COVID-19 AND SUPREME COURT ORAL ARGUMENT: THE CURIOUS CASE OF JUSTICE CLARENCE THOMAS

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> The Court will hear oral arguments by telephone conference on May 4, 5, 6, 11, 12, and 13 in a limited number of previously postponed cases. . . . The Chief Justice will call the first case, and he will acknowledge the first counsel to argue. . . . At the end of this time, the Chief Justice will have the opportunity to ask questions. When his initial questioning is complete, the Associate Justices will then have the opportunity to ask questions in turn in order of seniority.[1]

There is no question that the COVID-19 pandemic has touched nearly every aspect of American political institutions. The White House Press Corps created a rotating schedule to ensure only every third briefing room

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1. Press Release, Supreme Court of the U.S., Regarding May Teleconference Arguments Order of Business (Apr. 28, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-28-20.

seat was occupied,[2] several states expanded absentee and mail-in balloting,[3] then-presidential candidate Joseph R. Biden, Jr. held a livestreamed town hall meeting about the pandemic,[4] and the House of Representatives cast votes remotely for the first time in its 233-year history.[5] Each of these changes was adopted with varying degrees of acceptance and success,[6] but one thing is certain: there is no immediate end in sight to this pandemic.

An institution notoriously reticent (sometimes even hostile) to change, the U.S. Supreme Court was also forced to make institutional adjustments due to the pandemic. On March 16 and April 3 of 2020, the Court issued press releases postponing its normally scheduled oral arguments due to the pandemic.[7] Just ten days later, it announced it would forego in-person arguments and proceed via telephone conference for thirteen of its final 2019 term cases.[8] Further details of the telephonic sessions—including procedures for joining the conference

2. Steve Herman, *White House Journalists Voluntarily Scale Back Their Presence*, VOA (Mar. 16, 2020), https://www.voanews.com/science-health/coronavirus-outbreak/white-house-journalists-voluntarily-scale-back-their-presence.

3. *See COVID-19 and Elections*, NAT'L CONF. ST. LEGIS., https://www.ncsl.org/research/elections-and-campaigns/state-action-on-covid-19-and-elections.aspx (last visited Aug. 31, 2020).

4. *Joe Biden Holds COVID-19 Town Hall with Democratic Governors*, C-SPAN (May 14, 2020), https://www.c-span.org/video/?472209-1/joe-biden-holds-covid-19-town-hall-democratic-governors.

5. Nicholas Fandos, *With Move to Remote Voting, House Alters What It Means for Congress to Meet*, N.Y. TIMES (May 15, 2020), https://www.nytimes.com/2020/05/15/us/politics/remote-voting-house-coronavirus.html.

6. *See* Michael Wines, *As Trump Rails Against Voting by Mail, States Open the Door for It*, N.Y. TIMES (May 21, 2020), https://www.nytimes.com/2020/05/21/us/vote-by-mail-trump.html; Eric Wemple, *One American News Network has been Ousted from Coronavirus Briefing Rotation. Here's Why.*, WASH. POST (Apr. 2, 2020), https://www.washingtonpost.com/opinions/2020/04/02/one-america-news-network-has-been-ousted-coronavirus-briefing-rotation-heres-why/.

7. Press Release, Supreme Court of the U.S., Regarding Postponement of March Oral Arguments (Mar. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20; Press Release, Supreme Court of the U.S., Regarding Postponement of April Arguments (Apr. 3, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20.

8. Press Release, Supreme Court of the U.S., Regarding May Teleconference Oral Arguments (Apr. 13, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20. Several of these cases were consolidated so that it actually held only ten argument sessions.

call and changes to norms of how the proceedings would be conducted—were made available in the April 28 press release, excerpted above. This seemingly mundane announcement marked the most substantial change to the Court's oral argument process in half a century.[9] Indeed, the Court purported to hear arguments by phone, the Justices would take turns asking questions in order of seniority, and the arguments would be livestreamed to the public for the first time in its history.[10]

While it was initially unclear how these changes would impact oral argument sessions, Court watchers focused a fair amount of attention on whether the new procedures would lead Associate Justice Clarence Thomas to participate.[11] Indeed, the (in)famously taciturn Justice is not known for speaking during arguments, doing so in just 39 of approximately 2,200 orally argued cases heard in his twenty-eight years on the bench. But given the new, take-turns format, the question was whether Thomas would participate when the Court convened via telephone on May 4, 2020. Those who tuned in for the

