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Influences on Rhetoric in Qualified Immunity Cases: Race, Gender and Political Ideology of Circuit Court Judges and Supreme Court Justices from 1982-2021

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INTRODUCTION

When writing the Constitution, many of the Founders worried about the government having too much power over the country's citizens. To ensure the privacy and security of the country's citizens, the Founders decided to include the Fourth Amendment, guaranteeing "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] To further protect the country's citizens, the 42nd Congress passed the federal Civil Rights Act of 1871 as part of many post-Civil War legal developments. Otherwise known as 42 U.S Code, the Civil Rights Act of 1871 includes section 1983, which seeks to hold officials, "who, under color of any statute, ordinance, regulation, custom, or usage of any State...subjects...any citizen of the United States...to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws…"[2] liable to the injured party. Although it was rarely a factor in litigation for a century, Section 1983 gained prominence after the U.S Supreme Court's 1961 decision in *Monroe v. Pape*, in which the Supreme Court decided that a police officer can be held individually liable for their actions under the Civil Rights Act.

Since the 1980s, Section 1983 has been used to file lawsuits against government officials--particularly police officers--who have been accused by citizens of violating civil rights granted by the Bill of Rights that have been incorporated to state and local entities through the Fourteenth Amendment. The increase in litigation against government officials led the Supreme Court to hold that government officials are entitled to qualified immunity. This doctrine, commonly referred to as the Qualified Immunity Doctrine, shields individuals from criminal prosecution and lawsuits in an effort from the Court to balance the importance of protecting the

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[1] Madison , J. (2021, July 21). *Constitution of the United States*. U.S. Senate: Constitution of the United States. Retrieved February 15, 2022, from https://www.senate.gov/civics/constitution_item/constitution.htm#amendments
[2] Legal Information Institute. (n.d.). *42 U.S. Code § 1983 - Civil Action for deprivation of rights*. Legal Information Institute. Retrieved February 15, 2022, from https://www.law.cornell.edu/uscode/text/42/1983

rights of citizens and protecting government officials who are trying to do their jobs. The main goal of the Qualified Immunity Doctrine is to prevent the disturbance of responsibilities of government officials as trials pose a potential undue burden on an official's ability to do their jobs. Although the doctrine intends to have a positive outcome, it has recently had many consequences such as the protection of police officers after acts of police brutality, illegal searches and seizures, and false arrests.

After the Supreme Court's landmark decision in *Harlow v. Fitzgerald* (1982), Qualified Immunity suits have increased throughout the country. As such, scholars such as Professor Joanna Schwartz at the University of California, Los Angeles have become interested in expanding the field of judicial behavior to include Qualfiied Immunity. The consequences of the Qualified Immunity Doctrine on communities of color have increased in recent years, and as such it is important to study and understand the factors behind judicial-decisionmaking in qualified immunity cases. Are judges influenced by their race, gender, and political ideology when deciding whether to protect a police officer from lawsuits? If so, does a lack of diversity within and across these three categories create a disadvantage for potential victims of a police officer's behavior? The implications of answers to each of these questions are incredibly important as they shine light on the possibility of a biased judiciary. This paper serves as an opportunity to push the boundaries of judicial behavior literature through the analysis of a large caseload, decisions from the highest federal courts, and findings that may produce substantive implications for the future of the judiciary.

In recent years, accusations of police misconduct and brutality against citizens--most notably citizens from marginalized communities--have increased, leading to the establishment of organizations such as Black Lives Matter. As a result, multiple lawsuits have been filed in courts

at all levels around the country by organizations such as the American Civil Liberties Union. As victims of police misconduct and brutality seek financial compensation and criminal prosecution, the debate over the interpretation and application of qualified immunity has intensified--calling into question whether qualified immunity is meant to shield officials from "burdens associated with discovery and trial,"[3] or is a means to curb the civil rights protections of the country's citizens.

Therefore, I seek to expand upon the existing scholarship on judicial behavior by focusing on decision-making within Qualified Immunity cases. Are judges influenced by their race, gender, and political ideology when deciding whether to protect a police officer from lawsuits? If so, does a lack of diversity within and across these three categories create a disadvantage for potential victims of a police officer's behavior? Race, gender, prior professional experience, political ideology, social movements, and public opinion have all been shown to have an effect on the rhetoric judges and Justices use within opinions, concurrences, and dissents within different fields of law such as abortion rights, gender and riacl discrimination cases, and criminal cases.[4] These characteristics have yet to be incorporated into studies of judicial decisionmaking within the field of qualified immunity. The rhetoric of judges is important because each decision sets further precedent that future judges will rely on. Rhetoric is responsible for constraining or expanding upon current precedent. Whether the outcomes of said rhetoric are positive or negative, it is important to understand how judges are phrasing their decisions, and how this affects the outcomes of future qualified immunity cases. The goal of this paper is to analyze the rhetoric that judges and Justices have used in opinions, concurrences, and dissents within Qualified Immunity cases to determine how large of an affect the traits of a

[3] Harlow v. Fitzgerald (Supreme Court June 24, 1982).
[4] Harris, A. P., & Sen, M. (2019). Bias and Judging. *Annual Review of Political Science*, *22*, 241–259. https://doi.org/https://doi.org/10.1146/annurev-polisci-051617-090650

judge's and Justice's identity--along with public opinion and prominent social movements--have had on judicial decision-making, ultimately resulting in a determination of whether reform of the Qualified Immunity Doctrine is possible within the judiciary or not.

THE QUALIFIED IMMUNITY DOCTRINE: ESTABLISHMENT, EXPANSION, AND APPLICATION

A. Concerns over Litigation: Protecting Government Officials

As previously stated, the Supreme Court believes the Qualified Immunity Doctrine is meant to balance "the importance of a damages remedy to protect the rights of citizens against the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[5] This was not always the case. As with many statutes, laws, and doctrines, the interpretation of the Qualified Immunity doctrine has changed over time. Originally, the Supreme Court reasoned that qualified immunity was intended to shield government officials from financial liability. Fifteen years before the ruling in *Harlow v. Fitzgerald*, the Court ruled that law enforcement officials were entitled to qualified immunity from suits in *Pierson v. Ray* (1967).[6] In this decision, the Court found that qualified immunity can be used to shield government officials from financial burdens if the official was acting in good faith. The main concern of the Court at the time fell on whether police officers were able to perform their duties without the undue burden of a possible damages lawsuit: "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does."[7] The interest in protecting officials from financial liability is clear when reviewing the

[5] Schwartz, Joanna. "How Qualified Immunity Fails." *The Yale Law Journal*, vol. 127, no. 1, 2017.
[6] *Id*.
[7] *Id.*

scope of the qualified immunity defense. Qualified immunity cannot be used to defend municipalities, some private actors, and claims for injunctive or declaratory relief. The Court has ruled that municipalities and private actors--such as prison guards-- are not entitled to qualified immunity because neither is threatened by financial liability.

Fifteen years later, the Supreme Court's decision in *Harlow v Fitzgerald* (1982) expanded qualified immunity, honing in on "the diversion of official energy from pressing public issues," "the deterrence of able citizens from acceptance of public office," and "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[8] Following *Harlow*, the Court has continued to focus on protecting government officials from the burdens of discovery and trial, ruling that government officials can raise qualified immunity to defend against these burdens. In 1985, the Court reaffirmed *Harlow* in *Mitchell v Forsyth* (1985) stating that trial and pretrial matters, such as discovery, "can be peculiarly disruptive of effective government."[9] In 2009, the Court explained the importance of qualified immunity in defending against the discovery process and described the need to protect government officials from the burdens of discovery and trial as the "'driving force' behind [the] creation of the qualified immunity doctrine."[10]

B. Utilization and Application; Requirements for a Grant of Qualified Immunity

When the Supreme Court expanded qualified immunity, it also reviewed and changed the requirements a defendant had to meet to be granted a qualified immunity defense. From 1967 to 1982, a defendant raising qualified immunity had to show two things: (1) "his conduct was

[8] *Id.*
[9] *Id.*
[10] *Id.*

objectively reasonable," and (2) "he had a 'good-faith' belief that his conduct was proper."[11] The requirements, known as the subjective prong, were eliminated in the *Harlow* decision in which the Court established the prong was not compatible with the goals of qualified immunity as subjective intent was often unresolved before trial. The Court also stated that the gathering of evidence for the official's subjective motivation "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues.[12]" The Court believed eliminating the subjective prong would "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time."[13]

As the Court grew concerned over the burdens of litigation and involved itself in cases to interpret the Qualified Immunity Doctrine, it also began to decide the manner in which courts should analyze qualified immunity claims. Over time, the Court concluded that lower courts must answer two questions when analyzing qualified immunity--whether a constitutional right was violated, and whether that right was clearly established.[14] Though answers to these questions were requirements for qualified immunity, the order in which they are answered is unclear. In *Saucier v. Katz* (2001), the Court held that lower courts must first determine whether the defendant had violated the plaintiff's constitutional rights and then decide whether the right was clearly established.[15] In *Pearson v. Callahan* (2009), the Court reversed its decision in *Saucier* and held that the two-step process was not mandatory because it was "unduly burdensome."[16] As

[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

a result, lower courts are now allowed to not decide the first question as long as they can grant qualified immunity on the ground that the right was not clearly established.

C. Studies Pertaining to the Influence of Political Ideology on Judicial Decision-making

Constantly growing in importance, the question of how much influence political ideology has on judicial decision-making has been a focus of political science research for decades. Specifically, a large amount of research has focused on the influence of a President's ideology on his judicial nominee once on the bench. In 1971, Scigliano found that an estimated three-fourths of judges conformed to the expectations of the President by whom they were appointed. Similarly, Spaeth and Rohde (1976) found that between 1909 and 1971 less than one-quarter of judges voted "contrary to the desires of the President."[17] In 1982, Heck and Shull found a strong relationship between a President's support for civil rights and the voting behavior of the President's judicial appointees in racial equality cases.[18] The most important literature considered to be the foundation of the field of judicial behavior is Segal & Spaeth's attitudinal model. This model theorizes the "Supreme Court decides disputes in light of the facts of the case vis-á-vis the ideological attitudes and values of the justices."[19] This model has influenced the work of multiple scholars, leading to the development of algorithms which can predict Supreme Court decisions using Justice ideology and other case characters, as well as the discovery of panel effects showing that the ideological composition of three-judge panels affects the decisionmaking of judges on the panel.[20] In their article *Buyer Beware? Presidential Success through Supreme Court Appointments*, Segal et al. sought to provide better insight into concordance between a

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[17] Segal, J. A., Timpone, R. J., & Howard, R. M. (2000). Buyer Beware? Presidential Success through Supreme Court Appointments. *Political Research Quarterly, 53*(3), 557-573.
[18] *Id*.
[19] Segal, J. A., & Spaeth, H. J. (2008). *The Supreme Court and the Attitudinal Model Revisited*. Cambridge University Press.
[20] Harris, A. P., & Sen, M. (2019). Bias and Judging. *Annual Review of Political Science*, *22*, 241–259. https://doi.org/https://doi.org/10.1146/annurev-polisci-051617-090650

President and his Supreme Court appointees.[21] Using new data that gauges the preferences of Presidents from Franklin D. Roosevelt through Bill Clinton, Segal et al. examine concordance for Supreme Court appointments made between 1937 and 1994 while also taking into account the possibility that the judicial positions of the justices may change over time. Segal et al. found that although Presidents since Franklin Roosevelt have been successful in their Supreme Court appointments from a policy standpoint, this success is temporary because changes in judicial behavior diminish the long run impact of presidential appointments. Specifically, concordance between Presidents and their Supreme Court appointees is statistically insignificant after four terms on the bench when examining cases involving civil liberties. Through an analysis of presidential preferences, Nemacheck (2012) found that Presidents act strategically when choosing who to nominate for a Supreme Court vacancy.[22] Nemacheck states that a President who does not face opposition in Congress will nominate a candidate who shares similar ideological values and maximize the President's certainty of the nominee's future behavior. On the other hand, a President who faces Congressional opposition will focus on securing a candidate's confirmation instead of choosing a candidate who ideologically aligns with him.

D. Studies Pertaining to the Influence of Race and Gender on Judicial Decision-making

Increasingly as important is the question of how much influence race has on judicial decision-making. In recent decades, researchers have turned their attention to the race of judges presiding over cases, how a judge's race affects the outcome of a case, and whether the effects of race only impact the individual judge or a panel of judges as a whole. Though political scientists

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[21] *Id*.

[22] Nemacheck, C. L. (2008). Selecting Justice Strategy and Uncertainty in Choosing Supreme Court Nominees. In *Strategic selection: Presidential nomination of Supreme Court Justices from Herbert Hoover through George W. Bush* (pp. 3-18). Charlottesville: University of Virginia Press.

and legal scholars are determined to come to a conclusive and extensive finding on the relationship between race and judicial decision-making, the data required is scarce. The federal judiciary is mainly composed of white, male judges. *Examining the Demographic Compositions of U.S Circuit and District Courts*, a study by the Democracy and Government Reform Team at the Center for American Progress, found that as of November 18, 2019 “39 of the 91 Article III district courts entirely comprise white judges,” “active judges of color comprise at least half of the bench on only 13 district courts--14 percent,” and “just one district court--the District Court of Puerto Rico--entirely comprises judges of color.”[23] With such a small amount of diversity, many studies have faced external validity issues questioning whether the findings of race on judicial decision-making are well-founded and can be applied to the judiciary as a whole. Nonetheless, studies such as *Judging the Voting Rights Act* by Cox and Miles have been carried out in an effort to answer this important question. Cox and Miles find that “African-American judges are, on average, more than twice as likely as white judges to find that minority citizens' voting rights were violated,” “African-American judges vote in favor of liability more than half the time, while judges who are not African-American do so only about one-quarter of the time,” and “both Republican and Democratic appointees are substantially more likely to vote in favor of liability when they sit with an African-American judge than when they do not.”[24] Many judges and politicians are apprehensive toward such findings, claiming that judges and justices are meant to be impartial and only “call balls and strikes.” But, as the judiciary becomes more diverse and inclusive, some judges have decided to speak out on how race has affected their decision-making. In her lecture *A Latina Judge's Voice*, Justice Sotomayor speaks about her

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[23] The Democracy and Government Reform Team. (2020, February 13). Examining the Demographic Compositions of U.S. Circuit and District Courts. Retrieved December 5, 2020, from https://www.americanprogress.org/issues/courts/reports/2020/02/13/480112/examining-demographic-compositions-u-s-circuit-district-courts/

[24] Cox, A. B., & Miles, T. J. (2008). Judging the Voting Rights Act. Columbia Law Review, 108(1), 1-54.

upbringing as a Latina woman has shaped her view and understanding of the law, resulting in her decisions being different from those of her white counterparts.[25] In her tribute to Justice Marshall, *Thurgood Marshall: The Influencer of a Raconteur*, Justice O'Connor speaks about how her time on the bench with Justice Marshall has influenced her for the rest of her career because of his stories about his life and social inequality.[26]

Research studying the effects of demographic factors is relatively new compared to literature studying the influence of political ideology on decision-making. The Carter Administration became the first to prioritize the diversification of the federal judiciary, leading to the opportunity to incorporate demographic data such as gender and race into the field of judicial behavior. Professors Allison Harris, Pennsylvania State University, and Maya Sen, Harvard University, summarized research that has analyzed demographic factors to understand the nuances of judicial decision-making in their paper "Bias and Judging."[27] Harris and Sen state the "literature finds that gender is a predicitive factor in gender related cases…sexual harassment, reproductive rights, and sex- or gender-based discrimination."[28] Harris and Sen cite literature, such as Davis et al. (1993), which found "statistically significant differences between male and female appellate judges' in…search and seizure cases."[29] Also new to the current literature is the focus on the intersectionality of race and gender, especially on judges who are women of color. Collins and Moyer (2008) found that "nonwhite female judges are more likely to rule in favor of criminal defendants,"[30] an important finding that supports my analysis in this paper.

