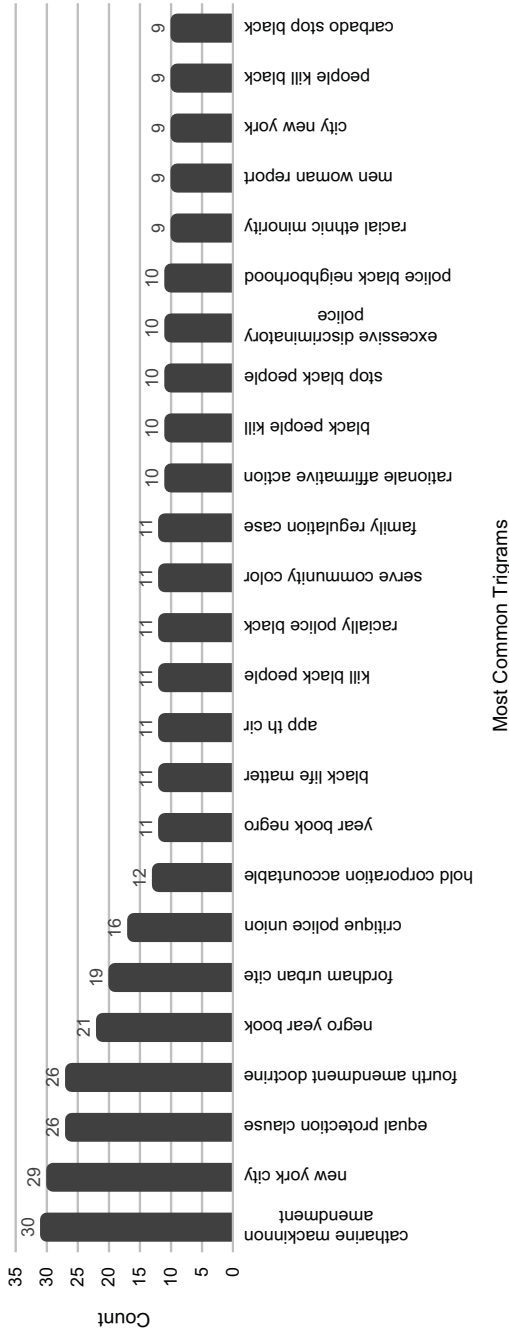


FIGURE 1.12 Common trigrams associated with mentions of CRT in law journals, 2020–2022.

sexual orientation,” and “brown board education.” All appeared more than 100 times in relation to CRT. As a whole, the trigrams from the 1990s suggest an emphasis on both common issues of race and the law and intersectionality. In the 2000s, the most common trigram once again is “equal protection clause,” followed this time by “brown board education.” These trigrams suggest that the work published in these gatekeeper journals in this decade focused more on specific people and historical events and addressed intersectionality between race, gender, and sexual orientation far less. In the 2010s, “equal protection clause” remains the most common trigram, appearing with CRT more than twice as often as the next most common trigram, “marginal whiteness framework,” which is closely followed by “major life activity” and “brown board education.” These trigrams suggest a shifting focus toward the construct of race. This is also the first decade where criminal procedure appears on the list of most common trigrams. The final set, which only covers 2020–2022, suggests a significant shift in 2020 that coincides with the resurgence of the Black Lives Matter movement after George Floyd was killed by police. Although the two most frequent trigrams are a scholar and a place, and “equal protection clause” remains one of the most common trigrams, “black life matter” is the tenth most frequent trigram, and for the first time there are multiple trigrams that reference the killing of Black people by police and discriminatory treatment by police.

Although CRT was not mentioned by name in prior confirmation hearings, a look at the topics commonly addressed in conjunction with CRT in law journals over time does share some commonalities with the most common words used in conjunction with race in Supreme Court confirmation hearings. They share an emphasis on the equal protection clause, the pivotal court case of *Brown v. Board of Education*, the policy of affirmative action, and, at least in the 1990s, an emphasis on the intersectionality of race, gender, and sexual orientation. Yet, the trigrams for mentions of race during Justice Jackson’s confirmation hearing have no overlaps with the trigrams for the law journals since 2020, nor any significant overlaps with the trigrams for law journals in the previous decades.

Critical Race Theory on C-SPAN

Beginning in the 1990s, C-SPAN offered its viewers occasional opportunities to learn about CRT. According to our search of the C-SPAN API, the first mention of critical race theory on C-SPAN was in a 1995 conference panel sponsored by American University Washington College of Law that offered viewers the chance

to learn insights from a recent article on CRT published in the *California Law Review* (C-SPAN, 1995, 1:25:18). Thus, just six years after the first CRT workshop in 1989, C-SPAN began offering its viewers opportunities to learn about CRT.

Figures 1.13 to 1.16 display trigrams by decade for mentions of CRT on C-SPAN. Most of the CRT mentions we found in the 1990s occurred at events held at law schools or hosted by legal organizations that C-SPAN chose to air. While the trigrams for this decade contain a lot of noise, the frequency of mentions of law journal, law school, law professors, and law school classroom suggest that C-SPAN viewers' opportunities to learn about CRT in this decade, as limited as they were, were heavily influenced by the field of law. Over the next decade, references to law school remain commonplace in the trigrams. Mentions of CRT typically occur during academic panels, during forums, or on book-focused programming. Between 2010 and 2020, the number of references to CRT increased but averaged less than three mentions per year. For the first time, a handful of these mentions occur outside academic contexts. Martin Luther King and the civil rights movement appear prominently. Much of the language is consistent with academic panels, and Harvard Law School appears on the list of most frequent trigrams. Yet, in this decade "supreme court justice" is also the 15th most common trigram used in conjunction with "critical race theory."

The vast majority of mentions of CRT on C-SPAN occur after 2019, with 929 mentions of CRT on C-SPAN between 2020 and 2022. CRT is talked about in academic panels, but also on the House and Senate floor, in presidential and gubernatorial debates, during campaign rallies, and on C-SPAN hosted shows and call-in programs. In this decade, the most frequent trigram appearing in conjunction with "critical race theory" is "equal right amendment," followed by "united state america," "best interest child," "would like see" and "difference men woman." The trigrams suggest that CRT was frequently discussed in conjunction with gender issues and discrimination on the basis of sex. This has similarities to the trigrams for discussions of race in Supreme Court confirmation hearings. In addition, "school board meeting" makes an appearance on the most common trigrams list, as does "supreme court justice." The latter references may be particularly significant. Supreme Court justice appearing in the trigrams for critical race theory on C-SPAN in both the period 2010–2019 and 2020–2022 suggests that the two are beginning to be discussed with some frequency in relation to each other. This provides some foundation for frequent C-SPAN viewers to expect CRT to be a subject for discussion in Supreme Court confirmation hearings.