9. Initially, oral argument time was unlimited. *Understanding U.S. Supreme Court Oral Arguments*, CORNELL UNIV. LIBRARY, https://guides.library.cornell.edu/SupCourtOralArguments (last visited Oct. 8, 2020). In 1849 the Court limited it, for the first time, to two hours per side. *Id.* In 1925 it was again limited to one hour per side. *Id.* Then, in 1970, arguments were limited to 30 minutes per side. *Id.* Further, Chief Justice Burger changed the shape of the courtroom bench to make communication easier between Justices and counsel. Ryan C. Black, Timothy R. Johnson & Ryan J. Owens, *Chief Justice Burger and the Bench: How Physically Changing the Shape of the Court's Bench Reduced Interruptions During Oral Argument*, 43 J. SUP. CT. HIST. 83, 83 (2018). *See generally* TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT (updated ed. 2011).

10. *See* Supreme Court of the U.S., *supra* note 1; Press Release, Supreme Court of the U.S., Media Advisory Regarding May Teleconference Argument Audio (Apr. 30, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-30-20.

11. This assertion is evidenced by the attention given to Thomas after he spoke during the first arguments. *See, e.g.*, Greg Stohr, *Supreme Court Tele-Argument Brings Minor Hiccups, Thomas Questions*, BLOOMBERG (May 4, 2020), https://www.bloomberg.com/news/articles/2020-05-04/justice-thomas-speaks-during-supreme-court-phone-argument; Brent Kendall & Jess Bravin, *Under Coronavirus Court Procedures, Clarence Thomas Finds His Voice*, WALL ST. J. (May 10, 2020), https://www.wsj.com/articles/justice-clarence-thomas-finds-his-voice-11589036401.

livestreamed session found their answer quickly: when called upon by Chief Justice John Roberts, only six minutes and five seconds into the day's first case, Thomas took his turn, starting with, "Yes, Ms. Ross—*a couple of questions*" (emphasis added).[12] All told, Thomas spoke multiple times in every one of the ten telephonic arguments that culminated the Court's 2019 term.[13]

Such a startling change in judicial behavior leads us to two interrelated research questions: *is Thomas' increased participation due solely to the telephonic format, or do other explanations account for his behavior?* In asking these questions, we specifically move away from media accounts of his participation, which focus on his silent streaks or speculate on reasons why he breaks such streaks.[14] In Section I, we delineate several accounts of his silence on the bench, including observations by his colleague Justice Harry A. Blackmun; how the media picked up on his silence; Thomas' own observations about this phenomenon; and, finally, what scholars have said about it. In Section II, we analyze empirically Thomas' silence prior to and during the pandemic. In Section III, we provide a multivariate analysis to explain when he is most likely to speak during an argument session. In Section IV, we provide data on the impact Thomas has had on oral argument sessions when he does speak. Section V concludes with a summary and discussion of our findings and some thoughts on how we may expect Thomas to act if, post-pandemic, the Court moves back to traditional arguments.

I. ORAL ARGUMENT AND JUSTICE CLARENCE THOMAS:

12. Oral Argument at 6:05, U.S. Patent & Trademark Office v. Booking.com B.V., 140 S. Ct. 2298 (2020) (No. 19-46), https://www.supremecourt.gov/oral_arguments/audio/2019/19-46.

13. *See Argument Session: May 4, 2020–May 13, 2020*, SUPREMECOURT.GOV, https://www.supremecourt.gov/oral_arguments/argument_audio/2019 (last visited Sep. 25, 2020).

14. *See, e.g.*, Neil A. Lewis, *2 Years After His Bruising Hearing, Justice Thomas Can Rarely Be Heard*, N.Y. TIMES (Nov. 27, 1993), https://www.nytimes.com/1993/11/27/us/2-years-after-his-bruising-hearing-justice-thomas-can-rarely-be-heard.html.

A CASE OF SILENCE

A. Justice Harry A. Blackmun Takes Note

It was not immediately evident that, during his career, Thomas would speak so little during oral argument sessions. However, little escaped the attention of fellow Justice Harry A. Blackmun. Indeed, Blackmun is perhaps as well-known for the meticulous notes he took during the Court's decision-making process as he is for the famous (and sometimes infamous) opinions he authored.[15] During oral argument, Blackmun regularly predicted how he thought his colleagues would vote, noted questions and comments made by other Justices, rated the attorneys' arguments, and even kept detailed physical descriptions of the lawyers who argued.[16] Subsequent scholarship demonstrated the utility of Blackmun's notes, as he clearly used them as more than just a way to pass the time.[17]

Blackmun also kept track of when he believed his colleagues were monopolizing the proceedings by asking too many questions.[18] In fact, he noted his annoyance

15. *See generally* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN (2005); Amanda C. Bryan, Rachael Houston & Timothy R. Johnson, *Taking Note: Justice Harry A. Blackmun's Observations from Oral Argument about Life, Law, and the U.S. Supreme Court*, 45 J. SUP. CT. HIST. 44 (2020).