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[25] Sotomayor, S. (2009, May 14). Lecture: 'A Latina Judge's Voice'. *The New York Times*.
[26] Day O'Connor, S. (1992). Thurgood Marshall: The Influence of a Raconteur. *Stanford Law Review, 44*(A Tribute to Justice Thurgood Marshall), 1217-1220.
[27] Harris, A. P., & Sen, M. (2019). Bias and Judging. *Annual Review of Political Science*, *22*, 241–259. https://doi.org/https://doi.org/10.1146/annurev-polisci-051617-090650
[28] *Id.*
[29] Davis S, Haire S, Songer DR. 1993. Voting behavior and gender on the U.S. Courts of Appeals. Judicature 77:129
[30] Collins TA, Moyer L. 2008. Gender, race, and intersectionality on the federal appellate bench. Political Res. Q. 61(2):219–27

Not included in this paper because of constraints on time and resources are the effects female and nonwhite judges have on other judges they serve with–otherwise known as panel effects; specifically, panel effects indicate that "the presence of at least one female judge changes the voting behavior of her male colleagues."[31] Harris and Sen cite studies conducted by Farhang & Wawro and Peresie with find that having one woman on a three-judge federal appeals panel shifts the panel in support of the plaintiff in gender discrimination cases.[32] This paper presents the opportunity for scholars to expand upon my research and include an analysis of panel effects within qualified immunity cases viewed by federal appeals panels.

PRIOR RESEARCH ON QUALIFIED IMMUNITY

The most salient literature to date on Qualified Immunity is a series of essays published in the *Notre Dame Law Review* by a group of researchers and scholars. These essays, as a collection, seek to answer four questions: (1) "What would constitute a sufficient justification for the doctrine of qualified immunity," (2) is the doctrine necessary, and if so, what are its policy affects, (3) is it possible to change or remove the doctrine, (4) if there is no sufficient justification for the doctrine and it can be removed, what happens next?[33] These questions also serve as the foundation for this paper. The in-depth analyses of these scholars and researchers and the analysis I am conducting in this paper merge to develop a deeper understanding of the institutional implications behind the qualified immunity doctrine and judges' decision-making in qualified immunity cases. My approach and analysis are new to research within the field of qualified immunity. To support and better understand my findings, it is essential to look at and

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[31] Harris, A. P., & Sen, M. (2019). Bias and Judging. *Annual Review of Political Science*, *22*, 241–259. https://doi.org/https://doi.org/10.1146/annurev-polisci-051617-090650
[32] *Id.*
[33] Bray, S. L. (2018). Foreword: The Future of Qualified Immunity. *Notre Dame Law Review*, *93*(5), 1793–1796.

explain the literature that came before this paper and aided in my goal to expand upon the current view of judicial behavior within qualified immunity cases.

Before analyzing the rhetoric of any judge, the first step to understanding the Qualified Immunity Doctrine is to look back at its conception and ask whether there is substantial justification for the doctrine. In her paper "The Case Against Qualified Immunity," Professor Joanna Schwartz argues that qualified immunity is "ineffective at achieving its policy end...".[34] Professor Schwartz identifies multiple issues in the foundation of the Qualified Immunity Doctrine: (1) The doctrine has no basis in common law, and (2) the doctrine does not achieve its intended policy goals. Before the Supreme Court's landmark decision in *Pierson v. Ray* (1967), government officials were not able to claim a good faith defense against lawsuits. Government officials were allowed to petition for indemnification and avoid financial liability, but an official whose conduct was illegal was liable regardless of good faith. In *Pierson*, the Court established that good faith immunity can protect officials from liability, something that many scholars have deemed "inconsistent with the common law and many of the Court's own decisions."[35] The definition and application of qualified immunity then evolved in *Harlow*, in which the Court decided to focus on whether an officer's conduct was "objectively unreasonable" instead of relying on whether the officer acted with a "subjective, good faith belief that their conduct was lawful."[36] Following this decision, the Court has stated that a plaintiff must present precedent or a factually similar case in which every officer would know their conduct was unlawful. If the plaintiff succeeds, the officer is entitled to appeal the denial of qualified immunity. Additionally, qualified immunity can apply to any constitutional claim, not just claims in which the officer's good is relevant. Professor Schwartz states that "none of these aspects of qualified immunity can

[34] Schwartz, J. C. (2018). The Case Against Qualified Immunity. *Notre Dame Law Review*, *93*(5), 1797–1852.
[35] *Id.*
[36] *Id.*

be found in the common law when Section 1983 became law, or in *Pierson*."[37] The Court and its individual Justices have conceded that its jurisprudence cannot be grounded in the common law. In a concurrence, Justice Thomas stated qualified immunity should be in accordance with "the common-law background against which Congress enacted the 1871 [Civil Rights] Act,"[38] acknowledging that the doctrine has evolved far beyond the common law it was once claimed to stem from.

Professor Schwartz then goes on to explain how the doctrine has failed to achieve its intended policy goals. Citing her past research, Professor Schwartz finds that "a combination of state laws, local policies, and litigation dynamics ensures that officers are virtually never required to pay anything toward settlements and judgments entered against them."[39] Professor Schwartz finds that in 9225 cases involving qualified immunity plaintiffs were paid more than $735 million, but individual officers only contributed to settlements in 0.41% of cases, and paid 0.02% of the total awards. Local policies and state laws allow municipalities to take on the financial burden of officers. These findings show that the doctrine's first policy goal of protecting officials from financial burden is not achieved by the doctrine, but by municipalities and other policies that take on the financial burden an officer may face, allowing the officer to avoid financial liability without raising a successful qualified immunity defense. The doctrine's second policy goal of protecting officers from the burdens of litigation tells a similar story. In other prior research, Professor Schwartz reviewed 1183 lawsuits related to section 1983 and found that only seven cases (0.6%) were dismissed on qualified immunity grounds before discovery while 3.2% of cases were dismissed before trial. The doctrine, again, fails to achieve another of its policy goals, rendering it largely useless to officers. The final policy goal of the

[37] *Id.*
[38] *Id.*
[39] *Id.*

doctrine–to protect against overdeterrence–is also not achieved. Professor Schwartz points toward studies that have found: (1) officers do not worry about lawsuits and liability and (2) people are not deterred from becoming police officers because of fear of being sued. These findings combined with previously mentioned state laws and local policies show that fear of lawsuit and liability are not deterring people from becoming officers–a key argument for the Qualified Immunity Doctrine.

Karen M. Blum, a professor of law at Suffolk University, has also detailed the failures of qualified immunity. In her paper "Qualified Immunity Time to Change the Message," Blum details three issues with the Qualified Immunity Doctrine, the first of which she shares with Schwartz: (1) "hampering the development of constitutional law," (2) "draining resources of litigants and courts through interlocutory appeals that are…without merit," and (3) "breeding confusions into the roles of the judge and jury….enhancing the judge's role at the expense of the constitutional right to jury trial."[40] Blum presents cases to prove that these issues exist because of the current Qualified Immunity doctrine, such as specific court cases in which qualified immunity has been granted to police officers without the court answering a constitutional question. Blum finds that qualified immunity cases have become incredibly fact-bound because of Supreme Court precedent over the past forty years. For this, Blum recommends that the lower courts be required to give reasons for why they did or did not decide the constitutional question as well as the elimination of the "fact-bound-case justification for not deciding"[41] the constitutional question. Blum goes on to find that defendants in qualified immunity cases infrequently raise a qualified immunity defense at the motion to dismiss stage and the motion is infrequently granted. As a result, Blum deems interlocutory appeals to be unnecessary and

[40] Blum, K. M. (2018). Qualified Immunity: Time to Change the Message. *Notre Dame Law Review*, *93*(5), 1887–1936.
[41] *Id.*

burdensome to litigants and the court; she recommends that the availability of the interlocutory appeal be eliminated at the motion of dismiss stage after a denial of qualified immunity. Finally, Blum finds that the two pronged analysis required in qualified immunity cases essentially removes the constitutional right to have a jury by allowing judges to decide fact-based questions. Blum recommends that the judges be constrained to the second prong of the analysis, in which they would only be able to determine whether the law at the time was "sufficiently clear to give a reasonable officer notice that his conduct, as found by the jury, was unlawful."[42] Accordingly, the jury would decide whether an officer's conduct was objectively reasonable.

Scholars Aaron Nielson and Christopher Walker build a case for qualified immunity in their paper "A Qualified Defense of Qualified Immunity." In response to Schwartz's claim that qualified immunity fails to achieve its policy goals, Nielson and Walker argue that policy concerns should not play a role in reconsidering the doctrine. As the doctrine was created by the judiciary to implement section 1983, policy concerns only serve to undermine stare decisis, something which the courts generally do not allow. Policy concerns should, therefore, be directed toward Congress instead of the Court. Additionally, Nielson and Walker argue hat Congress would be discouraged from narrowing immunities in cases in which local governments pay lawsuits against police officers. Acknowledging that the doctrine is not perfect, Nielsen and Walker suggest reforms to address concerns raised by Schwartz and other scholars. These reforms culminate in the Supreme Court refining it approach to qualified immunity by instructing lower courts to "give reasons for exercising…discretion to reach constitutional questions" and using that discretion in "strategic ways."[43] More oversight and uniformity from

[42] *Id.*
[43] Nielson, A. L., & Walker, C. J. (2018). A Qualified Defense of Qualified Immunity. *Notre Dame Law Review*, *93*(5), 1853–1886.

the Supreme Court would be enough to change the doctrine without substantially reconsidering the doctrine.

Alan Chen, professor of Law at the University of Denver Sturm College of Law, argues that–although empirical research has shown that the Qualified Immunity Doctrine is deeply flawed–major reform or elimination of the doctrine is highly unlikely. Professor Chen cites many sources of empirical research, including the findings of Schwartz, Nielson, and Walker, but says that empirical research on its own will not be what causes major reform to the doctrine. The issue, Professor Chen details, lies in whether empirical research will ultimately be incorporated into congressional or Supreme Court decisionmaking. Without the incorporation of empirical research into the decisionmaking of these two institutions, the empirical research will have little opportunity to incite major reform. Although I agree with Professor Chen, it is also important to conduct empirical research in the event that Congress or the Court will decide to incorporate empirical research in their decisionmaking process. Professor Chen concludes by saying that "the Court is well qualified to take up these critiques without awaiting congressional action."[44]

Another important factor that must be taken into account for future empirical research is the societal impact of the Qualified Immunity Doctrine. Fred Smith, Jr., Associate Professor at Emory Law School, argues that two legal and social movements are currently occurring, and Qualified Immunity is at the crossroads of both. Agreeing that the doctrine is flawed, Smith details two possible reforms that may fix the doctrine instead of fully eliminating it. Smith states that immunity for government officials may have its benefits, and there are ways to maintain these benefits by fixing the flaws of the doctrine with two possible proposals. The first proposal comes from John Jeffries, Jr., an expert in the field of constitutional torts. Jeffries proposes that

[44] Chen, A. K. (2018). The Intractability of Qualified Immunity. *Notre Dame Law Review*, *93*(5), 1937–1968.

the the qualified immunity doctrine just be fault-based instead of fact-based: "the question should not be whether a right was "'*clearly established*'...Rather, the question is whether the conduct was '*clearly unconstitutional*.'"[45] Jeffries's proposal emphasizes that even if officers have protection when acting pursuant to a warrant or court order, there are other government officials who were at fault–something which the law should not ignore. This proposal would improve the doctrine and appeal to people who argue that the doctrine should be based in common law and people who are demanding for more accountability from the government. The second proposal is to expand *respondeat superior*–making local governments liable for the unconstitutional behavior of their employees. Scholars have agreed that the "most plausible, textually sound"[46] reading of Section 1983 results in broad respondeat superior liability. This proposal also ensures that any violation of a constitutional right will have a remedy; instead of dismissing all claims and granting immunity for an individual officer without holding someone accountable, this proposal guarantees that someone will be held accountable for violations of constitutional rights. Smith concludes his argument by stating that there is currently an opportunity to meet the demands of the formalists and social movements currently targeting the Qualified Immunity Doctrine.

In recent years, the spotlight has been shone on qualified immunity through the actions of police officers around the country. The murders of multiple people of color at the hands of police officers has drawn attention to the legal intricacies of suing police officers. As a result, people have been made aware of the Qualified Immunity Doctrine and social movements and organizations have begun to call for the end of qualified immunity; "Civil rights advocates had

[45] Smith, F. O. (2018). Formalism, Ferguson, and the Future of Qualified Immunity. *Notre Dame Law Review*, *93*(5), 2093–2114.
[46] *Id.*

been demanding an end to qualified immunity long before George Floyd's murder…".[47] The most important news outlets in the country–such as the *New York Times*, *NPR*, and *CNN*–have published articles and reported on qualified immunity; articles about the doctrine, efforts and calls to reform or eliminate the doctrine, and the impacts of the doctrine have been detailed by news outlets across the country. Going even further, the Qualified Immunity doctrine has begun to face challenges in Congress where the George Floyd Justice in Policing Act of 2021 "would eliminate qualified immunity for law enforcement officers."[48] As empirical research and social movements converge to challenge the Qualified Immunity Doctrine, it is important to conduct research on the factors behind judicial decision-making in these cases and provide a larger foundation for future scholarship and activism.

Although these studies do not focus on the rhetoric used by judges, they support the use of political ideology, gender, and race as variables in my analysis. It is also important to bridge the gap between studying the influence of these variables on judges and *outcomes*. Decision-making is not just the end result of a case, it is the entire process by which a case is decided. Therefore, it is important to understand the *rhetoric* judges are using in deciding these cases, and whether that rhetoric is influenced by identity characteristics. In studying the influence of these characteristics on rhetoric and then analyzing the outcomes themselves, a more well-rounded understanding of judicial behavior and decision-making will be produced.