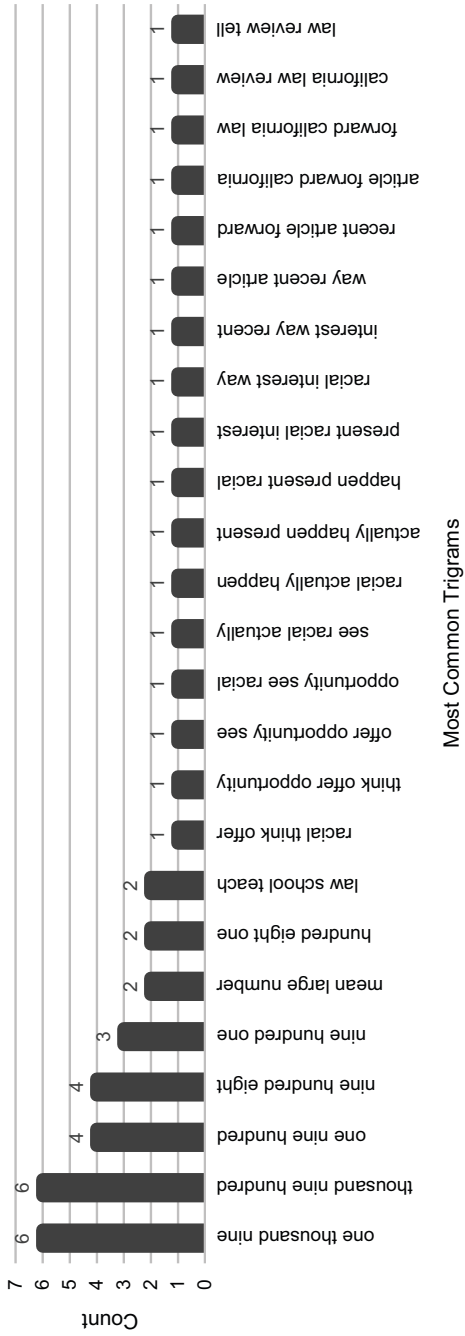


FIGURE 1.13 Common trigrams associated with mentions of CRT on C-SPAN, 1990s.

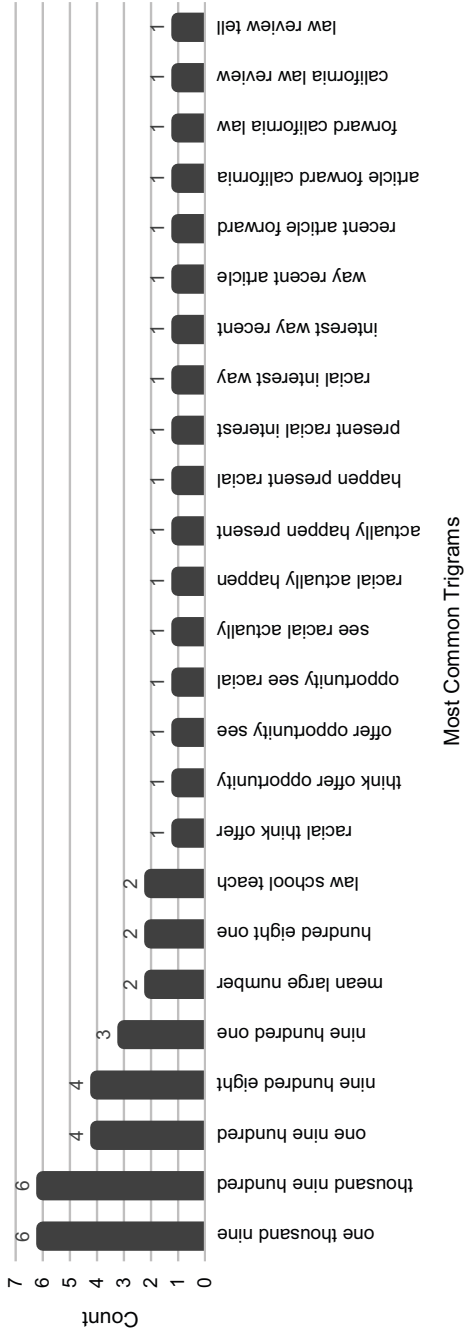


FIGURE 1.14 Common trigrams associated with mentions of CRT on C-SPAN, 2000s.

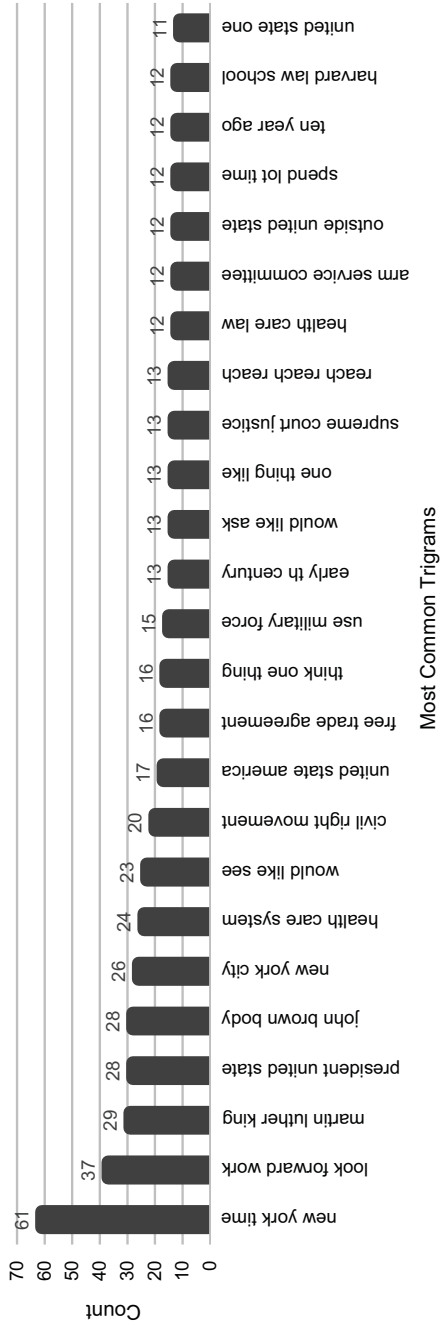


FIGURE 1.15 Common trigrams associated with mentions of CRT on C-SPAN, 2010s.



FIGURE 1.16 Common trigrams associated with mentions of CRT on C-SPAN, 2020–2022.