16. Bryan et al., *supra* note 15, at 51–52.

17. *See generally* RYAN C. BLACK, TIMOTHY R. JOHNSON & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE (2012); Timothy R. Johnson, Paul L. Wahlbeck & James F. Spriggs, *The Influence of Oral Argumentation Before the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006); Eve M. Ringsmuth, Amanda C. Bryan & Timothy R. Johnson, *Voting Fluidity and Oral Argument on the U.S. Supreme Court*, 66 POL. RES. Q. 429 (2013).

18. *See* Timothy R. Johnson, *The Digital Archives of Justices Blackmun and Powell Oral Argument Notes* (2009) [hereinafter *Argument Archives*], https://sites.google.com/a/umn.edu/trj/harry-a-blackmun-oral-argument-notes (containing Blackmun's oral argument notes in every case for which they exist). Using these notes, Johnson coded for a variety of phenomena Blackmun wrote about. In this instance, as a basic indicator that Blackmun saw a real trend in Justices speaking so often, the mean of the *Too Many Questions* variable increases from 4.25 per term in the years preceding Justice Antonin Scalia's ascension to the bench, to 18.25 once Scalia arrives. In other words, once the notoriously loquacious Scalia was appointed, Blackmun's complaints in this matter

with such behavior on 141 separate occasions.[19] In *Freeman v. Pitts*,[20] for example, he complained: "?s—K too many."[21] Similarly, in *Eastman Kodak Company v. Image Technical Services, Inc.*,[22] Blackmun wrote "Scalia again,"[23] annoyed that the junior Justice spoke for roughly six minutes—or one-tenth of the sixty minutes usually allotted for the Justices to hear arguments.

Our point is this: even prior to Thomas' appointment, Blackmun not only paid attention to *what* his colleagues said, but also noted *how much* they had to say.[24] Given this attention to detail, it is unsurprising that he also memorialized Thomas' very first oral argument utterance. Indeed, dated November 5, 1991—just Thomas' second day on the bench—Blackmun's notes in *Collins v. City of Harker Heights*[25] include the shorthand phrase: "T asks his 1st?."[26] In the months and years to come, Blackmun made a particular habit of singling out

increased more than four-fold (data available from authors upon request). For more on how Scalia's presence changed oral argument see Timothy R. Johnson, Ryan C. Black & Ryan J. Owens, *Justice Scalia and Oral Arguments at the Supreme Court in* THE CONSERVATIVE REVOLUTION OF ANTONIN SCALIA 245–272 (David A. Schultz & Howard Schweber eds., 2018).

19. *See* Johnson, *Argument Archives*, *supra* note 18.

20. 503 U.S. 467 (1992).

21. The transcription of Blackmun's shorthand is "questions—Kennedy too many." Justice Blackmun Oral Argument Notes (Oct. 7, 1991), *in Argument Archives*, No. 18-1290, http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1991%20term/89-1290.jpg

22. 504 U.S. 451 (1992).

23. Justice Blackmun Oral Argument Notes (Dec. 10, 1991), *in Argument Archives*, No. 90-1029, http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1991%20term/90-1029.jpg.

24. While not as often, Blackmun also considered, from time-to-time, that his colleagues were overly quiet. Indeed, on 15 occasions he penciled that the Justices asked too few questions (data available from authors upon request).

25. 503 U.S. 115 (1992).

26. The transcription is "Thomas asks his 1st question." Justice Blackmun Oral Argument Notes (Nov. 5, 1991), *in Argument Archives*, No. 90-1279, http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1991%20term/90-1279.jpg.