METHODOLOGY

The main focus of this paper is to analyze the rhetoric of judges within qualified immunity cases and compare said rhetoric after determining the race, gender, and political ideology of each

[47] Carlisle, M. (2021, June 3). *Qualified immunity may be key for police reform. what is it?* Time. Retrieved April 14, 2022, from https://time.com/6061624/what-is-qualified-immunity/
[48] *Id.*

judge. To determine the extent of influence that the gender, race and political ideology of a judge have in Qualified Immunity suits, I have collected 3,726 Qualified Immunity suits across the twelve Circuit Courts and 79 suits the Supreme Court from 1982-2021, starting with the landmark precedential qualified immunity case, *Harlow v. Fitzgerald* (1982). These cases were collected through *Nexis Uni*[49], in which I entered “qualified immunity police " as my keywords and then filtered for the circuit and, more specifically, cases only in the Circuit Court of Appeals instead of all the district courts within the circuit. To further narrow the extensive caseload per court, I specifically looked for cases where police officers were being sued for their actions during the moment of a plaintiff’s (possible) arrest; these actions include possible illegal searches and seizures, false arrests, and the excessive use of force. I made the decision to use cases concerning constitutional violations at moments of probable arrest because the inspiration for this paper was the increased demand for qualified immunity reform after the constitutional rights of people of color were violated by police officers during searches and arrests. *Nexis Uni* includes brief overviews of each case that aided me in identifying suits stemming from the actions at the moment of arrest. While searching for these cases, I separated the cases by court and within each court they were separated by decade. Each case was then assigned a number, starting with one and going in numerical order. Because of constraints in time and resources, I only use 10% of cases from each decade within each court, resulting in a sample size of 378 Qualified Immunity cases. I then used a random number generator to randomly select these 378 cases. After determining which cases to include in my data, I downloaded PDFs of each case, copied the text of each opinion, concurrence, and dissent, and uploaded the text to a spreadsheet. This spreadsheet is organized to identify the case, circuit it comes from, whether it was an

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[49] *Advance-Lexis-com.ezproxy-prod.pima.edu*. (n.d.). Retrieved January 5, 2022, from https://advance-lexis-com.ezproxy-prod.pima.edu/bisacademicresearchhome?crid=1cd059cb-060a-4b72-a408-e2c4e63fb525&pdmfid=1516831&pdisurlapi=true

opinion, concurrence or dissent (each coded with "Y" for "yes" and "N" for no), the last name of the judge, the ideology of the judge (coded "C" for "conservative" and "L" for "liberal"), gender (coded "M" for "male" and "F" for "female"), and race (coded "W" for "white" and "NW" for "not white").

My independent variables are the gender, race, and political ideology of the judges presiding over the 378 cases. My data includes 244 judges across the twelve circuit courts and Supreme Court from 1982-2021. Using *Nexis Uni*, I found the names of the judge who wrote the opinion, concurrence, and dissent for each case. Second, I collected data for the race and political ideology of each judge from 1982-2004 using the *Attributes of U.S. Federal Judges Database* from the University of South Carolina's Judicial Research Initiative.[50] This database only has data (such as race, career history, and nomination data) for judges within the circuit courts before 2004. For judges nominated and confirmed after 2004, I searched for their race and political ideology using numerous websites, such as *Ballotpedia* and *Bloomberg.com*. The races included in my study are as follow: "White" and "Non-White". The decision to restrict race to "White" and "Non-white" was made after conducting the preliminary text analysis. The "conText" package only allows for bivariate analysis, limiting the variation of subsets that I can analyze within each variable. As a result, I was also required to limit my political ideology variable to two categories–"Conservative" and "Liberal". The classification of each judge into one of the two political ideology categories varied by the following factors: (1) the judge's partisan affiliation, (2) the partisan affiliation of the President who nominated the judge, (3) whether the judge had previous experience as a U.S Attorney or Assistant U.S Attorney (and, subsequently, the partisan affiliation of the President or Attorney General that appointed the judge), (4) whether

[50] Zuk, G., Barrow, D. J., & Gryski, G. S. (n.d.). *Attributes of U.S. Federal Judges Database*. Retrieved April 12, 2022, from http://artsandsciences.sc.edu/poli/juri/attributes.htm

the judge had a prosecutorial or law enforcement background (resulting in the assumption that the judge is more conservative) or as a public defender (resulting in the assumption that the judge is more liberal), (5) and whether the judge was endorsed by the Federalist Society (resulting in a Conservative classification) or by the American Constitution Society (resulting in a Liberal classification). For example, if a judge was nominated to the court by a Republican President *and* was appointed as an Assistant U.S attorney by a Republican Attorney General *or* the judge identified as a registered Republican, the judge would be considered Conservative. For judges nominated after 2004, I also utilized Google to determine the race of each judge based on appearance, last name, and country of origin (for judges who were born outside of the United States). I acknowledge that these metrics are controversial in nature, but they were used out of necessity resulting from the lack of a reliable source of data after 2004. There is also room for undue bias by using such metrics as last name and physical appearance do not always accurately represent the intricacies of race. Lastly, it is important to recognize that, although the federal judiciary is much more diverse than it has been over the past two centuries, there are still very few non-white judges in comparison to their white counterparts. Therefore, my findings should be applied with caution if used to support studies on other courts or in other fields of law and judicial decision-making.

Using RStudio, I conducted a text analysis with the new "conText"[51] package designed by Postdoctoral Fellow at Vanderbilt University, Pedro Rodriguez.[52] The text analysis was conducted on the opinions, concurrences, and dissents of each case. To do so, I first read 10 cases to collect a list of keywords and phrases. I then conducted a preliminary text analysis in RStudio using the words and phrases on 16 Supreme Court cases. The words used in my analysis

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[51] Rodriguez, P. L. (2021). *Quick Start Guide*. GitHub. Retrieved October 2021, from https://github.com/prodriguezsosa/conText/blob/master/vignettes/quickstart.md

[52] Rodriguez, P. L. (n.d.). *About Me*. Pedro L. Rodríguez. Retrieved April 12, 2022, from http://prodriguezsosa.com/

were as follows: excessive, force, clearly, established, reasonable, search. The words "clearly," "established," and "reasonable" originate from precedent set by the Supreme Court in *Harlow*: "...law [that] was clearly established at the time an action occurred." The other three keywords originate from the context of the cases included in my analysis. These cases all involve the use of force, false arrests, or searches and seizures, which are the focus of my analysis. "The "conText" package also produces nearest neighbors for the words I have selected across all documents, though the maximum number of nearest neighbors that can be produced is 20. Using these nearest neighbors, I calculated a cosine-similarity ratio, which identifies how similar all the documents are to each other based on the variables I select (race, gender, or political ideology). I acknowledge that having binary variables restrict the depth of my analysis; I am unable to conduct an analysis that includes multiple different races (such as, Black, Latine, White, Asian American/Pacific Islander, Native American.) I am also unable to make a distinction between how liberal or conservative a judge really is and cannot label a judge as "moderate." As a result, the analysis and findings of this project should be used and applied with caution, as the variables "race" and "political ideology" are not representative of more specific categories under these two umbrellas.

FINDINGS

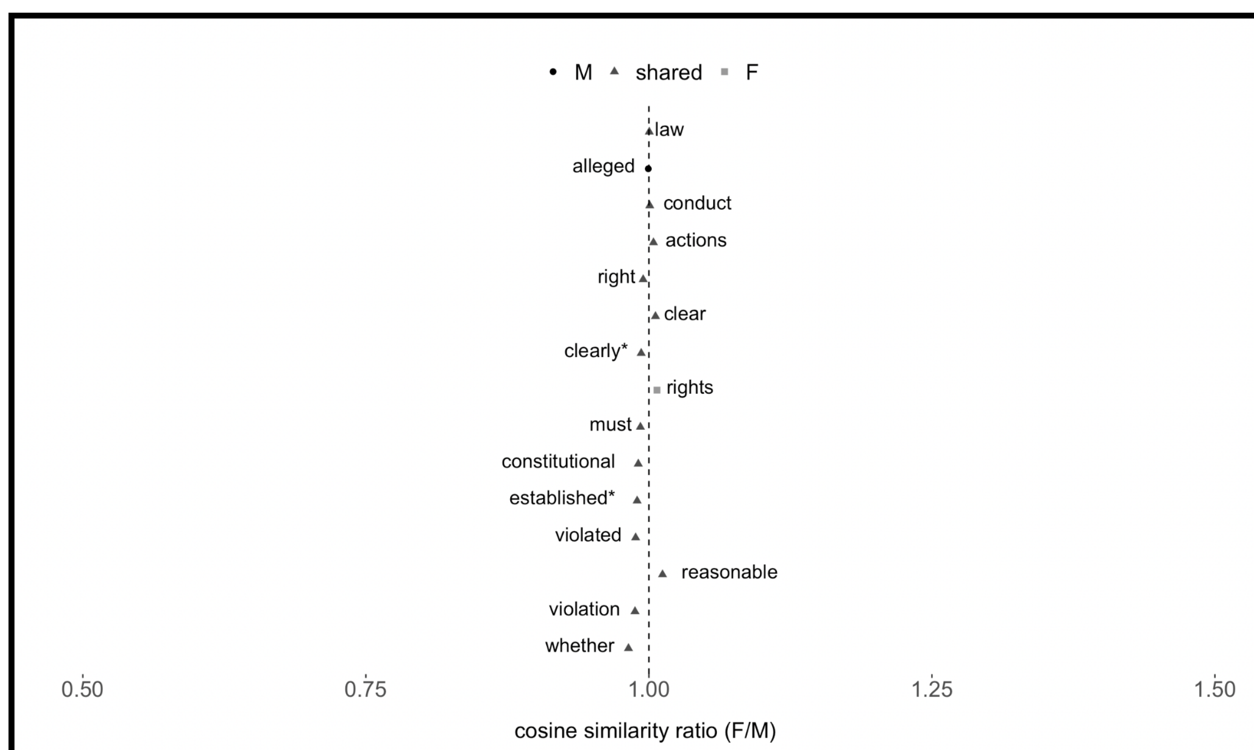
As previously mentioned, my analysis relies on the use of the "conText" package within Rstudio. "ConText" allowed me to conduct a textual analysis of 378 (approximately ten-percent of my original sample size) cases across the twelve circuit courts and the Supreme Court. The final analysis includes text from 367 opinions, 34 concurrences, and 57 dissents for a total sample size of 458 written documents. These documents were written by a total of 244 judges, which includes: 93 liberals and 151 conservatives (38.1% and 61.9% respectively), 53 women and 191

men (21.7% and 79.3% respectively), and 40 nonwhite and 204 white judges (16.4% and 83.6% respectively). My findings are divided into two categories–words originating from precedent ("clearly," "established," and "reasonable") and words originating from the context of the cases ("excessive," "force," "search"). Within these two categories, my findings are separated by variable (political ideology, race, and gender). Once again, I emphasize that these findings should be used with caution as they have been constrained by a limit on the variation within variables, the low amount of diversity within the judiciary, and decisions made in the interest of time which limit the sample size used.

A. Words Originating from Precedent: "Clearly," "Established," "Reasonable"

As previously stated, these three keywords are used because they play an important role in today's Qualified Immunity Doctrine. After calculating cosine-similarity ratios for each worried for each variable, it became clear that, for the most part, there was little to no difference between the rhetoric used by judges based on gender, race, and political ideology when comparing the nearest neighbors "clearly," "established," and "reasonable."

Figure 1: Nearest Neighbors Cosine-Similarity of "Clearly" based on Gender



The cosine-similarity ratio is calculated on a scale of 0-to-1, with “0” indicating the texts from the documents in my analysis are completely dissimilar from each other, “1” indicating the texts are exactly alike. There are some words with a cosine similarity ratio slightly greater than one, but this result is meant to be interpreted the same as a result of “1.” When calculating the cosine similarity ratio of nearest neighbors for the word “clearly” by gender, the resulting cosine similarity ratio shows that judges are sharing a majority of the nearest neighbors (represented by the triangles on the plot). As shown in Figure 1, the only differences between male judges (represented by a dot on the plot) and female judges (represented by a square on the plot) are that male judges share “alleged” across all texts and female judges share “rights” across all texts. These differences, though, are not significant as the cosine-similarity ratio was plotted with a significance level of 0.05; therefore, it cannot be concluded that gender influences the rhetoric of judges. Figures 2 and 3 tell a similar story within the cosine similarities for “clearly” within the political ideology and race variables.

Figure 2 shows conservative judges (denoted by a dot on the chart) share the word “rights” while liberal judges (denoted by a square on the chart) share the word “alleged.” These differences are not statistically significant, and therefore do not support the hypothesis that a judge’s rhetoric is influenced by their political ideology. Figure 3 shows white judges (denoted by a dot on the chart) share the word “clear” while nonwhite judges (denoted by a square on the chart) share the word “alleged.” These differences are not statistically significant, and therefore do not support the hypothesis that a judge’s rhetoric is influenced by their race. The nearest neighbors shared by judges across each variable can all be related back to precedent set by the Supreme Court in *Harlow* (1982); words such as “reasonable,” “established,” “law,” and “constitutional” are all shared regardless of the variable.

Figures 4[53], 5[54], and 6[55] do not show significant difference between the nearest neighbors surrounding the word “established” based on gender, political ideology, or race.When conducting the textual analysis using the word “reasonable,” the nearest neighbors produced while calculating the cosine similarity ratios tell a different story from the previous two keywords.