Critical Race Theory on Fox News

Using the GDELT Television Explorer API, we collected every clip appearing on the Fox News Channel that mentioned critical race theory.¹¹ Each clip's transcript and metadata, such as show name and original airtime, were downloaded, converted to tabular data, and prepared for analysis by removing stop words and irrelevant domain-specific terms. In the period of 2009–2022, we found that over 99.5% of Fox News's mentions of CRT occurred after 2019. Altogether, between 2009 and the end of 2019, we located less than 30 mentions of CRT on Fox News. The earliest mentions we found of CRT on Fox News through the GDELT database were on Glenn Beck's show in 2010 and 2011. One of these suggested a link between CRT at the University of Arizona and a local school district. In 2012 and 2013, the number of shows referencing CRT grew but mentions remained sparse. These mentions usually included references to Derek Bell or to liberation theology. In early 2013 there is a reference to CRT allegedly being taught in a high school and references to it allegedly being used by juries. In 2015 there are two references on *Fox and Friends* to CRT being taught in a university, and in 2019 there are references to CRT in a discussion of whether math can be racist. Much of the discussion is highly negative. For example, Derek Bell was mentioned in conjunction with CRT on three different Fox News shows airing in March 2012.¹² On one he is referred to as “a pretty radical guy” having “some far out theories” (*The O'Reilly Factor*, 2012), and another labels him “this leftist kook Derek Bell that embraced this critical race theory that has been described as anti-constitution, anti-American” (*America Live*, 2012).

References to CRT increased dramatically after 2019. Between January of 2020 and June of 2022, we located over 6,000 mentions of CRT on Fox News. Figure 1.17 displays the trigrams used most frequently in conjunction with “critical race theory.” Strikingly, all 25 of the most common trigrams used in conjunction with CRT relate to schools. The first three—“parent school board,” “school board parent,” and “parent push back”—all seemingly urge parents to go to school board meetings and push back against CRT in schools. Discussions of CRT as a legal doctrine were rare. In fact, there were only a few mentions of courts or the judicial system in conjunction with CRT until the nomination of Ketanji Brown Jackson to the Supreme Court. Given the Fox News coverage of CRT, regular Fox News viewers were likely to see CRT as a growing cause for concern, especially in the nation's public school system. Yet, they would have had very little reason to connect CRT with the Supreme Court prior to Justice Jackson's nomination.



FIGURE 1.17 Common trigrams associated with mentions of CRT on Fox News.

IDENTIFYING WHAT INFLUENCED MENTIONS OF CRT DURING JUSTICE JACKSON'S CONFIRMATION HEARING

Critical race theory was, by far, the most common topic referenced in conjunction with race during Justice Jackson's confirmation hearing. The evidence suggests that television coverage rather than developments within the field of law drove the sudden emergence of CRT as a topic of discussion during this hearing. Attention to CRT in law journals associated with prominent law schools had been declining since its peak in 1997.¹³ If senators were taking their cues from these journals, CRT should have appeared as a topic of discussion in confirmation hearings long before Justice Jackson's hearing, and it should have been less likely to emerge during her hearing than during the hearings for justices nominated during most of the 1990s and early 2000s. In contrast, an astronomical increase in attention to CRT on television occurred after 2019. Mentions of CRT on C-SPAN in 2020–2022 were roughly 17 times higher than the number of mentions between the start of C-SPAN coverage and 2019. Meanwhile, there were more than 200 times the mentions of CRT on Fox News in 2020–2022 as there had been on Fox News in the period of 2009–2019. Before 2020, most regular viewers of these networks would have heard no more than a handful of references to CRT, but by the time Judge Jackson was nominated, CRT was a fairly regular topic of discussion on Fox News.

Comparisons of content also suggest that it was television, and particularly Fox News, driving how CRT was discussed during Justice Jackson's confirmation hearing. The trigram for mentions of race during her confirmation hearing, discussed previously, already hints at that as 3 of the 12 most frequently mentioned trigrams in conjunction with race involved schools—private schools, public schools, and “school critical race.” Schools were not commonly mentioned in conjunction with CRT in “gatekeeper” law journals. *Brown v. Board of Education*, an important legal precedent that helped dismantle de jure segregation in public schools, was the only reference related to schools that appeared in the trigrams for critical race theory in law journals.

While there are very few overlaps between the trigrams for our law journal CRT mentions dataset and the C-SPAN CRT mentions dataset, it is clear both from the early C-SPAN trigrams and the programs within which CRT mentions occurred that C-SPAN coverage of CRT has been heavily influenced by the field of law. Yet, as mentions became more common, the content of these mentions begins to shift. The only references to schools appearing in the top 25 trigrams

for CRT on C-SPAN prior to 2020 are mentions of law schools. However, “school board meeting” does appear as the 13th most common trigram in conjunction with “critical race theory” on C-SPAN between 2020 and 2022.

Meanwhile, all 25 of the most common trigrams for CRT on Fox News involve schools. CRT was a growing focus of attention on Fox News, and its viewers were particularly likely to hear about this theory in relation to schools. This creates incentives for senators wishing to appear on Fox News to bring up CRT in relation to schools during Justice Jackson’s confirmation hearing. Multiple Republican senators did so, including Senator Marsha Blackburn (R-TN) and Senator Ted Cruz (R-TX). To assess how well these attempts succeed in gaining airtime, we used the GDELT Television Explorer tool to collect the percentage of airtime for each Republican senator on the Senate Judiciary Committee in the 17-day period prior to Justice Jackson’s confirmation hearing, and the 17-day period from the start of confirmation hearings through the confirmation vote, and calculated the percentage change between the two periods.¹⁴ These results are provided in Table 1.2.

Senator Chuck Grassley (R-IA), the ranking minority member of the committee, enjoyed a 630.3% increase, but his total coverage still lagged behind media savvy Senator Lindsey Graham (R-SC). Graham, while receiving more coverage than other senators, actually saw a decrease in coverage during the confirmation

TABLE 1.2 *Republican Senators’ Success at Attracting Fox News Coverage*

Republican members of the Senate Judiciary Committee	Mentions on Fox News prior to confirmation hearing (March 4–20, 2022)	Mentions on Fox News from confirmation hearing to confirmation vote (March 21–April 7, 2022)	% Change in mentions
Marsha Blackburn (R-TN)	0.0106	0.0327	308.5
John Cornyn (R-TX)	0.0079	0.0126	159.5
Tom Cotton (R-AR)	0.0463	0.0693	149.6
Ted Cruz (R-TX)	0.0317	0.0819	258.3
Lindsey Graham (R-SC)	0.1653	0.1272	-23.0
Chuck Grassley (R-IA)	0.0066	0.0416	630.3
Josh Hawley (R-MO)	0.0132	0.0504	381.8
John Kennedy (R-LA)	0.0225	0.0139	-38.0
Mike Lee (R-UT)	0.0079	0.0214	270.8
Ben Sasse (R-NE)	0.0093	0.0139	149.5
Thom Tillis (R-NC)	0.0040	0.0020	-50.0

hearing. Aside from Grassley, the four most successful of these senators in generating increases in attention were Josh Hawley (R-MO) at 381.8%, Marsha Blackburn (R-TN) at 308.5%, Mike Lee (R-UT) at 270.8%, and Ted Cruz (R-TX) at 258.3%. Meanwhile, in terms of overall mentions during the confirmation hearing, after Graham, Cruz drew the most attention, followed by Senators Cotton (R-AR), Hawley, Grassley, and Blackburn.