Thomas to note his oral argument behavior, including comments such as "T asks a ?,"[27] and "T asks a ? again."[28]

These handwritten references to Thomas end, however, after the 1992 term because, according to Court records and our data, Thomas did not speak during the entire 1993 term—Blackmun's last on the bench. Thomas did, however, speak in seven and eight cases, respectively, during his first two terms (1991 and 1992), setting a record for participation he would not break until May 2020. Of these fifteen cases in which Thomas spoke before Blackmun's retirement, Blackmun took note six times.[29] His comments range from *Cincinnati v. Discovery Network*,[30] where he wrote, "T asks his 1st ? o t Fall"[31] to "T!"[32] to, in the second-to-last case of the term, "CT asks a ?!!"[33]

In just two terms observing his oral argument behavior, it was clear Blackmun had come to characterize Thomas as a generally silent colleague who rarely spoke. And, when Thomas did speak, Blackmun was quick to

27. Justice Blackmun Oral Argument Notes (Nov. 10, 1992), *in Argument Archives*, No. 91-1160, http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1992%20term/91-1160.jpg. The case was *Arave v. Creech*, 507 U.S. 463 (1993).

28. Justice Blackmun Oral Argument Notes (Dec. 9, 1992), *in Argument Archives*, No. 91-1306, http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1992%20term/91-1306.jpg. The case was *United States v. Olano*, 507 U.S. 725 (1993).

29. The one exception was *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). Ironically, Thomas had nine separate speaking turns in this case but Blackmun took no specific note of them. He did, however, write "Lots o ?s" (lots of questions).

30. 507 U.S. 410 (1993).

31. The translation is "Thomas asks his 1st question of the fall." Justice Blackmun Oral Argument Notes (Nov. 9, 1992), *in Argument Archives*, No. 91-1200, http://users.polisci.umn.edu/~trj/OAnotesbyterm75/HAB75/1992%20term/91-1200.jpg.

32. Justice Blackmun Oral Argument Notes (Mar. 3, 1993), *in Argument Archives*, No. 91-1833, http://users.polisci.umn.edu/~trj/OAnotesbyterm75/HAB75/1992%20term/91-1833.jpg. The case was Lincoln v. Vigil, 508 U.S. 182 (1993).

33. Justice Blackmun Oral Argument Notes (Dec. 9, 1992), *in Argument Archives*, Nos. 91-261, 91-274, http://www.polisci.umn.edu/~tjohnson/OAnotesbyterm75/HAB75/1992%20term/91-261,91-274.jpg. The case was Bldgs. & Constr. Trades Council of Metro. Dist. v. Assoc. Builders & Contractors of Mass./RI, Inc., 507 U.S. 218 (1993).

excitedly memorialize the phenomenon. The question is whether others would notice Thomas' behavior. It is to that question we now turn.

B. The Media Pick up on Blackmun's Insights

While Blackmun had a penchant for following Thomas' peculiar oral argument behavior, the media was not so fast to catch on. Although recent coverage of Thomas is saturated with stories about his silence, the media didn't first report on this aspect of his judicial behavior until 1993—his third term. In a broad piece, focused mostly on activities outside the Court, Neil A. Lewis framed Thomas' non-participation as part of a more general retreat from public life following the media circus covering his nomination and subsequent sexual harassment allegations against him.[34] Specifically, Lewis noted Thomas' complete silence during a sexual harassment case, adding, "Although he was outspoken when he served on the United States Circuit Court of Appeals for the District of Columbia, Justice Thomas has been the most reticent member of the Court. In fact, he rarely speaks at all."[35]

This account appears to be the only media acknowledgement of Thomas' silence during his early years on the bench; the reason why is intuitive. Although he did not speak as much as his other colleagues, there were no long-term gaps between cases when Thomas spoke. As the data we outline below indicate, with the exception of 1993, he spoke at least once per term from 1991 to 1999.[36] Thus, though his behavior was certainly unusual compared to his colleagues, it was not newsworthy enough to generate extensive coverage. In fact, it appears there are no news articles dedicated specifically to his reserved courtroom demeanor during his first few years on the bench. Even Lewis's nod to Thomas' virtual

34. Lewis, *supra* note 14.
35. Lewis, *supra* note 14.
36. *See infra* Table 1a.

silence was buried in an article focused on, what was assumed to be, Thomas' prolonged response to his controversial confirmation hearing.