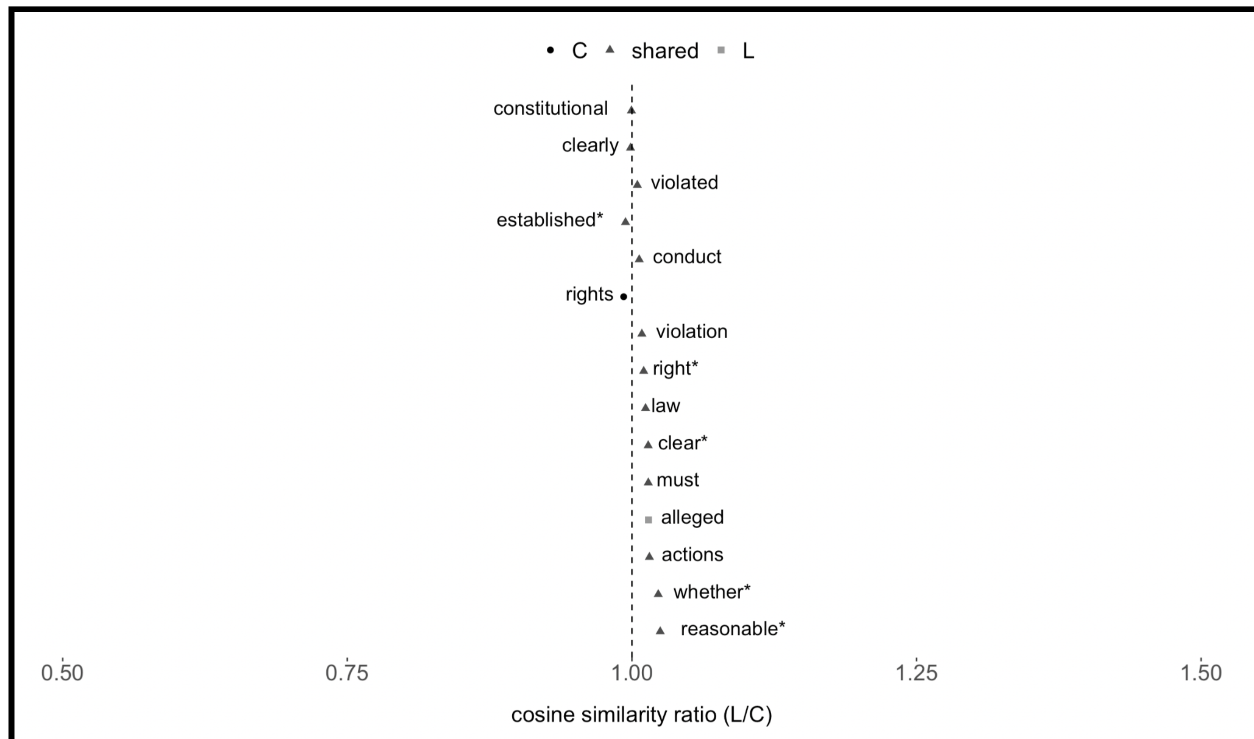


Figure 2: Nearest Neighbors Cosine-Similarity of “Clearly” based on Political Ideology

[53] See Appendix: Figure 4: Nearest Neighbors Cosine-Similarity of “Established” based on Gender
[54] See Appendix: Figure 5: Nearest Neighbors Cosine-Similarity of “Established” based on Political Ideology
[55] See Appendix: Figure 6: Nearest Neighbors Cosine-Similarity of “Established” based on Race

Figure 3: Nearest Neighbors Cosine-Similarity of "Clearly" based on Race

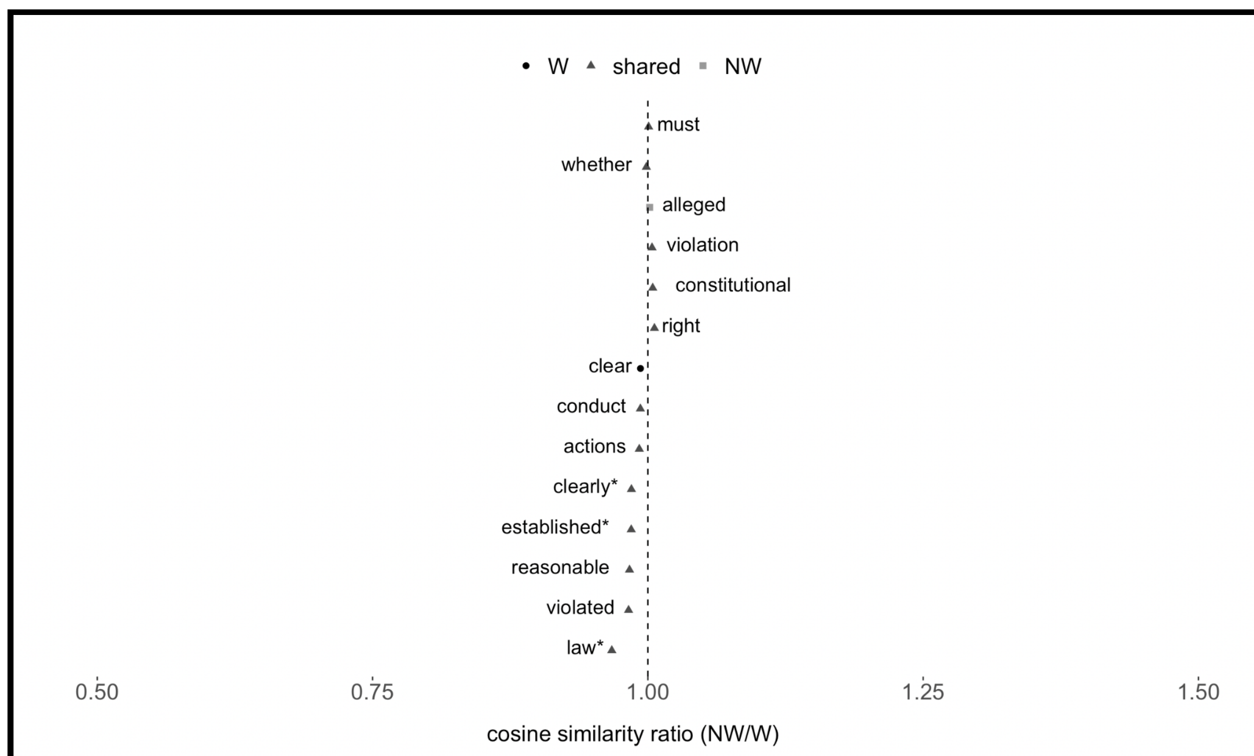


Figure 7 shows that male judges, at a significance level of 0.05, share the words "arrest" and "cause." Combined with the keyword "reasonable," these two significant nearest neighbors show that male judges may be justifying the actions of police officers when speaking considering the intent behind an arrest and whether the officer has probable or reasonable cause to justify their actions. On the other hand, female judges–although not at a significant level–share the words "force" and "use." Combined with the keyword "reasonable," these two nearest neighbors show that female judges may be more concerned with determining whether the force an officer used was reasonable. The nearest neighbors shared between male and female judges supports these findings with words such as "circumstances," "conduct," and "objectively," which refer to the facts within cases that detail the actions of police officers.

Figure 7: Nearest Neighbors Cosine-Similarity of "Reasonable" based on Gender

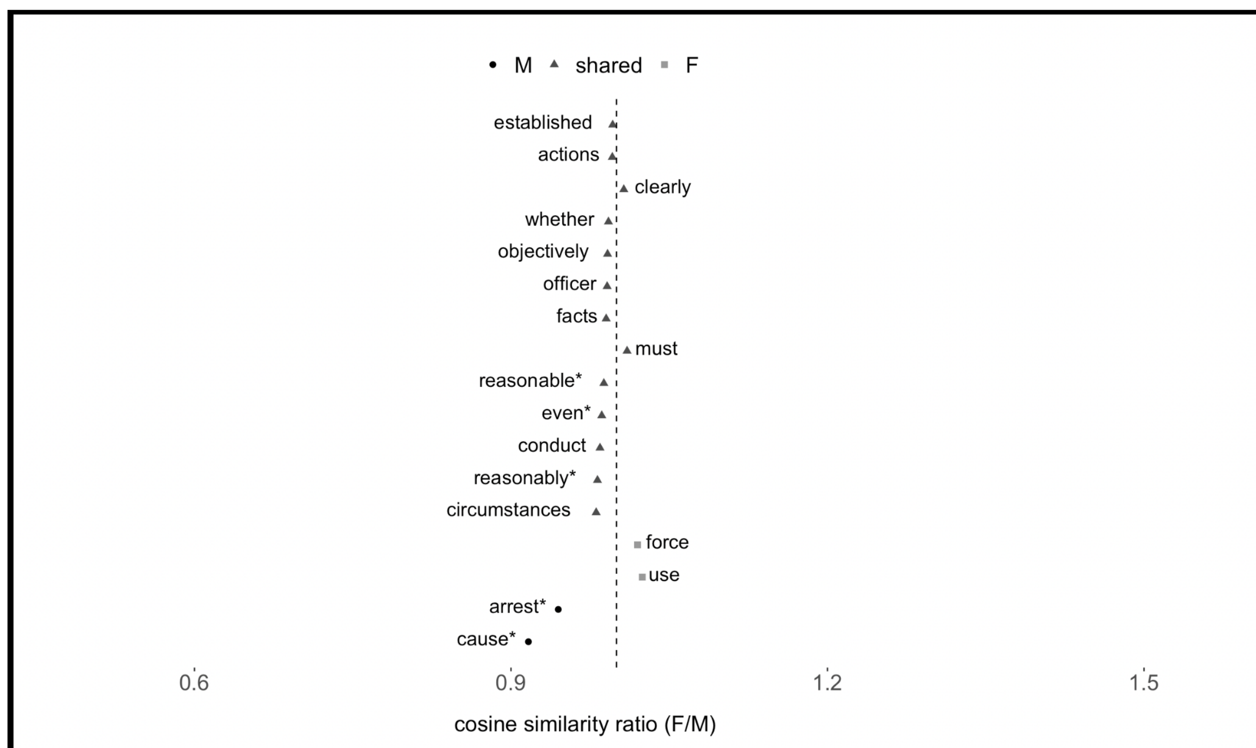
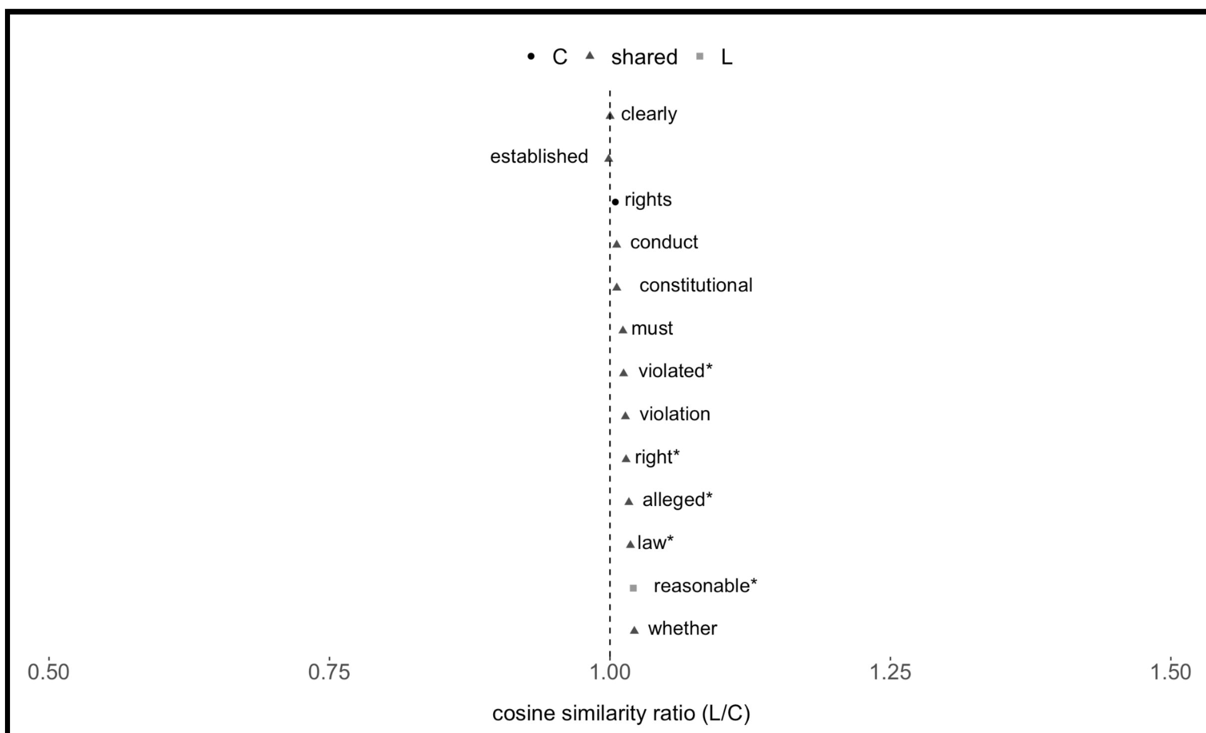


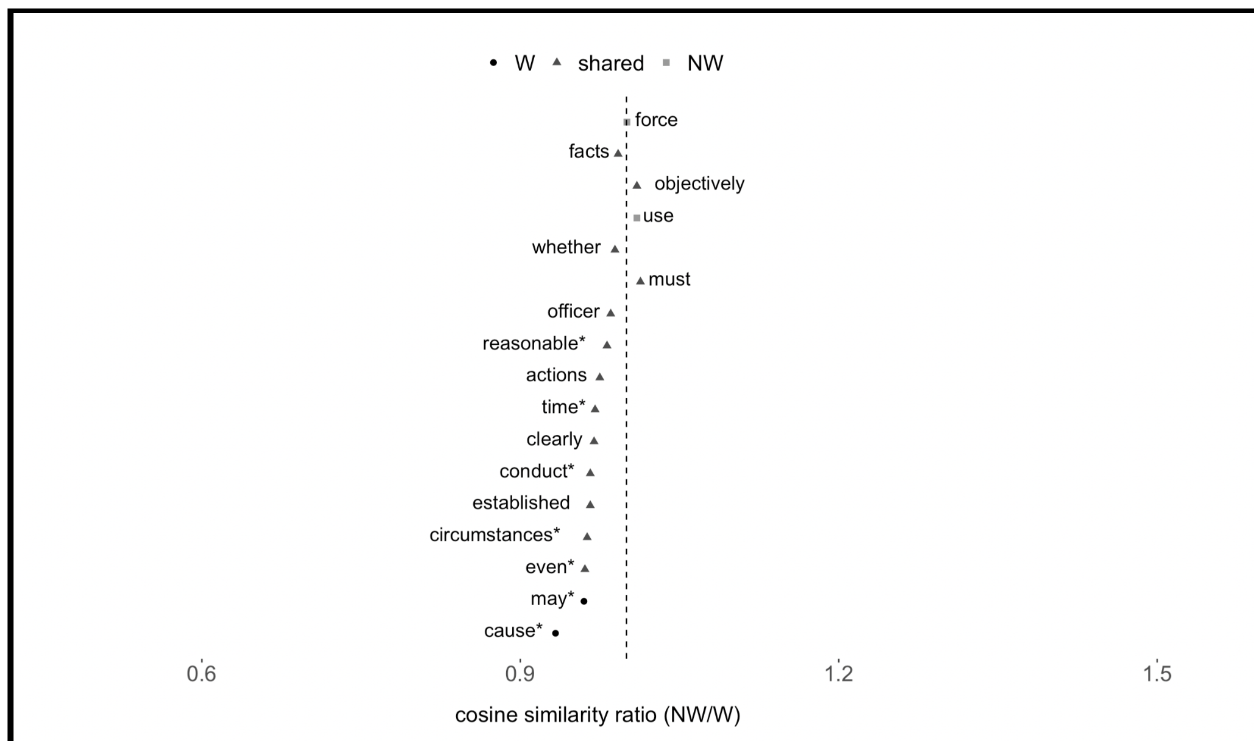
Figure 8 shows the cosine similarity ratios of nearest neighbors using the word "reasonable" for judges based on political ideology. In this case, liberal judges–at a significant level–share the word "reasonable" across all texts. Although this result is significant, it lacks context as this nearest neighbor is the same as the keyword. Instead, this plot shows that liberal and conservative judges share the majority of nearest neighbors around the word "reasonable." These nearest neighbors reflect that judges are deciding whether the actions committed by police officers violated the plaintiffs rights, showing that judges have become fact finders instead of leaving this responsibility to a jury.

Figure 8: Nearest Neighbors Cosine-Similarity of "Reasonable" based on Political Ideology



Similar to Figure 7, Figure 9 shows that white judges, at a significance level of 0.05, share the word "cause." Combined with the keyword "reasonable," this significant nearest neighbor shows that white judges may be justifying the actions of police officer when speaking considering the intent behind an arrest and whether the officer has probable or reasonable cause to justify their actions. On the other hand, nonwhite judges–although, not at a significant level–share the words "force" and "use." Combined with the keyword "reasonable," these two nearest neighbors show that female judges may be more concerned with determining whether the force an officer used was reasonable. The significant nearest neighbors shared between white and nonwhite judges supports these findings with words such as "circumstances," "conduct," and "reasonble," which refer to the facts within cases that detail the actions of police officers.