Aside from Graham and Grassley, there is substantial overlap between those senators that engaged in the most aggressive questioning and those that successfully generated the most media attention. Through a combination of emphasis on CRT, sentencing in child pornography cases, and other topics, these senators managed to attract substantial attention on Fox News. The frequent linking of these topics is apparent in the trigrams for critical race theory in Justice Jackson's confirmation hearing, displayed in Figure 1.18. The most common trigram, "law school note," refers to a law school note Jackson had written about sex offender registration laws. Several Republican senators attempted to use this in their claims that she was soft on child pornography offenders, and "assume child pornography," "child pornography offender," and "pornography offender pedophile" were the 8th through 10th most common trigrams used in close conjunction with "critical race theory" during her confirmation hearing. Senator Hawley led the initial charge on this issue, while Senators Blackburn, Cruz, and Lee, all made this a prominent part of their questioning. The second most common trigram, "georgetown day school," referenced the school Justice Jackson's children attended, which Senator Cruz used to try to link Justice Jackson to CRT. This provided an opening to make CRT in schools, a frequent focus of Fox News, a subject of discussion at the confirmation hearing. Meanwhile, the sixth most common trigram, "allow biological male," provides evidence that transgender issues, another topic often discussed on Fox News, were also frequently brought up in close conjunction with CRT. Senator Blackburn devoted significant attention to this in her statements and questions during the hearing.

The following clip from Senator Blackburn's opening statement provides an example of how she tied multiple salient issues together to successfully triple the amount of attention she received on Fox News during the hearing period compared to the period before it.

You once wrote that every judge has, and I quote, personal, hidden agendas, end quote, that influence how they decide cases. So I can only wonder, What's your hidden agenda? Is it to let violent criminals, cop killers, and child predators back to the streets? Is it to restrict parental rights and expand government's

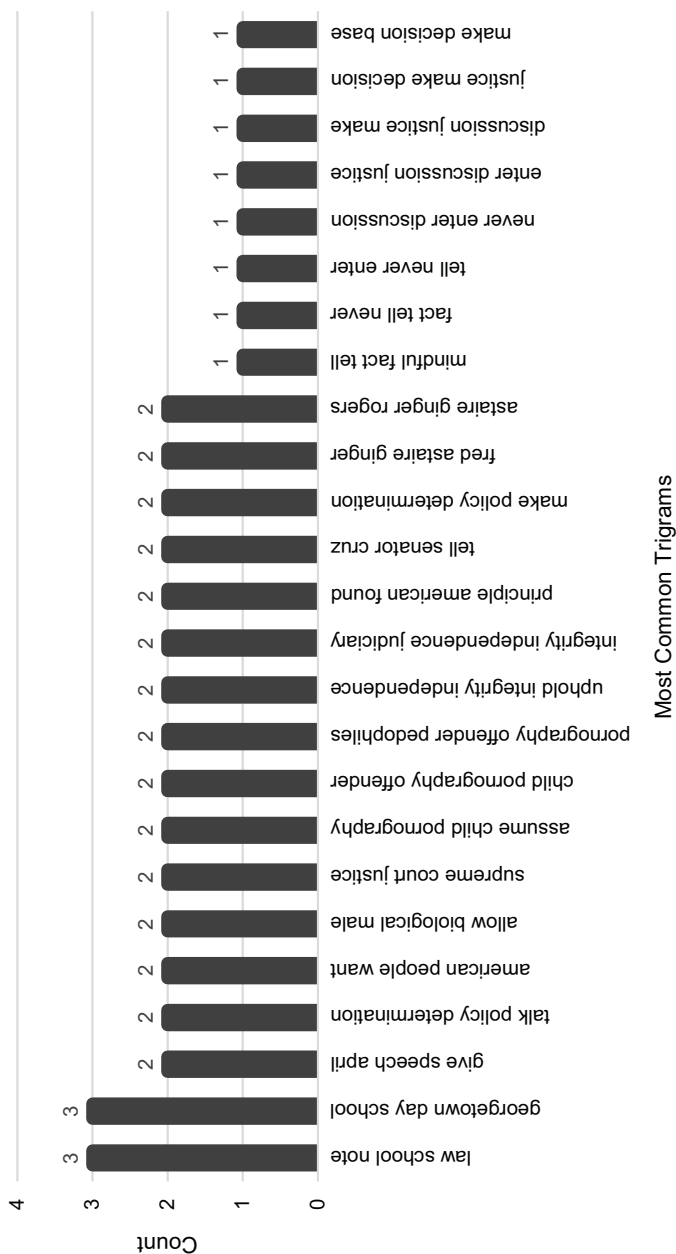


FIGURE 1.18 Common trigrams associated with mentions of CRT during Jackson hearing.

reach into our schools and our private family decisions? Is it to support the radical left's attempt to pack the Supreme Court? You have praised the 1619 project, which argues the U.S. is a fundamentally racist country, and you have made clear that you believe judges must consider critical race theory when deciding how to sentence criminal defendants. Is it your personal hidden agenda to incorporate critical race theory into our legal system? These are answers that the American people need to know. (C-SPAN User, 2023)



The programming decisions of Fox News offers senators different incentives than does C-SPAN. C-SPAN offers its viewers live, continuous coverage of Supreme Court confirmation hearings and little mediated programming related to it, aside from when viewers raise questions during open phone programming. Viewers' exposure to senators' comments and questions typically occurs live and unfiltered, with senators receiving the same proportion of airtime as the proportion of the hearings in which they hold the floor. Meanwhile, Fox News emphasizes mediated programming more, via its news shows and shows where hosts discuss current events. These shows package key moments from the hearings, showing brief clips and discussing what happened. This results in a much wider range in the amount of coverage senators asking questions receive. Figure 1.19 compares the amount of airtime senators received on C-SPAN during the confirmation period to the amount of airtime they received on Fox News.¹⁵ Senators Graham, Cruz, Cotton, Blackburn, and Grassley all managed to successfully attract a substantially greater share of coverage on Fox News than they did on C-SPAN. Among these senators, the proportion of Fox News to C-SPAN coverage for Cotton and Blackburn were exceptionally large. They joined Cruz and Hawley in launching targeted attacks involving issues of race, critical race theory, and child pornography sentencing, or some combination of these issues. Senator Cotton added extensive questioning on crime and law and order issues, while Senator Blackburn added transgender issues to her line of questioning. By using the hearing to broach frequent subjects of discussion on Fox News, they were disproportionately rewarded with airtime.