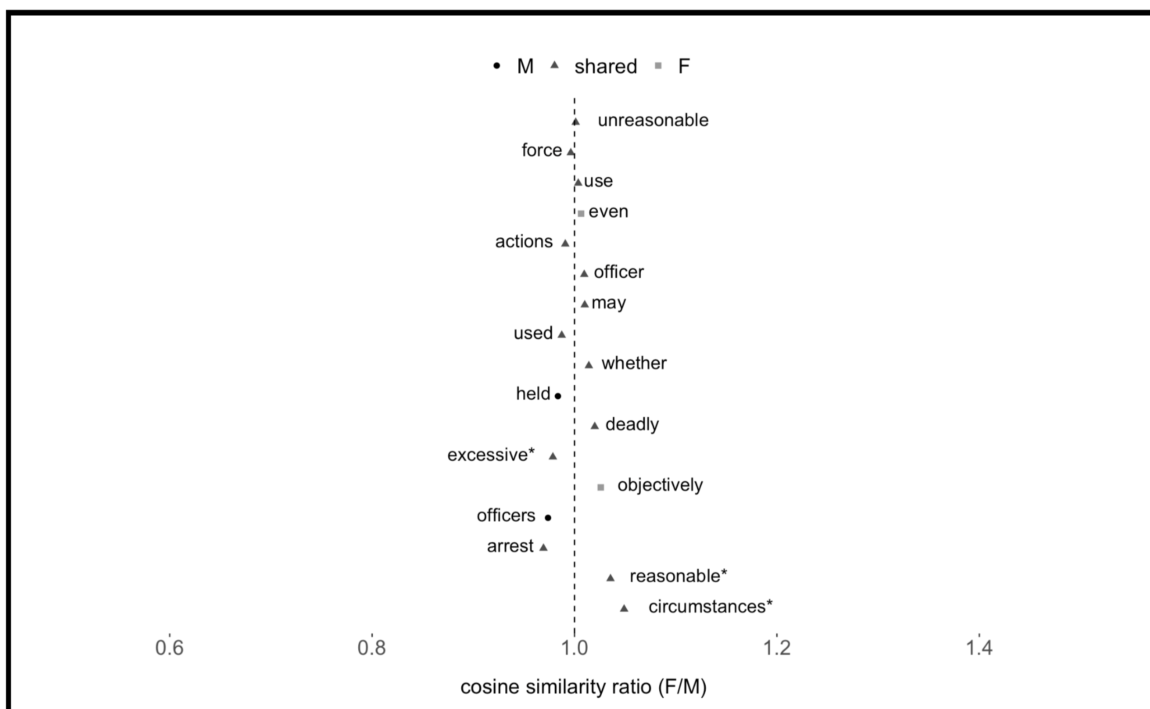
Figure 9: Nearest Neighbors Cosine-Similarity of "Reasonable" based on Race



B. Words Originating from Case Context: "Force," "Excessive," "Search"

The three keywords in this part of the analysis are important to the context of the cases I selected. Each case in my sample is a lawsuit resulting from the moment of a search or possible arrest. After calculating cosine-similarity ratios for each keyword for each variable, it became clear that race, political ideology, and gender potentially influence the rhetoric a judge uses depending on the context of the case.

Figure10: Nearest Neighbors Cosine-Similarity of "Force" based on Gender

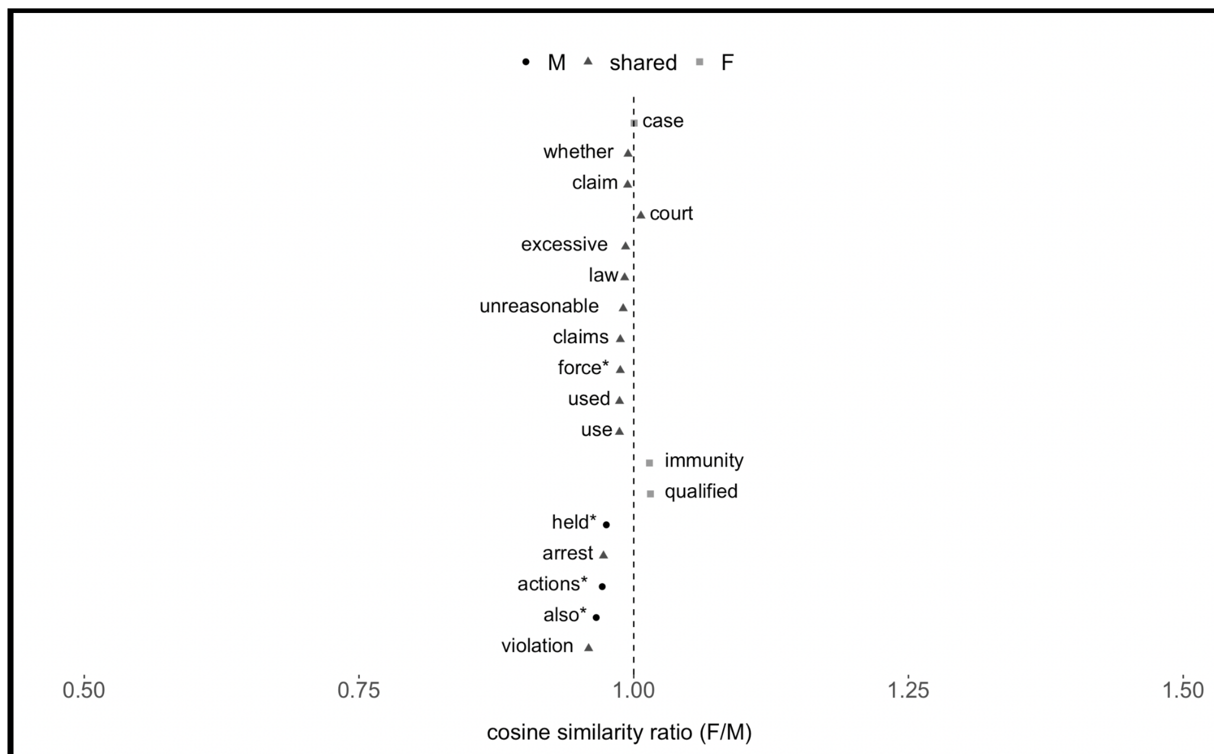


Beginning with "force", Figure 10 shows that male judges share the word "officers" while female judges share the word "objective" with neither result being significant. When looking at the nearest neighbors shared between male and female judges, "reasonable," "circumstances," and "excessive" are significant results. These nearest neighbors tell us that both male and female judges may be concerned with the facts of a case when the case involves a use of force. There is little variation, and no significant variation, between the rhetoric used by male and female judges. There is even less variation in the rhetoric used by judges when taking political ideology[56] and race[57] into account.

Figure 13 shows the cosine similarity of nearest neighbors for the word "excessive" based on gender. Male judges share "actions" at a significant level and when combined with other nearest neighbors such as "violation," "unreasonable," "excessive," and "force," these nearest neighbors

[56] See Appendix: Figure 11: Nearest Neighbors Cosine-Similarity of "Force" based on Political Ideology
[57] See Appendix: Figure 12: Nearest Neighbors Cosine-Similarity of "Force" based on Race

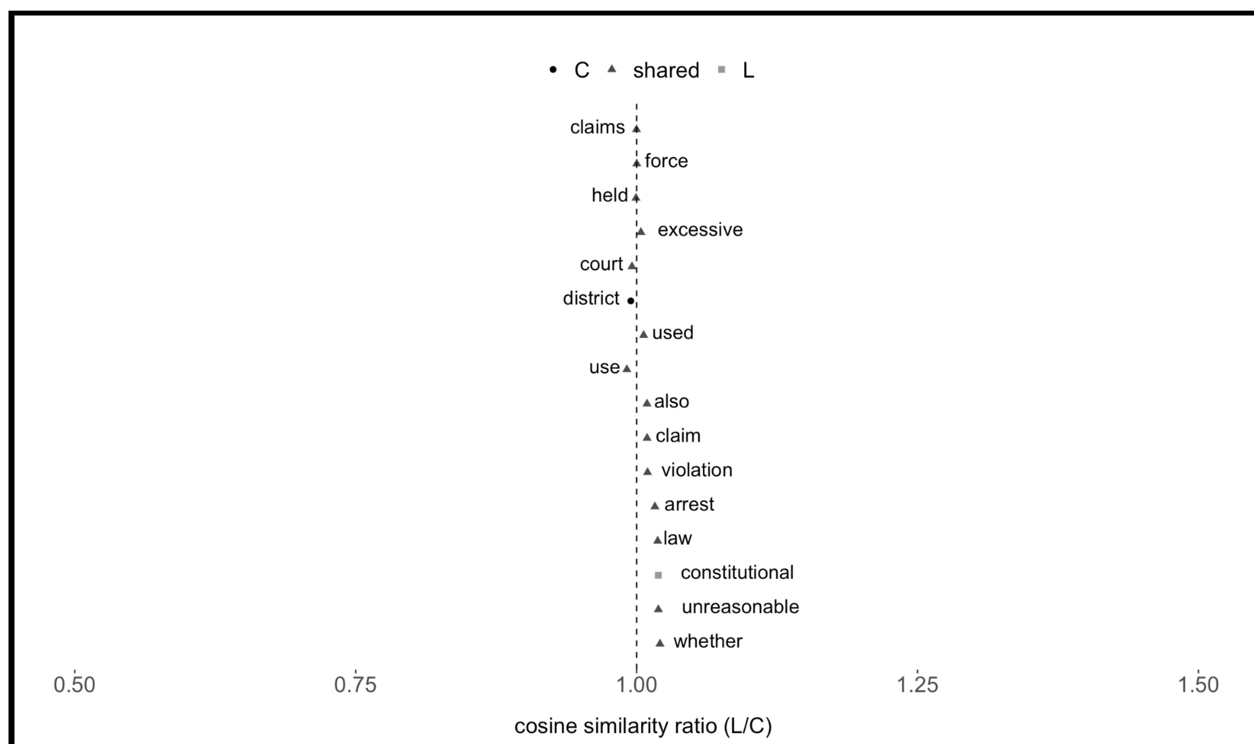
Figure 13: Nearest Neighbors Cosine-Similarity of "Excessive" based on Gender



indicate that male judges may be concerned with fact finding in cases that involve an excessive use of force. The difference between this case and the results of the text analysis using "force" may be due to the fact that the cases in my analysis are all appeals from district court decisions. The decisions of the district courts may have determined whether the use of force was excessive, resulting in the circuit courts affirming or reversing these decisions. The circuit courts may have to decide that the use of force in one case was excessive, contrary to what the district court decided, potentially leading to the differences in nearest neighbors produced by the separate text analyses. It may be of future interest to analyze qualified immunity cases from district courts that were appealed to the circuit courts; this type of analysis could potentially show larger variation between male and female judges. Figure 14 shows that there is very little and insignificant variation between the nearest neighbors of "excessive" based on political ideology. There are no significant results within the nearest neighbors shared by both conservative and liberal judges.

Political ideology may not influence the rhetoric used by judges in qualified immunity cases that focus on an officer's use of excessive force during searches and arrests.

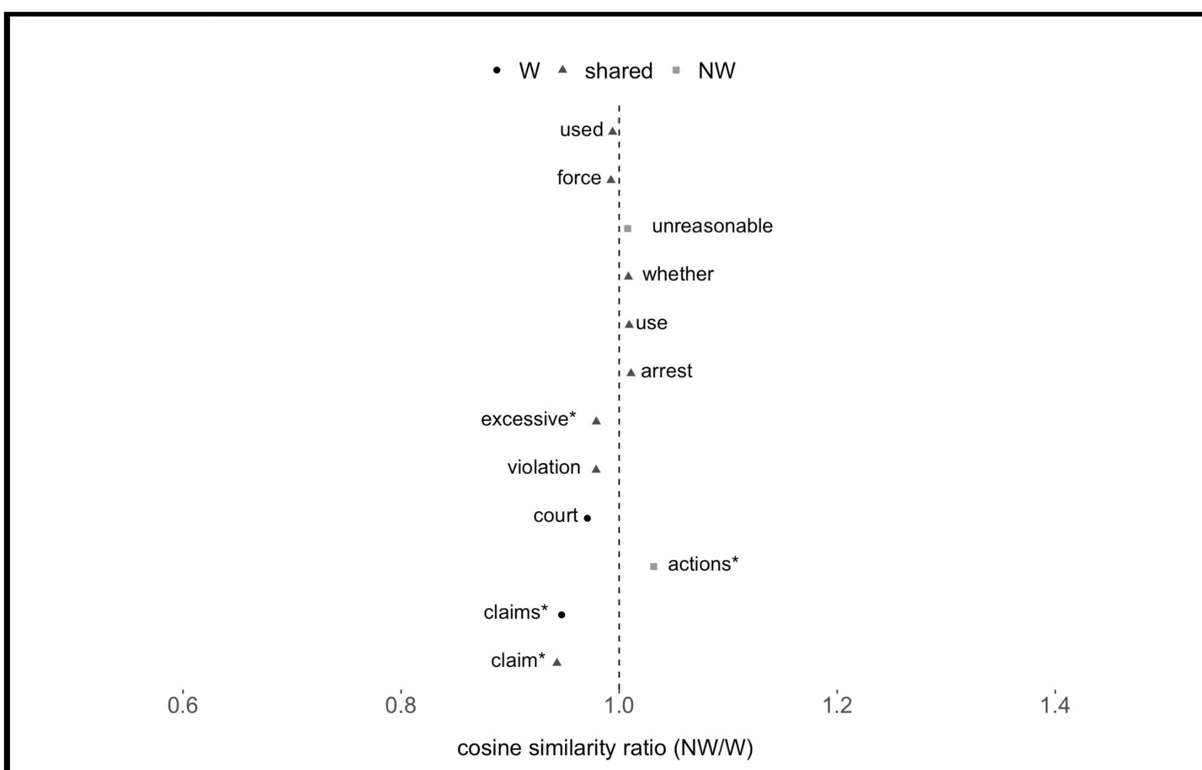
Figure 14: Nearest Neighbors Cosine-Similarity of "Excessive" based on Political Ideology



On the other hand, Figure 15 shows some significant variation between the rhetoric used by white and nonwhite judges when analyzing the nearest neighbors of "excessive." Nonwhite judges share the word "actions" at a significant level and "unreasonable" at an insignificant level across all texts included in the analysis. These nearest neighbors can be contextualized by using other nearest neighbors such as "excessive," "force," "violation," "whether," and "arrest." Nonwhite judges appear to be more concerned about the reasonableness of the force used during arrests and determining whether this use of force violated the constitutional rights of the plaintiff(s). White judges share the word "claims" at a significant level. Although both white and

nonwhite judges share "claim" at a significant level, it is interesting to see that nonwhite judges share "actions" while white judges share "claims." When contextualizing these two words, "actions" seems to refer to the conduct of officers without a layer of ambiguity, whereas "claims" seems to refer to the plaintiff and add a layer of ambiguity to the conduct of the officers.

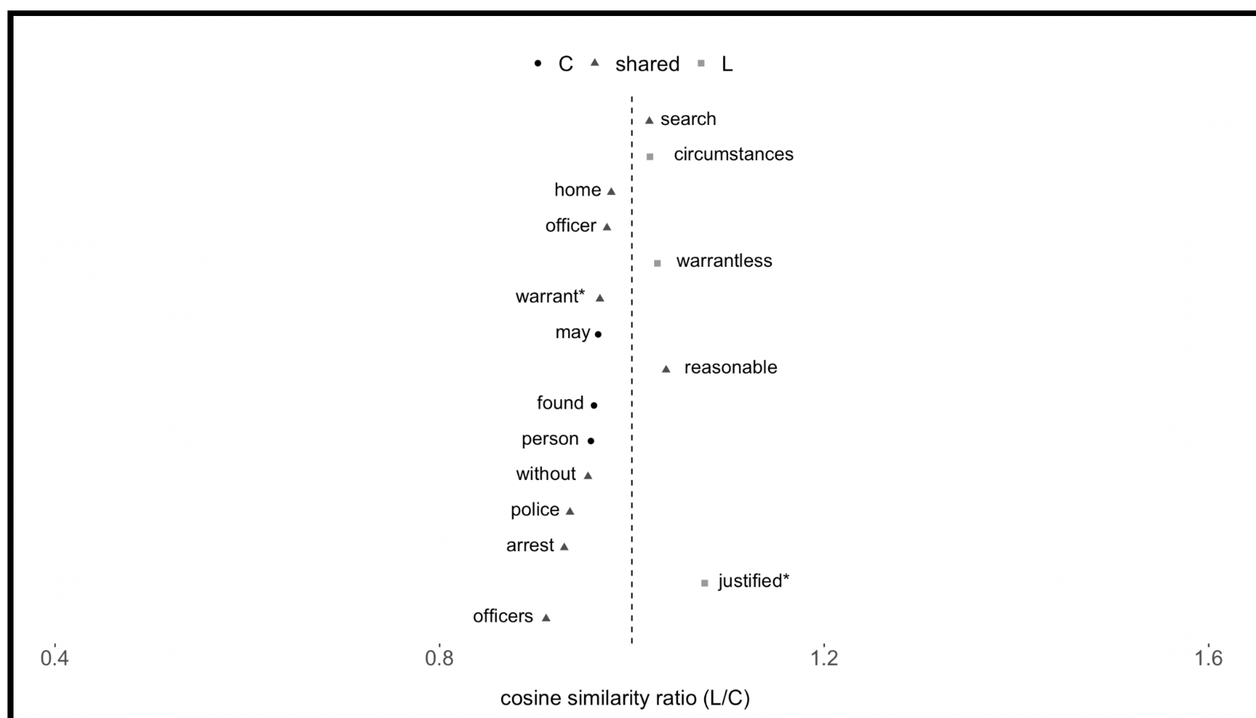
Figure 15: Nearest Neighbors Cosine-Similarity of "Excessive" based on Race



Lastly, the cosine similarity ratios of nearest neighbors for the word "search" were calculated. These cosine similarities tell a completely different story from every previous keyword. Beginning with political ideology, Figure 16 shows that liberal judges share the nearest neighbors "circumstances," "warrantless," and "justified"–with "justified" being a significant result. Conservative judges share the words "found," "may," and "person," but none of these nearest neighbors are significant and they do not show the intent or context behind the rhetoric

used by conservative judges in cases involving searches. Liberal judges may be concerned with fact finding in these cases and appear to have the goal of determining whether a search with a warrant was constitutional and if the circumstances behind warrantless searches justify a violation of the plaintiff's rights.

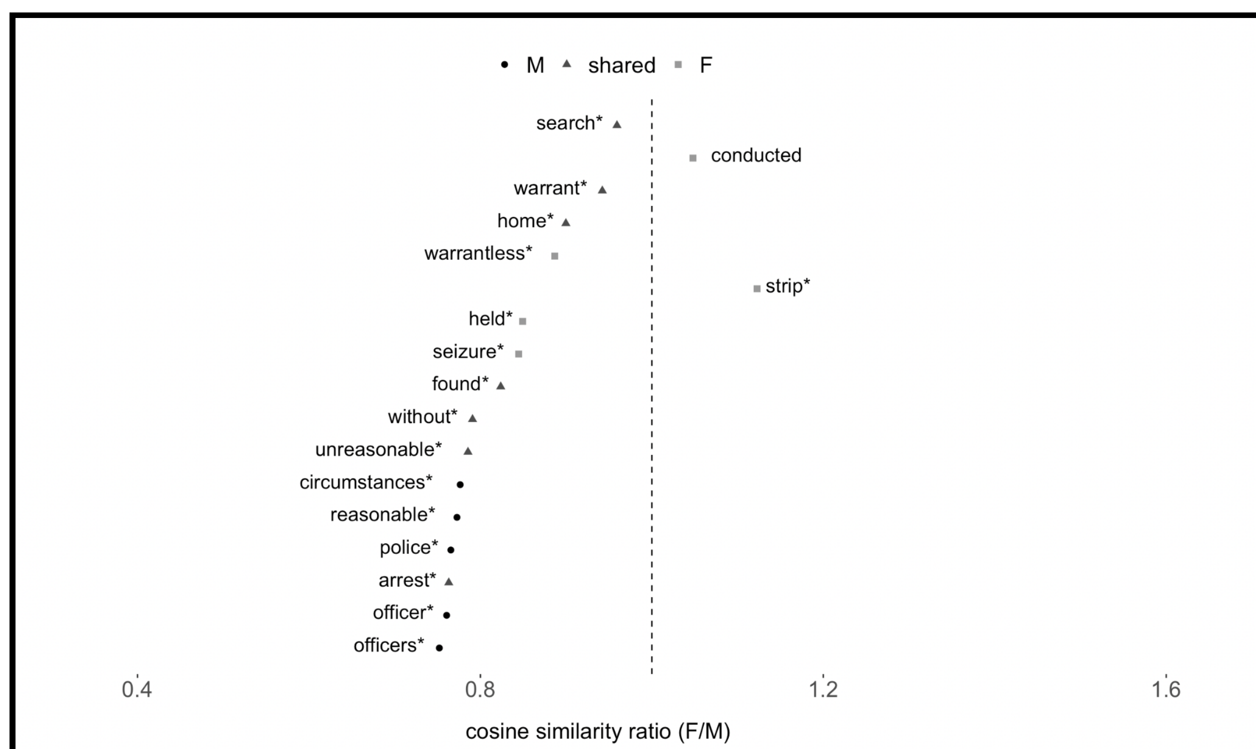
Figure 16: Nearest Neighbors Cosine-Similarity of "Search" based on Political Ideology



The variation between rhetoric continues when taking gender into account. Figure 17 displays many significant nearest neighbors for both male and female judges. Male judges share "circumstances," "reasonable," "police," and "officer(s)" at a significant level. These nearest neighbors imply that male judges may be more likely to attempt to justify the actions of police officers who have been sued for violating the rights of a plaintiff during a search, with or without a warrant. Female judges, on the other hand, share "strip," "warrantless," "seizure," and

"conducted," with the first three nearest neighbors being significant. These nearest neighbors demonstrate that female judges appear to be more likely to care about the conditions of search, whether it violated the constitutional rights of the plaintiff, and may not attempt to justify the actions of officers like their male counterparts.

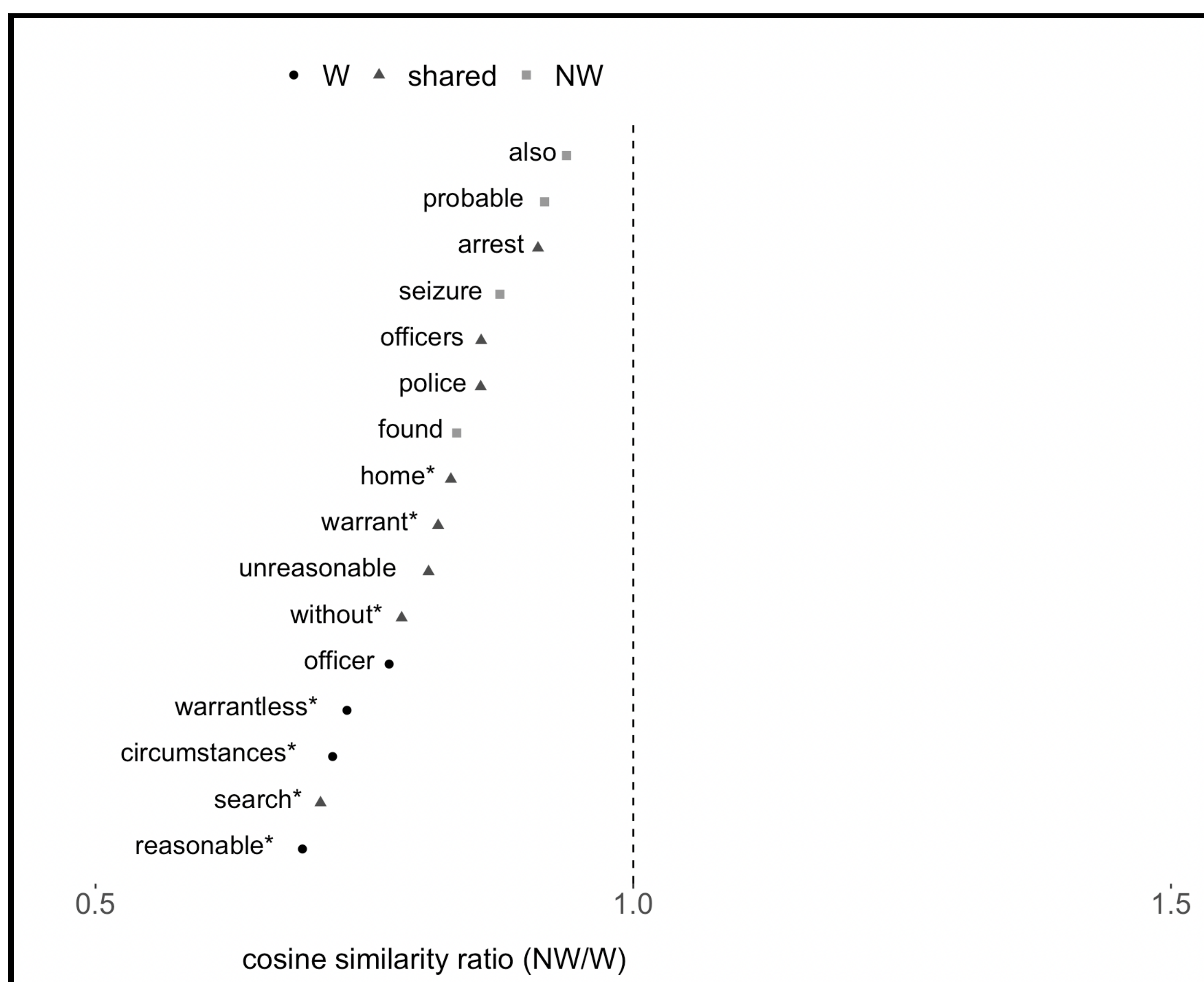
Figure 17: Nearest Neighbors Cosine-Similarity of "Search" based on Gender



The final variable, race, shows almost as much variation as gender, but with fewer significant results. Nonwhite judges share the nearest neighbors "seizure" and "probable," indicating that nonwhite judges appear to be concerned with finding whether a constitutional right was violated and if there was probable cause for said violation during a search. White judges had many significant results including "warrantless," "circumstances," and "reasonable," implying that

these judges may be concerned with justifying the actions of police officers and granting qualified immunity regardless of there being a constitutional violation.

Figure 18: Nearest Neighbors Cosine-Similarity of "Search" based on Race



The textual analysis I conducted on "search" has shown that all three variables–political ideology, race, and gender–influence the rhetoric judges use in qualified immunity cases involving search and seizures. Specifically, race and gender produced the most significant results of any textual analysis in this paper. Although the other keywords did not produce results that support my original hypothesis, the textual analysis of each keyword do contribute important

results. Rhetoric surrounding words that play important roles in precedent and the determination of qualified immunity are less likely, if at all, to be influenced by political ideology, race, or gender. The rhetoric around these keywords seems to be influenced by the precedent itself, which may indicate that keywords originating from precedent may serve as effective control variables when conducting textual analysis of other qualified immunity cases and cases within other fields of law. Rhetoric surrounding words originating from the context of the cases included in my data vary in the amount it is influenced by race, gender, and political ideology. The differences in significant results and variation between cases that involved a search versus cases that involved the use of force and potential arrest lead to other potential research questions. It may be of interest in future research to separate qualified immunity cases into numerous different contexts, such as use of force in prison, searches conducted while suspects are detained, and the actions of officers during interrogations.

These findings should be taken and applied with caution. Not included in this study are the outcomes of each case (i.e., whether qualified immunity was granted). This means that I cannot conclusively determine that the *outcome* of qualified immunity cases is influenced by race, gender, or political ideology. This study solely focused on the *rhetoric* in qualified immunity cases. But this study presents an opportunity for future research to study the outcomes of qualified immunity cases based on the influence of these three variables on rhetoric.

CONCLUSION

This paper set out to find whether political ideology, race, or gender influence the rhetoric of judges in qualified immunity cases. Using the texts of opinions, dissents, and concurrences from 378 cases across every circuit court and the Supreme Court, I conducted a textual analysis of six different keywords across every document based on each of my three variables. As seen in this

analysis, rhetoric is influenced by political ideology, gender, and race in cases that involve searches before or during an arrest. These findings should be applied and used with caution as my variables were constrained by the "conText" package in Rstudio, and I was constrained by time and resources to include more cases with the potential to have a larger sample size of female and nonwhite judges. My findings may not be representative of judges when analyzing specific races and ethnicities under the "nonwhite" umbrella. The same can and should be acknowledged about political ideology in this paper; the political ideology of a judge is not just liberal or conservative, as judges can be moderate and the spectrum from liberal to conservative is subjective and continuous–any judge can fit along any part of the spectrum.

My analysis shows the following: the keywords "clearly," "established," and "reasonable," do not produce significant nearest neighbors that show political ideology, gender, or race influence a judge's rhetoric within the context of these keywords. The keyword "force" also fails to produce significant variations within and across my variables. While the keyword "excessive" produces few significant values and little variation within a judge's rhetoric based on gender and political ideology, it does produce significant values based on race. Nonwhite judges appear to be more concerned about the reasonableness of the force used during arrests and determining whether this use of force violated the constitutional rights of the plaintiff(s) while white judges add a layer of ambiguity to the conduct of police officers, implying that the plaintiff must prove their claim to be factually true before considering whether any use of force violated the plaintiff's constitutional rights. Lastly, the most significant results were produced by the textual analysis conducted on the keyword "search." This textual analysis produced significant results and high levels of variation within and across political ideology, gender, and race. Liberal judges appear to be concerned with fact-finding in cases involving searches and may have the

goal of determining whether a search with a warrant was constitutional, or if the circumstances behind warrantless searches justify a violation of the plaintiff's rights. Meanwhile, conservative judges appear to be more likely to justify the conduct of police officers in warrantless searches. Male judges also appear more likely to attempt to justify the actions of police officers who have been sued for violating the rights of a plaintiff during a search, with our without a warrant. Female judges are more likely to care about the conditions of search, whether it violated the constitutional rights of the plaintiff, and may not attempt to justify the actions of officers like their male counterparts. Nonwhite judges appear to be concerned with finding whether a constitutional right was violated and if there was probable cause for said violation during a search. White judges appear to be concerned with justifying the actions of police officers and granting qualified immunity regardless of there being a constitutional violation.