In addition to attracting media attention, these lines of questioning may have also been an attempt to make the nomination toxic for other Republican senators to support. Here, there is far less evidence of success. At the end, Justice Jackson was confirmed to the Supreme Court with a vote of 53–47 on April 7, 2022, with support from just three Republican senators (U.S. Senate, 2022). This matched the amount of support she had received the prior year when she was confirmed

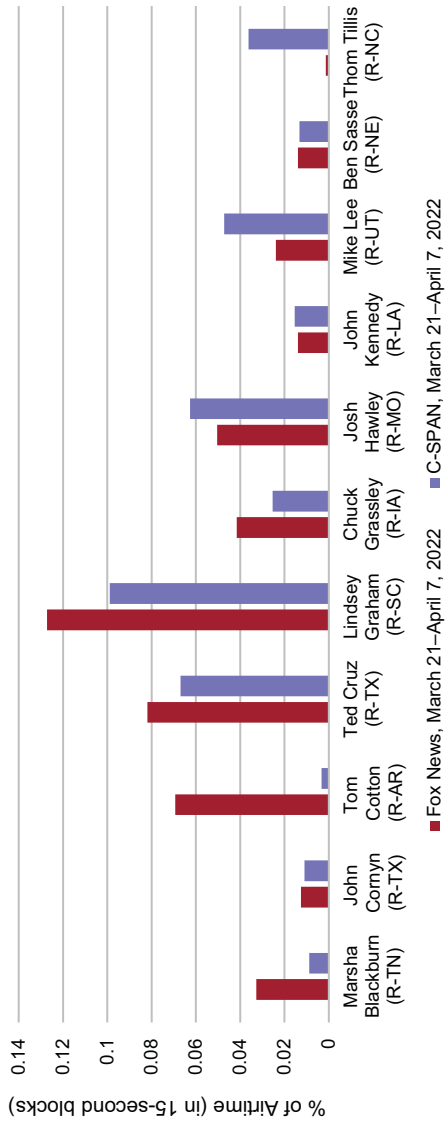


FIGURE 1.19 Republican senators' success in amplifying attention on Fox News over C-SPAN (March 21–April 7, 2022).

to be U.S. circuit judge for the District of Columbia Circuit, when there were not televised hearings and critical race theory and sentencing for child pornography went unmentioned. However, in 2021 there were also three Republicans that did not cast a vote, making that confirmation vote 53–44 (U.S. Senate, 2021). Senator Lindsey Graham (R-SC) switched his vote from yes for circuit court to no for the Supreme Court, Senator Mitt Romney (R-UT) switched his vote from no to yes, and Senators Susan Collins (R-ME) and Lisa Murkowski (R-AK) supported her in both votes. Meanwhile, Senators Blunt (R-MO), Rubio (R-FL), and Sasse (R-NE) did not cast a vote for the circuit court nomination but voted against her Supreme Court confirmation. Thus, while there were a few changes in individuals' votes, she had the same amount of support in both confirmation votes.

CONCLUSION

The discussions of race during Justice Jackson's confirmation hearing marked a significant departure from discussions of race during prior Supreme Court confirmation hearings. Analysis of trigrams in previous televised confirmation hearings suggests significant senator interest in learning how prospective justices might rule on cases involving discrimination on the basis of both race and gender. Questions often focus on the equal protection clause of the Constitution and landmark civil rights cases and legislation. Aside from a few mentions of the Voting Rights Act, when race came up explicitly in Ketanji Brown Jackson's confirmation hearing, it was almost always in the context of CRT, a topic she had mentioned only once in passing in a prior speech.

Critical race theory, like other lenses for judicial interpretation, may be a relevant topic for discussion in a Supreme Court confirmation hearing, but the way it emerged in Justice Jackson's confirmation hearing had little to do with its relevance to the law. We found scant evidence that senators' sudden interest in it was driven by a growing prominence within the law journals of the institutions that have commonly served as the proving grounds for Supreme Court justices, their law clerks, and the senators serving on the Judiciary Committee. Further, the way it was talked about, and the topics raised in conjunction with it, bore little resemblance to how CRT is talked about in these journals. Instead, the sudden emergence of it during Justice Jackson's confirmation process closely follows its sudden rise to prominence as a subject of discussion on television, and more particularly, on Fox News.

The attempts to link Ketanji Brown Jackson to lightning rod issues for conservatives follows the tactics opponents to a nomination typically use—trying to connect the nominee to controversial issues, accusing them of bias or extremism, and spreading that controversy outside the Senate chambers (Gibson & Caldeira, 2009; Kurtz et al., 1998). Yet, the topics opponents selected for these attacks seem made for television, and we found evidence that the senators who launched them received substantially higher attention on Fox News as a result. Rather than discussing CRT as a potential lens for legal interpretation, it was tied to how Fox News audiences were most accustomed to hearing about it—in schools. In addition, during the confirmation hearing CRT was often mentioned in the same breath as other frequent hot-button issues on Fox News, and the senators who did so were particularly successful in amplifying the amount of coverage they received on Fox News compared to the amount on C-SPAN. The competition for sound bites on limited coverage of hearings increases incentives for this behavior compared to networks like C-SPAN that provide complete coverage without mediation.