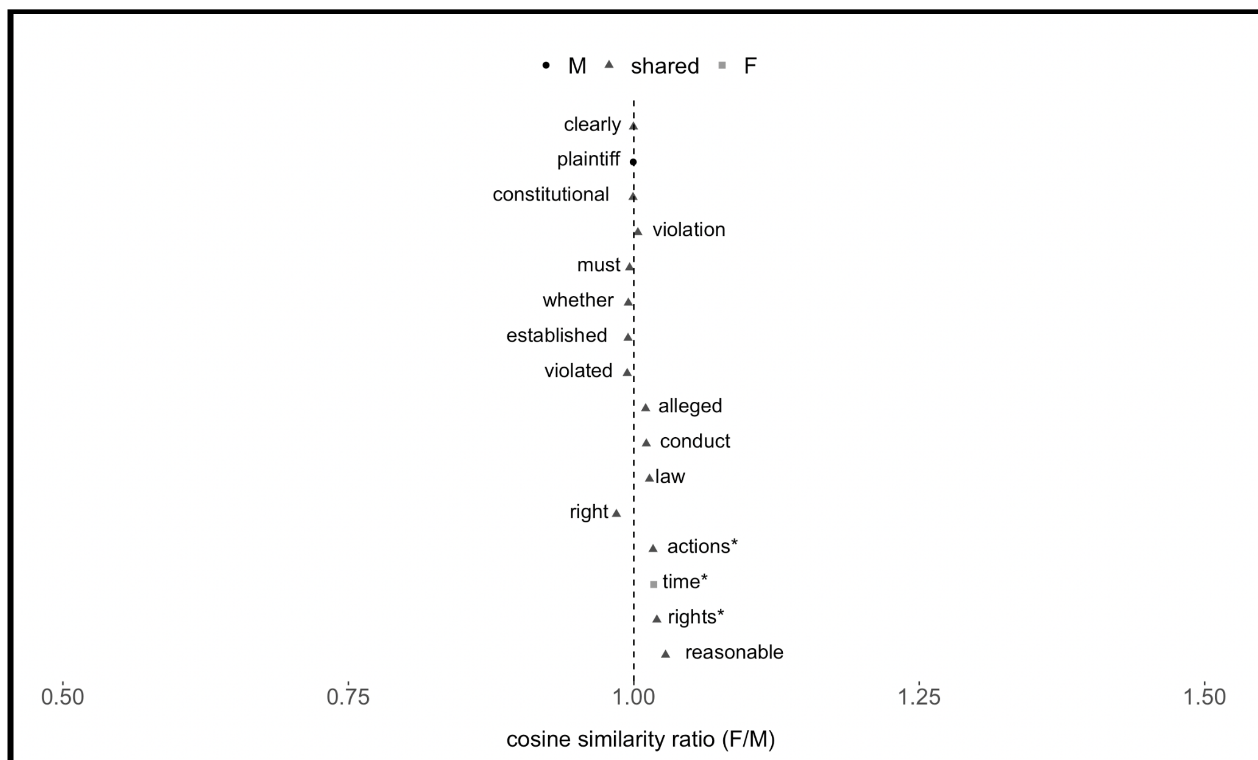
More research must be conducted to identify just how influential political ideology, race, and gender are on the rhetoric and judicial decisionmaking of judges in qualified immunity cases. If future research finds that the influence of these variables is minimal, then it may be possible to reform or eliminate the qualified immunity doctrine without first having to increase the diversity of all three variables within the judiciary–something which cannot be easily done as the nomination and appointment of judges across the federal judiciary are determined by the President and the Senate. While many scholars have found that the Qualified Immunity Doctrine is deeply flawed, it appears as though these flaws cannot be immediately attributed to a judge's identity; these flaws appear to be more institutional and can be attributed to precedent that has impeded development of constitutional law in the field of qualified immunity.

Certainly, though, some form of action must be taken to reform the doctrine, if not eliminate completely. Social movements such as Black Lives Matter will continue to rightfully

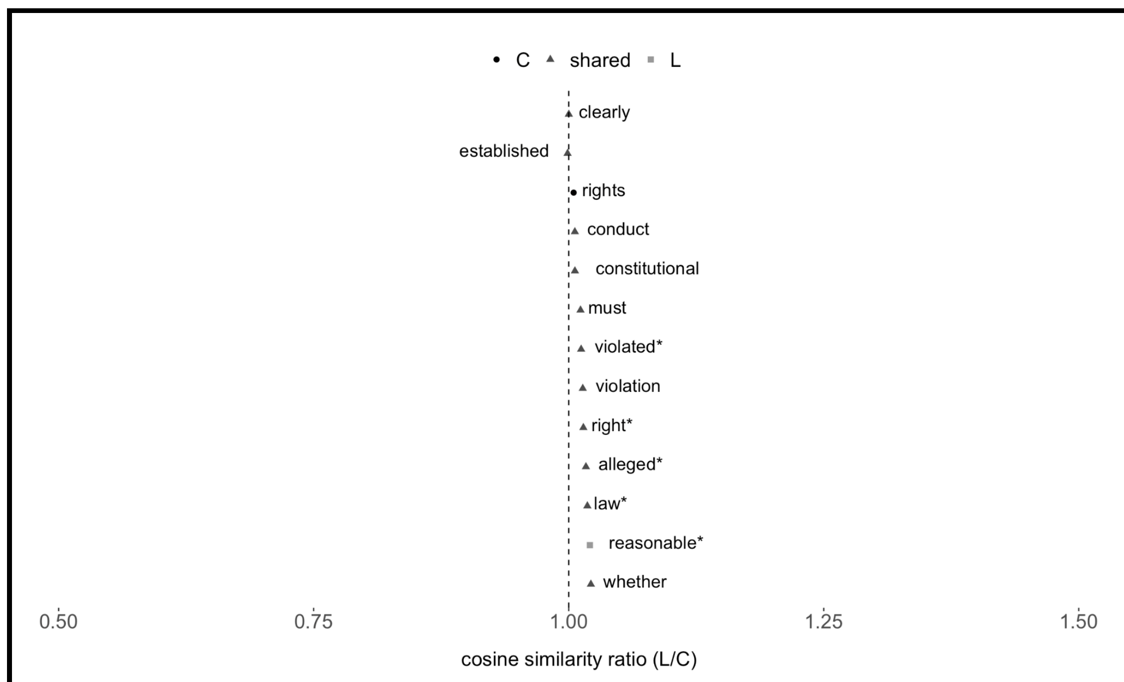
call for each branch of government to consider revisiting the Qualified Immunity Doctrine as news outlets continue to shine light on racial inequality, police misconduct, and brutality. This paper serves as an opportunity to expand on literature within the field of qualified immunity and judicial behavior, with the possibility of using a similar or improved version of the textual analyses conducted in this paper within other fields of law. It is important to consider how the different identities of judges influence judges's rhetoric and judicial decisionmaking across fields of law and throughout the judiciary. Interpreting and understanding these factors in relation to decisions written by judges will help create a more fair and unbiased judiciary in which any citizen can bring forth a claim without the undue burdens posed by litigation and potential bias stemming from a judge's identity.

Appendix

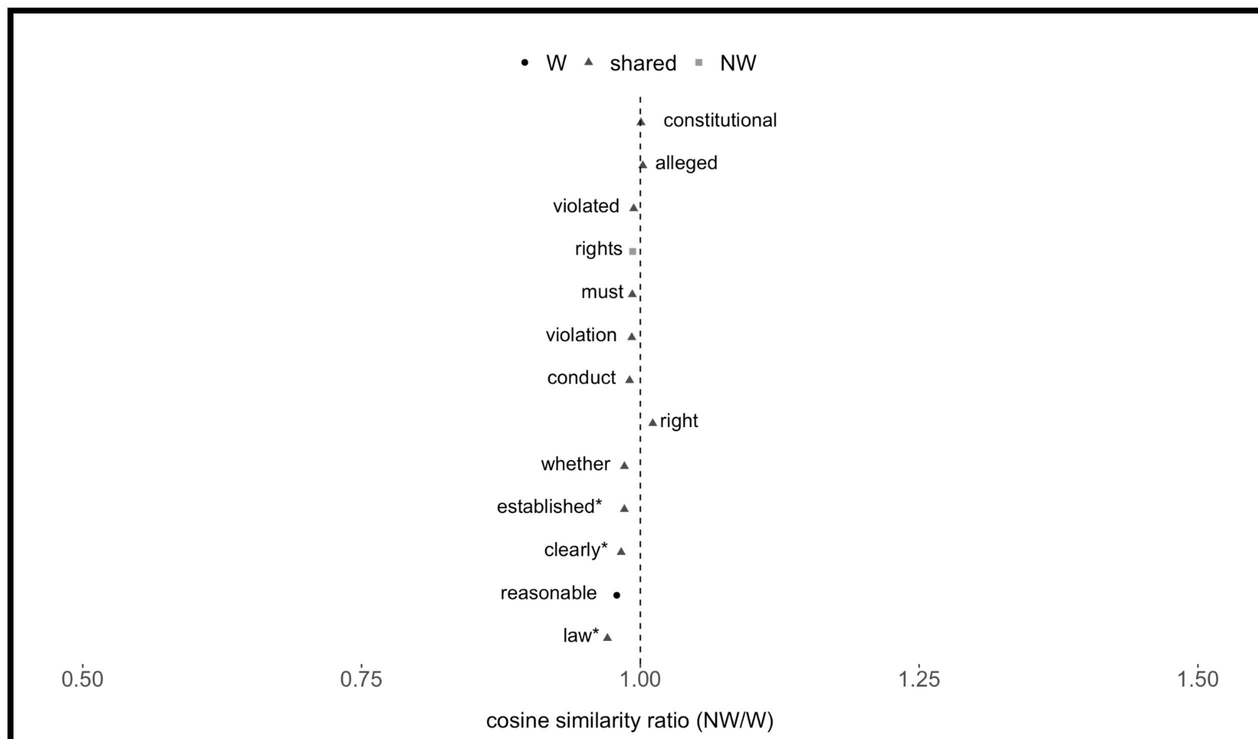
1. Figure 4: Nearest Neighbors Cosine-Similarity of "Established" based on Gender



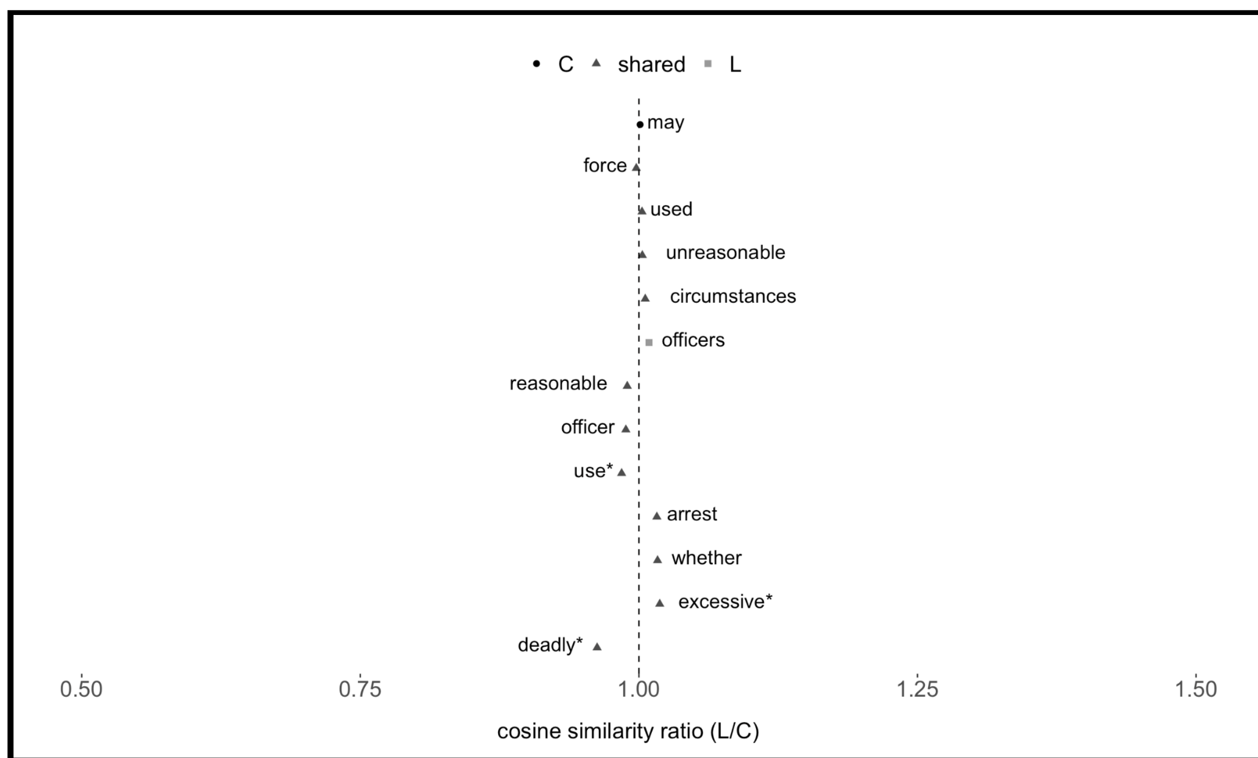
2. Figure 5: Nearest Neighbors Cosine-Similarity of "Established" based on Political Ideology