Justice Jackson survived these attacks and was successfully confirmed to the Supreme Court, yet these attacks carry potentially serious costs. Nominees to the Supreme Court have long been coached not to engage with the attacks launched against them, nor vigorously defend themselves from these attacks, lest they be seen as not possessing the proper temperament for a judge. This can be particularly damaging for both female nominees and for members of racial and ethnic minorities. It forces these nominees to experience what is sometimes thinly veiled, or even overt, sexism and racism from those who see them as somehow less qualified to serve on the bench because of these characteristics (Bennett, 2018; Boyd et al., 2018). Boyd et al (2018, p. 895) found that “as predicted by out-group theory and prior studies of gender bias in hiring, male senators grill female nominees on their judicial philosophies—questions representing the core professional skill expected of U.S. Supreme Court justices—more so than they press male nominees.” They warn that this

serves to perpetuate negative stereotypes that male judges are more believably prepared to serve in the judiciary and, specifically, as Supreme Court justices. As more and more female and minority nominees participate in the confirmation process, this differential treatment could cast the legitimacy of the process and the Court itself into doubt, particularly if there is not a corresponding increase in female and minority senators (another high-profile and strongly

white, male stereotyped profession) capable of reducing the out-group dynamics. (Boyd et al., 2018, pp. 895–896)

Of the 22 members of the Senate Judiciary Committee faced by Justice Jackson, only four are female—Senators Dianne Feinstein (D-CA), Amy Klobuchar (D-MN), Mazie Hirono (D-HI), and Marsha Blackburn (R-TN)—one is Black (Senator Cory Booker, D-NJ), and one is Hispanic (Alex Padilla, D-CA). The limited diversity of the Senate Judiciary Committee leaves ample room for such out-group dynamics, intentional or not, to operate.

When Thurgood Marshall's suitability for the Supreme Court was questioned, there were Democratic senators who used their hearing time to help come to his defense, but Marshall had to quietly endure these attacks first (Boyd et al., 2018; Heath, 2015). When Sonia Sotomayor was charged by senators from the opposition party with being too "temperamental" or "excitable," senators from the president's party emphasized her judicial restraint, yet she still had to maintain her cool in the midst of aggressive questioning, and exercise restraint while her identity was questioned, lest she give them an example of the behavior they deemed inappropriate for the Court (Bennett, 2018; Chinn, 2019). Similarly, Senators Booker and Klobuchar, along with Senate Judiciary Committee chair Dick Durbin (D-IL) were among those who most consistently supported Justice Jackson against attacks from their Republican colleagues, but she still had to sit through them rather than directly engage. In each instance, senators insisted these were about issues and substance rather than race. Senator Cruz, in his opening statement stated, "We will see Democrats in the media suggest that any senator skeptical of your nomination that questions you vigorously, or dares to vote against you, must somehow harbor racial animus" and argued that Democrats had done the same thing to minority nominees to the courts nominated by Republican presidents, including Justice Clarence Thomas (C-SPAN, 2022a, 1:34:48). While the interplay of motivations behind attacking a nominee's suitability for the bench can at times be difficult to entangle, it bears asking how television viewers, perhaps already predisposed to see these nominees as less qualified, react to these attacks. Future research should investigate how these attacks affect the public's confidence in Supreme Court justices, as well as how discussions of race in confirmation hearings shape viewers' understanding and opinions about race and the law.

Legal scholars, political scientists, and pundits alike have called for reforms to the Supreme Court confirmation process (see, e.g., Brust, 2009; Farganis & Wedeking, 2014; Fein & Reidinger, 1991; Stone, 2011; Strauss & Sunstein, 1992).

The question of who is to blame remains open for debate—the nominees sidestepping or refusing to answer questions or the senators trying to play “gotcha” to score political points. While many of the calls to reform the process focus on the problem of vague answers from Supreme Court nominees,¹⁶ others emphasize how senators’ apparent efforts to get attention on television (and social media) also pose serious issues. We found evidence that senators who connected their attacks to multiple lighting rod issues for conservatives during Justice Jackson’s confirmation hearing were particularly effective at gaining airtime on Fox News. As long as senators get rewarded with airtime for these, and can broadcast to similarly minded constituents that they are leading the charge in addressing these issues, this practice is unlikely to change. To limit senators from treating the hearings “as an opportunity to create a spectacle in which to wage political war” (Stone, 2011, p. 466), Stone suggested having professional counsel instead of senators asking questions. Yet, this would require senators being willing to give up their chance to win coveted airtime. Television network practices can also change incentives. When airtime is freely available, and the complete hearings are broadcast and viewed, senators have reduced enticement to use incendiary questioning to secure airtime. However, selective and highly mediated coverage of Supreme Court confirmation hearings not only encourages senators to compete for limited television time, but it also provides the audience a skewed view of the nominee.

APPENDIX: METHODOLOGY

Data collection, processing, and analysis for this project was done using the Python programming language and several scientific computing and natural language processing libraries, including Pandas, NLTK, Scikit-learn, and Gensim.

Data Collection

Four main datasets were used for the text analysis in this project: partial transcripts of C-SPAN broadcasts from 1980 to 2022 in which “race” was mentioned, including all Supreme Court confirmation hearings within that time frame, C-SPAN broadcasts over the same period in which “critical race theory” was mentioned, also including confirmation hearings; partial transcripts of Fox News broadcasts from 2009 to 2022 mentioning “critical race theory”; and full text of

articles, abstracts, and reviews from select law journals mentioning “critical race theory” between 1981 and 2022. These datasets were retrieved using both programmatic and manual methods.

The C-SPAN transcript datasets were retrieved programmatically from the C-SPAN Video Library API utilizing the “mentions” endpoint, which allows API consumers to search programming for keywords or phrases. The endpoint was queried for both “race” and “critical race theory” separately, each search returning partial transcripts in which these phrases appeared. To obtain all possible results for these searches efficiently, the entire period of study from 1980 to 2022 was split into smaller six-month time frames, and queries for each topic were made to the API for every six-month period. The results from the API were returned in paginated form, with 20 results per page. Each page was requested in succession until all possible results had been downloaded per six-month period. Finally, all results were formatted and combined into tabular data with one mention, or partial transcript, and its metadata per row. API requests were made using the Python requests module, and datasets were stored and examined in tabular form using Pandas.

We used the GDELT 2.0 Television API¹⁷ to obtain transcripts of Fox News broadcasts related to CRT. The GDELT API provides access to data from the Internet Archive’s Television News Archive. This archive stores television broadcasts as 15-second clips. Using the API, the clips can be searched for mentions of a specific keyword or phrase, with any clip containing those topics returned by the API. Using “critical race theory” as a search term, the API was programmatically queried for all 15-second clips originating in Fox News broadcasts. To obtain complete results efficiently for the time frame for which data are available (2009–2022), this was split into one-month segments and each segment was queried in succession until a complete set of results was downloaded. The results were then formatted and combined into tabular data with one 15-second clip transcript and its metadata per row.

Articles, abstracts, and reviews related to CRT in selected law journals published between 1981 and 2022 were obtained from JSTOR. The search term “critical race theory” was used in JSTOR’s advanced search interface, and results were limited to the following: *California Law Review*, *Columbia Law Review*, *Duke Law Journal*, *Harvard Law Review*, *Michigan Law Review*, *Stanford Law Review*, *The University of Chicago Law Review*, *University of Pennsylvania Law Review*, *Virginia Law Review*, and *The Yale Law Journal*. The search yielded 578 results,

with each result downloaded manually as a PDF document. The PDF files were then parsed into plain text programmatically, formatted, and combined into a single tabular dataset with one article and its metadata per row.

We also used GDELT and JSTOR to collect the volume of coverage devoted to critical race theory. These data were used to compare attention paid to the topic in Fox News coverage, C-SPAN coverage, and select legal journals. For a measure of attention paid by law journals, a simple count of the articles found using JSTOR's advanced search, grouped by date, was used. For measures of attention paid by Fox News and C-SPAN, the GDELT 2.0 Television API was queried for volume data. The API provides a measure of coverage devoted to a topic by calculating the number of 15-second clips that mention that topic and representing that count as a percentage of the total count of 15-second clips within a selected time frame. For the entire period of study, 2009 to 2022, the API returns this data in monthly resolution, or as a percentage of coverage devoted to a search term for each month within the overall time frame. The search term "critical race theory" was used to query the API for Fox News coverage volume, then C-SPAN coverage volume. The datasets were reformatted as tabular data with each month and its coverage volume percentage per row.

Finally, two additional datasets were created specifically containing transcripts from the C-SPAN Video Library of Supreme Court confirmation hearings. For each of the C-SPAN datasets—mentions of "race" as well as mentions of "critical race theory"—the entire set was queried by program title, a metadata property returned from the C-SPAN API referencing the name of the broadcast program from which the transcript originated. All transcripts associated with hearings were then isolated by their program titles and copied into new datasets: all mentions of "race" in Supreme Court confirmation hearings, and all mentions of "critical race theory" in confirmation hearings.

Data Cleaning and Preprocessing

After compiling the textual datasets, a series of preparatory steps were taken to enable analysis of the data. All text data, including transcripts from C-SPAN and Fox News broadcasts as well as journal article text, was prepared for natural language processing using standard methods. First, general stop words, or words that occur often in text but do not contribute to the text's meaning, were removed. We used NLTK's list of standard English-language stop words for this purpose. Punctuation, numerals, HTML, copyright notices, and malformed text

or other artifacts resulting from parsing PDF files were also removed, and common English-language contractions were converted into their full-word forms. Finally, remaining words in the textual data were lemmatized, or converted to their base dictionary form (e.g., “playing” becomes “play”), according to their part of speech. This process ensures that when performing operations such as counting word frequencies, different grammatical forms of a word are counted together. For example, “teaching,” “taught,” and “teach” all contribute to the same frequency count since they have been converted to their base form, “teach.” The resulting textual data was saved in a new column of the tabular data of each set.

In addition to the general list of stop words that were removed, extremely common words—those occurring in more than 95% of text documents in a dataset—were removed. This processing ensures that domain-specific language, such as that used to introduce a broadcast show, announce an ad break, or other frequently used terms that do not contribute substantive meaning to the texts do not influence analysis. Likewise, extremely uncommon words—those occurring in less than 5% of documents—were also removed to eliminate noise from the analysis. The resulting cleaned data was saved in a new column in the tabular datasets.

Analysis

To understand the frequency with which CRT was addressed in C-SPAN and Fox News coverage, we used the volume data returned by the GDELT API. A simple count of articles devoted to the topic of critical race theory over time was used to determine how often the subject was addressed in legal journals.

Several natural language processing techniques were used to understand the substance of CRT discussion in both media and journal articles. The first method used to understand how the subjects of race and critical race theory were discussed was to calculate the simple frequency of all three-word phrases, or trigrams, used in each dataset. Understanding which phrases are used most often in conjunction with the topics of study provides insight into the context and meaning of the discourse. In the analysis of each dataset, we programmatically counted all sets of three words appearing directly next to each other after the removal of stop words. Once the raw frequency counts were calculated, we ranked the trigrams from most occurrences to least and plotted the top 25 phrases with their counts in a bar chart. For this task, depending on the specific data being analyzed, removal of additional stop words was required to obtain meaningful trigrams. For example, when considering how the topic of race was discussed, we

isolated specific confirmation hearings and calculated trigram counts for each. It was clear from the trigrams that certain phrases were frequently used but did not contribute to the overall context and meaning of the discourse. Procedural phrases, such as those used to introduce a congressperson before they asked a question or that use the name of the nominee at the start of a question, showed up in the trigram count but gave no indication of question meaning or context. In the larger datasets, these types of phrases were filtered out due to their high frequency. For the smaller slices of data, however, we chose to examine the phrases that appeared to be noise using NLTK's concordance functionality, inspecting the larger context of their use within the data, and manually removing them from the dataset if they failed to contribute meaning to the examined text. For each tabular dataset we examined, we first converted individual transcripts into a single continuous corpus of text using NLTK's built-in Text class. Then, using the Text class's concordance function, we examined the use of each trigram within its broader context to understand its relevance. Any trigram that was clearly irrelevant to the meaning of the text was removed from the data. Trigram counts were calculated in this manner for several specific sets of data: all C-SPAN broadcasts in which race was mentioned, C-SPAN broadcasts in which critical race theory was mentioned, C-SPAN mentions of CRT by decade, mentions of race on C-SPAN during Supreme Court confirmation hearings, mentions of CRT on C-SPAN during hearings, Fox News broadcasts in which CRT was mentioned, Fox News mentions of CRT by decade, mentions of CRT in legal journals, and mentions of CRT in legal journals considered by decade.

Along with calculating the raw frequencies of trigrams within the data, we also found three-word collocations within each dataset using Python's NLTK library. Unlike the trigram frequency calculation, the words in these collocations do not necessarily occur directly next to each other within the text. Instead, the algorithm we used examined a moving window of ten consecutive words and found three-word sets that occur within those windows according to a measure of association, intervening words notwithstanding. NLTK's collocations module implements several measures of association for finding word collocations. The measure of association used in our analysis, a likelihood ratio test, is a measure of the probability that a set of words will occur together within a dataset against the probability that the words occur independently in the dataset (Dunning, 1993). The benefit of this measure of association is that it locates significant word collocations, even if those sets of words occur infrequently within a text corpus. Using the same process as was used in finding concordances of trigrams, we converted

the tabular data for each dataset into a single text corpus. NLTK's collocation module was used to find and score all trigram collocations according to the likelihood ratio association measure, with collocations containing repeated words filtered out. Trigram collocations were then stored in their own tabular dataset with each row corresponding to a single collocation, and columns corresponding to its likelihood ratio score, a raw count of its occurrence, and a ratio of its occurrence to the total count of occurrences of all collocations within the dataset. These trigram collocations served as an additional indicator of the substance of discussion within each examined dataset. Collocations for each data source, while not presented in the body of the essay, help support the conclusions reached from analysis of the trigrams. These results can be found in Tables 1.A.1–1.A.5.