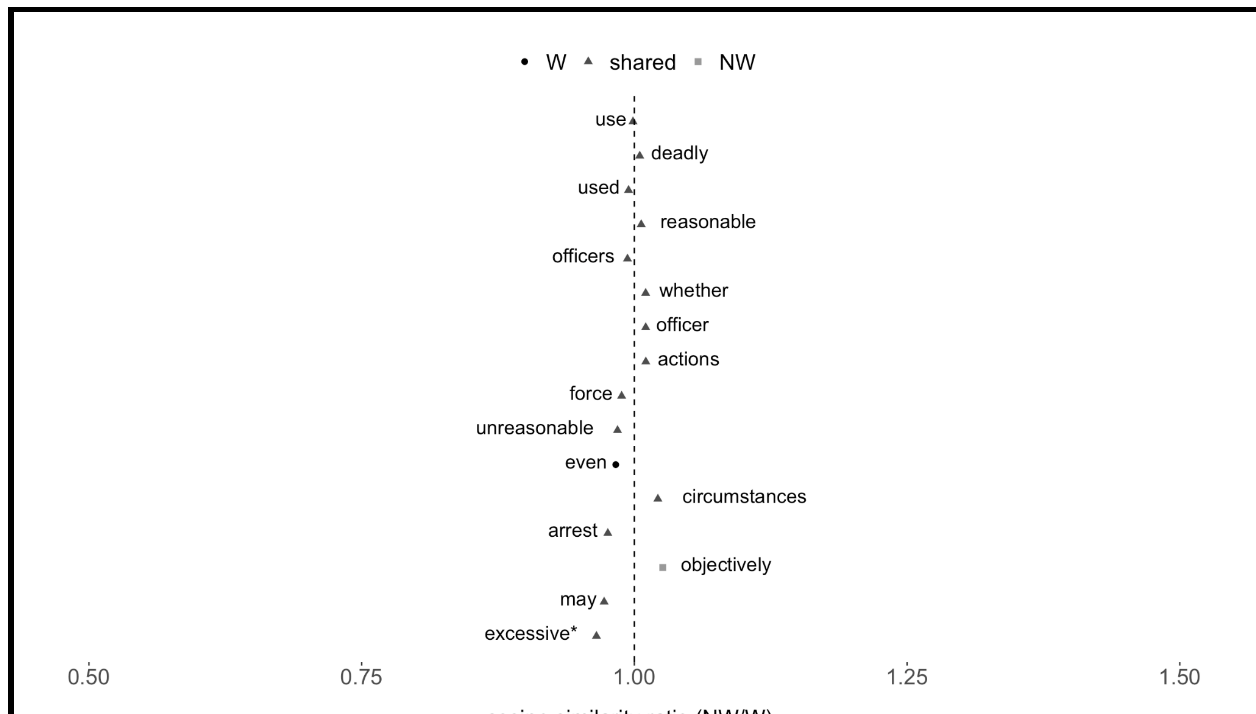
3. Figure 6: Nearest Neighbors Cosine-Similarity of “Established” based on Race



4. Figure 11: Nearest Neighbors Cosine-Similarity of “Force” based on Political Ideology



5. Figure 12: Nearest Neighbors Cosine-Similarity of "Force" based on Race



6. Abbott v. Sangamon County
7. Abella v. rodriguez
8. Abney v. Coe
9. Acosta v. City & County of San Francisco
10. Aczel v. Labonia
11. Adams v. Silva
12. Alfano v. Lynch
13. Alford v. Cumberland County
14. Alford v. Vernier
15. Anderson v. City of Aurora
16. Anderson v. Russell
17. Arnold v. Curtis

18. Arrington v. United States
19. Atkins v. Twp. Of Flint
20. Atwater v. City of Lago Vista
21. Awnings v. Fullerton
22. Ayala v. Wolfe
23. Bacque v. Leger
24. Bailey v. Andrews
25. Baltimore v. City of Albany
26. Bark v. Chacon
27. Battle v. Webb
28. Baxter v. Bracey
29. Bechman v. Magill
30. Berg v. Kelly
31. Blackwell v. Barton
32. Boone v. Spurgess
33. Bowles v. City of Porterville
34. Braden v. Davis
35. Bradshaw v. Stoller
36. Branch v. Gorman
37. Brand v. Casal
38. Brandenburg v. Murphy
39. Bresko v. John
40. Briggs v. O'Malley
41. Brooks v. City of W. Point
42. Brosseau v. Haugen

43. Bruning v. Pixler
44. Bryant v. Gillem
45. Buenrostro v. Collazo
46. Buonocore v. Harris
47. Burke v. County of Alameda
48. Cacereres v. Port Auth.
49. Caie v. West Bloomfield Twp.
50. Callahan v. Unified Gov't of Wyandotte Cnty.
51. Campbell v. City of Springsboro, Ohio
52. Campbell v. White
53. Carmichael v. Vill. of Palatine
54. Carnaby v. City of Houston
55. Carr v. Cadeau
56. Carroll v. Pfeffer
57. Cass v. City of Dayton
58. Castro v. McCord
59. Chamberlain v. City of White Plains
60. Chestnut v. Wallace
61. Chuman v. Wright
62. Church v. Anderson
63. Claridy v. Golub
64. Clark v. Edmunds
65. Coble v. City of White House
66. Cole v. Bone
67. Coles v. Eagle

68. Conlogue v. Hamilton
69. Cook v. Hill
70. Cook v. Sheldon
71. Cordova v. Aragon
72. Correa v. Simone
73. County of Sacramento v. Lewis
74. Covey v. Assessor of Ohio County
75. Cox v. Hainey
76. Craighead v. Lee
77. Crenshaw v. Lister
78. Cruz v. City of Laramie
79. Cunningham v. State Dep't of State Police
80. Curley v. Klem
81. Curley v. Village of Suffern
82. Curnow v. Ridgecrest Police
83. Cuvo v. De Biasi
84. Cybernet LLC v. David
85. Dancyy v. McGinley
86. Daniels v. Bango
87. Darnell v. Caver
88. Davis v. White
89. Dawson v. Brown
90. Dawson v. Jackson
91. Delade v. Cargan
92. DeMayo v. Nugent

93. Denby v. Engrstrom
94. Denise-Bradford v. Town of Silver City
95. DePoutot v. Raffaelly
96. Diamondstone v. Macaluso
97. Diaz v. Miami-Dade Cty.
98. Dickerson v. McClellan
99. District of Columbia v. Wesby
100. Dockery v. Blackburn
101. DuFour-Dowell v. Cogger
102. Dunigan v. Noble
103. Dunn v. City of Elgin
104. Ebergardinger v. City of York
105. Edrei v. Maguire
106. Ehrlich v. Town of Glastonbury
107. Emanuel v. Cnty. Of Wayne
108. Emesowum v. Cruz
109. Espinosa v. City & County of San Francisco
110. Estate of Allen v. City of W. Memphis
111. Estate of Erwin v. Green Cty.
112. Evans v. City of Etowah
113. Federman v. City of San Jose
114. Feliciano v. City of Miami Beach
115. Few v. Cobb County
116. Figg v. Schroeder
117. Fisher v. Wal-Mart Stores Inc.

118. Flemister v. City of Detroit
119. Fletcher v. Town of Clinton
120. Flowers v. Fiore
121. Foote v. Spiegel
122. Forsythe v. City of Burbank
123. Fulton v. Robinson
124. Gaddis v. Redford Twp.
125. Galletta v. Deasy
126. Garcia v. Doe
127. Garcia v. Escalante
128. Gardner v. Bd. Of Police Comm'rs
129. Garmon v. Foust
130. Garnett v. Undercover Officer
131. Gassner v. Garland
132. George v. City of St. Louis
133. Giannetti v. City of Stillwater
134. Glik v. Cunniffe
135. Gold v. City of Miami
136. Goodman v. Harris County
137. Goodwin v. City of San Bernardino
138. Gould v. Davis
139. Greenidge v. Ruffin
140. Greve v. Bass
141. Griffin v. Runyon
142. Griffith v. Coburn

143. Guite v. Wright

144. Gulley v. Elizabeth City Police Dep't

145. Hadley v. Williams

146. Hall v. Tudbury

147. Hamm v. Powell

148. Hanig v. Lee

149. Hanson v. Best

150. Hardy v. Broward County Sheriff's Office

151. Harlow v. Fitzgerald

152. Harris v. Serpas

153. Hartline v. Gallo

154. Harveston v. Cunningham

155. Hays v. Bolton

156. Hegarty v. Somerset County

157. Henderson v. City of Seattle

158. Hendricks v. Sheriff

159. Hernandez v. City of Union City

160. Hernandez v. Mesa

161. Hill v. Shobe

162. Hinchman v. Moore

163. Hindbaugh v. Washita County Bd. Of County Comm'rs

164. Hogan v. Cunningham

165. Holder v. Town of Sandown

166. Holt v. United States AG

167. Hopkins v. Sierra Vista

168. Hopkins v. Vaughn
169. Hosea v. City of St. Paul
170. Howards v. McLaughling
171. Hubbard v. Gross
172. Huff v. Reaves
173. Hukarevic v. County of Menominee
174. Hupp v. Cook
175. Irish v. Fowler
176. Irwin v. Santiago
177. Isom v. Town of Warren
178. Jackson v. Sauls
179. Jaegly v. Couch
180. Janis v. Biesheuvel
181. Jean-Baptiste v. Gutierrez
182. Jim v. County of Hawaii
183. Johnson v. Crooks
184. Johnson v. Estate of Laccheo
185. Jones v. Sandusky County
186. Junkert v. Massey
187. Keller v. Fleming
188. Kelley v. O'Malley
189. Ketcham v. City of Mt. Vernon
190. Kidd v. O'Neil
191. Kiles v. City of N. Las Vegas
192. King v. City of Eastpointe

193. Kingsland v. City of Miami

194. Kinnemore v. Cochran

195. Knight v. Bobanic

196. Koger v. Carson

197. Kohorst v. Smith

198. Krause ex rel. Estate of Krause v. Jones

199. Krause v. Bennett

200. Kroll v. Untied States Capitol Police

201. Kuha v. City of Minneapolis

202. Lacey v. City of Warren

203. Lal v. Cal

204. Lash v. Lemke

205. Lewis v. Charter Twp. of Flint

206. Lifton v. City of Vacaville

207. Liu v. Phillips

208. Lombardo v. City of St. Louis

209. Longino v. Henry Cty.

210. Lopez v. City of Cleveland

211. Losch v. Parkersburg

212. Louden v. City of Minneapolis

213. Luchtel v. Hagemann

214. Luck v. Rovenstine

215. Lykken v. Brady

216. Mace v. City of Palestine

217. Mangieri v. Clifton

218. Mann v. Yarnell
219. Marcavage v. City of New York
220. Marion v. City of Corydon
221. Marks v. Carmody
222. Martin v. Russell
223. Marvin v. City of Taylor
224. Masters v. Crouch
225. Maxwell v. County of San Diego
226. Mayard v. Hopwood
227. McCaaslin v. Wilkins
228. McCowan v. Morales
229. McKay v. Hammock
230. McKelvie v. Cooper
231. McLin v. Ard
232. McVay v. Sisters of Mercy Health Sys.
233. Merricks v. Adkisson
234. Mesa v. Prejean
235. Mettler v. Whitledge
236. Meyer v. Robinson
237. Moore v. Gwinnett Cty.
238. Mora v. City of Gaithersburg
239. Morelli v. Webster
240. Morris v. Lanpher
241. Morris v. Town of Lexington Ala.
242. Mucha v. Jackson

243. Mucha v. Vill. Of Oak Brook

244. Mullenix v. Luna

245. Mustafa v. City of Chicago

246. Neal v. Melton

247. Nelson v. City of Davis

248. Nerio v. Evans

249. Noone v. City of Ocean City

250. Oberfelder v. Bertoli

251. Ortega v. Christian

252. Painter v. Robertson

253. Park v. Shiflett

254. Parker v. Boyer

255. Parks v. Pomeroy

256. Patrick v. Moorman

257. Paullin v. City of Locley

258. Pena-Borrero v. Estremeda

259. Penley v. Eslinger

260. Perry v. Greene County

261. Petersen v. Farnsworth

262. Peterson v. Jensen

263. Pittman v. Nelms

264. Pleasants v. Town of Louisa

265. Plumhoff v. Rickard

266. Poole v. City of Shreverport

267. Pride v. Does

268. Pulice v. Enciso
269. Quick v. Geddie
270. Quinn v. Roach
271. Rahn v. Hawkins
272. Read v. Begbie
273. Reagan v. Mallory
274. Reavis v. Frost
275. Reeves v. Churchich
276. Reid v. Henry County
277. Reyes v. Bridgwater
278. Ricci v. Orso
279. Richards v. Gelsomino
280. Richardson v. City of Newark
281. Robinson ex rel. Walters v. Arrugueta
282. Robinson v. Cook
283. Robinson v. Twp. Of Redford
284. Rockwell v. Brown
285. Rogers v. King
286. Rogers v. Powell
287. Romero v. Story
288. Rosebrock v. Perez
289. Rothhaupt v. Maiden
290. Rudlaff v. Gillispie
291. Rush v. City of Lansing
292. Ryan v. City of Hazel Park

293. S.S. v. Bolton
294. Sada v. City of Altamonte Springs
295. Saman v. Robbins
296. Samples v. Vadzemnieks
297. Samuelson v. Cty of New Ulm
298. Santini v. Fuentes
299. Santos v. Carter
300. Saucier v. Katz
301. Savard v. Rhode Island
302. Scott v. City of Albuquerque
303. Scott v. District of Columbia
304. Scott v. Henrich
305. Seales v. City of Detroit
306. Serrano v. United States
307. Sexton v. Mangiaracina
308. Shanaberg v. Licking Cty.
309. Sharp v. Fisher
310. Sheehan v. City & County of San Francisco
311. Sheehy v. Town of Plymouth
312. Sheets v. Mullins
313. Shepherd v. City of Shreverport
314. Simmons v. City of Paris
315. Simpson v. Kansas
316. Sims v. Labowitz
317. Smith v. City of Santa Clara

318. Smith v. Lamz

319. Solomon v. Auburn Hills Police Dep't

320. Solomon v. Petray

321. Sornberger v. City of Knoxville

322. Soto v. Gaudett

323. Speight v. Griggs

324. Springman v. City of Venice

325. Stamps v. Town of Framingham

326. Statchen v. Palmer

327. Stocker v. City & County of San Franisco

328. Stringer v. Alben

329. Surratt v. McClarin

330. Sutherland v. Allison

331. Sutton v. Metro. Gov't of Nashville and Davidson County

332. Swain v. Spinney

333. Swiecicki v. Delgado

334. Szabla v. City of Brooklyn Park

335. Tangwall v. Stuckey

336. Taylor v. City of Milford

337. Taylor v. Waters

338. Teal v. Campbell

339. Thomas v. Plummer

340. Thornton v. Fray

341. Tisdale v. City of Phila.

342. Tolan v. Cotton

343. Torchinsky v. Siwinski

344. Tracy v. Freshwater

345. Trakhtenberg v. Cnty. Of Oakland

346. Tucker v. Las Vegas Metro. Police Dep't

347. Turk v. Comerford

348. United States v. Garcia-Hernandez

349. United States v. Voustianiouk

350. V-1 Oil Co v. Means

351. Valente v. Wallace

352. Vargas v. City of Phila.

353. Vega v. Ripley

354. Vohra v. City of Placentia

355. Walker v. City of Oklahoma City

356. Walker v. City of Pine Bluff

357. Walker v. City of Riviera Beach

358. Walker v. Donahoe

359. Wallingford v. Olson

360. Ward v. Moore

361. Warren v. Las Vegas Metro. Police Dep't

362. Warren v. Lincoln

363. Washington v. Newsom

364. Waugh v. Dow

365. Wernert v. Green

366. Wheeler v. Lawson

367. White v. City of Markham

368. White v. Harmon

369. White v. Pierce County

370. White v. Stanley

371. Whiting v. Kirk

372. Whitlow v. City of Louisville

373. Wigley v. City of Albuquerque

374. Williams v. Ingham

375. Willingham v. Loughan

376. Wilson v. Kittoe

377. Wilson v. Parker

378. Wollin v. Gondert

379. Wood v. Wooten

380. Wright v. City of Euclid

381. Young v. Hauri

382. Zavala v. Parks

383. Zia Trust Co. v. Montoya