Collocations also provide a mechanism for comparing how often particular topics are discussed between datasets. Using the trigram collocation data described above, we compared discussion of race in the Jackson confirmation hearing with the discussion of race in all other confirmation hearings. We used the trigram collocation data from each dataset to find common collocations that occurred in the pair of datasets being compared. For each collocation that occurred in both datasets, we used the frequency ratio of its use in the first dataset, then divided that number by the frequency ratio of its use in the second dataset, giving us a comparative score for each collocation's rate of use between datasets.

TABLE 1.A.1 Top Trigram Collocations Associated With Mentions of Race in Jackson Confirmation Hearing According to Likelihood Ratio

Collocation	Likelihood ratio
critical race theory	2,095.81
discriminate race theory	1,259.03
race theory critical	1,254.29
race theory talk	1,204.37
race theory never	1,199.44
race theory speech	1,191.87
race theory include	1,187.84
treat race theory	1,177.47
race critical theory	1,175.05
consider race theory	1,165.69

TABLE 1.A.2 Top Trigram Collocations Associated With Mentions of Race in All Confirmation Hearings Except Jackson According to Likelihood Ratio

Collocation	Likelihood ratio
equal protection clause	11,063.69
civil right act	8,510.20
thomas affirmative action	8,042.75
affirmative action remedy	7,931.26
affirmative action preference	7,895.11
affirmative action take	7,783.99
equal protection race	7,781.26
affirmative action gender	7,766.33
affirmative action practice	7,763.80
describe affirmative action	7,762.87

TABLE 1.A.3 Top Trigram Collocations Associated With Mentions of CRT on Fox News According to Likelihood Ratio

Collocation	Likelihood ratio
taught school board	5,422.38
parent school board	4,571.50
american school board	4,358.46
people school board	4,335.80
school board parent	4,335.46
white school board	4,241.59
school board American	4,237.35
teach school board	4,231.11
virginia school board	4,227.68
school board people	4,214.75

TABLE 1.A.4 Top Trigram Collocations Associated With Mentions of CRT in Jackson Confirmation Hearing According to Likelihood Ratio

Collocation	Likelihood ratio
georgetown day school	421.45
portion book baby	399.22
georgetown day magazine	380.97
antiracist portion book	376.21
georgetown day control	362.75
policy determination sentence	357.80
book baby portion	355.39
georgetown day curriculum	348.79
sentence policy determination	346.48
curriculum georgetown day	343.64

TABLE 1.A.5 Top Trigram Collocations Associated With Mentions of CRT in Legal Journals According to Likelihood Ratio

Collocation	Likelihood ratio
stigma affirmative action	37,4923.96
affirmative action admission	34,7487.45
rationale affirmative action	34,7193.83
diversity affirmative action	34,7026.88
affirmative action diversity	34,6896.19
affirmative action policy	34,6587.93
affirmative action debate	34,6583.55
opponent affirmative action	34,6569.51
debate affirmative action	34,6419.19
proposition affirmative action	34,6248.77

NOTES

1. As part of the Senate Judiciary Committee nominee questionnaire, nominees are asked to provide a copy of all published writings and public speeches. A search of the full text of her questionnaire, along with its 2,086 pages of attachments, yields only one mention of critical race theory (U.S. Senate Committee on the Judiciary, 2022a, 2022b). In a 2015 speech, Jackson had mentioned CRT as one of many academic disciplines that are relevant to studying sentencing policy.
2. The only open hearings that occurred during this period was for Justice Louis Brandeis in 1916 (Collins & Ringhand, 2016).
3. Note that these are some of the same issues that led to open public hearings after the confirmation of Justice Hugo Black.
4. Confirmation hearings are not the only venue through which senators seek to shape public opinion about nominees. One of the most influential sound bites against Robert Bork's nomination was uttered by Senator Edward Kennedy in a Senate floor speech the same day President Ronald Reagan nominated Bork, available at the C-SPAN Video Library (see Browning, 2016). In addition to floor speeches, senators may also use press conferences or take to social media to share their views on nominees. These communications are outside the scope of this research.
5. The number of statements and questions during the Bork hearing far exceeded this average (Farganis & Wedeking, 2014).
6. Additional methodological details describing the data collection and analysis processes used throughout this essay can be found in the essay appendix.
7. Meanwhile, our search of the C-SPAN transcripts suggests Rehnquist's hearing lacked attention to race.
8. Unfortunately, these law journals are not all available for the same time period via J-STOR. However, the drop apparent in Figure 1.5 cannot be solely attributed to the different end dates for which articles in these law journals were available via J-STOR, as the declining trend predates the drop-off in availability. That said, the figure likely undercounts mentions of CRT during the last six years. Thus, while it does not rule out some resurgence in the last few years, it does not reveal a trend consistent with growing attention from these gatekeepers.
9. The year 2009 is the first for which data are available through GDELT for Fox News.
10. The substance of mentions in these law journals may provide a limited picture of how CRT is talked about more broadly in the field of law. Journals specializing in issues of race and the law, such as *Columbia Journal of Race and Law*, or in critical

legal studies, such as *Law and Critique*, may well be a more welcoming home for CRT than those in our database and are likely to offer a more complete picture of CRT. Yet, we expect that those we identified as “gatekeeper” journals are those most likely to influence Supreme Court confirmation hearings, given the legal education of senators and those who serve on the court.

11. Data for Fox News content is not available through GDELT until 2009.
12. Rather than constituting a distinct mention, one of these three appears to simply play a clip from one of the other two shows.
13. Much of the growth and development of CRT within the field of law has instead happened outside these elite journals.
14. When a search for Thom Tillis yielded no results, we repeated a search for Senator Tillis and present those in Table 1.2. For all other senators we report the results of a search for their first and last name.
15. These data were collected using the GDELT Television Explorer. For all senators but Mike Lee, we report the results for a search of their first and last name. When Mike Lee came back with 0 for C-SPAN despite participating in the hearings, we searched again for Senator Lee and for Senator Tillis. Those results are presented in the figure. We do not expect similar changes in the searches for the other senators to significantly change the results presented in this figure as the differences for searches of Fox News for Mike Lee versus Senator Lee were minimal, as were those for Thom Tillis versus Senator Tillis.
16. Farganis and Wedeking (2014) find strong evidence that disputes the claim of growing evasiveness among nominees to the Supreme Court.
17. Access to the API is available at <https://api.gdeltproject.org/api/v2/summary/summary?d=iatv&t=summary>.

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