It was not until 2011—when Thomas had been silent for half a decade—that the media, writ large, began to focus on his lack of questions and comments. Newspapers, radio, and television outlets all analyzed what his silence meant and when, or whether, he would ever speak again.[37] In addition, debates between legal experts appeared in major newspapers about whether Thomas' behavior was good or bad for him and the Court or whether it mattered at all.[38]

Two years later the media again brought Thomas' behavior to the fore when, in *Boyer v. Louisiana*,[39] he broke a seven-year silent streak with a joke about Yale, his law school alma mater.[40] Despite less-than-clear audio, the fact that Thomas' voice was even partially heard "set off a small quake" in the public gallery, between the journalists present, and among the Justices and arguing attorney (who, for a short time, could not stifle her laugh at his joke).[41] Subsequent media coverage was extensive and almost comically in-depth,[42] considering it was likely

37. *See, e.g.*, Adam Liptak, *No Argument: Thomas Keeps 5-Year Silence*, N.Y. TIMES (Feb. 12, 2011), https://www.nytimes.com/2011/02/13/us/13thomas.html?_r=1&scp=4&sq=adam%20liptak&st=cse; Nina Totenburg, *Five Years Later, Justice Thomas Still Silent*, NPR (Feb. 22, 2011, 3:00 PM), https://www.npr.org/2011/02/22/133971220/5-Years-Later-Justice-Thomas-Still-Silent; Ariane de Vogue, *Justice Clarence Thomas' Silence Unmatched for 40 Years*, ABC NEWS (Feb. 22, 2011, 3:08 PM), https://abcnews.go.com/Politics/Supreme_Court/supreme-court-justice-clarence-thomas-celebrates-years-silence/story?id=12974416&page=1.

38. Jamal Greene et. al., Opinion, *Does Clarence Thomas' Silence Matter?*, N.Y. TIMES (Feb. 16, 2011), https://www.nytimes.com/roomfordebate/2011/02/16/does-clarence-thomass-silence-matter.

39. 569 U.S. 238 (2013).

40. Oral Argument at 41:12, Boyer v. Louisiana, 569 U.S. 238 (2013) (No. 11-9953), https://www.oyez.org/cases/2012/11-9953.

41. Robert Barnes, *Clarence Thomas Breaks Long Silence During Supreme Court Oral Arguments*, WASH. POST (Jan. 14, 2013), https://www.washingtonpost.com/politics/clarence-thomas-breaks-long-silence-during-supreme-court-oral-arguments/2013/01/14/a7c6023c-5e7a-11e2-9940-6fc488f3fecd_story.html.

42. The *New York Times* and the *Washington Post* contextualized the joke by thoroughly analyzing his previous comments about Yale and his views about

the joke was merely an aside picked up by the Justices' microphones. Despite the media furor, the *Times* and *Post* both concluded that joking did not count as judicial participation; Thomas may have spoken, but he didn't truly break his silence by asking a question or making a substantive legal comment.

It is important to note that none of Thomas' previous questions or comments received such overblown news coverage. Certainly, the media previously discussed Thomas' silence but the *Boyer* coverage set a new precedent for reporting on his oral argument participation. Instead of, as is typical, focusing on a Justice's constitutional philosophy or jurisprudence, the media instead reported the length of Thomas' silent streaks and engaged in detailed analyses of what he said and why he may have said it.[43]

Feeding that narrative, Thomas did not speak again during arguments, in any capacity, until February 29, 2016. On that date, during arguments in *Voisine v. United States*,[44] he shocked Court watchers, media

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oral argument. The *Times* additionally scoured the remark for meaning: "The joke itself seemed good-natured, and it was made funnier by Yale Law School's reputation. While by some measure it is the best law school in the nation, it is also known for intellectual abstraction and disdain for the actual practice of law. The joke was also probably evidence of a recent warming trend between Justice Thomas and [Yale] law school, from which he graduated in 1974." Adam Liptak, *Justice Clarence Breaks His Silence*, N.Y. TIMES (Jan. 14, 2013), https://www.nytimes.com/2013/01/15/us/clarence-thomas-breaks-silence-in-supreme-court.html. The *Washington Post* focused on Thomas' public disdain for speaking during argument sessions. Robert Barnes, *Supreme Court Justice Clarence Thomas Finishes His Thought*, WASH. POST (Jan. 23, 2013), https://www.washingtonpost.com/politics/supreme-court-justice-clarence-thomas-finishes-his-thought/2013/01/23/3036773a-65a3-11e2-9e1b-07db1d2ccd5b_story.html.

43. *See, e.g.*, Mark Joseph Stern, *Clarence Thomas Just Asked His First Question in a Decade on the Supreme Court*, SLATE (Feb. 29, 2016), https://slate.com/news-and-politics/2016/02/clarence-thomas-asked-a-question-from-the-bench-to-defend-gun-rights.html; Robert Barnes, *For the First Time in 10 Years, Justice Clarence Thomas Asks Questions During an Argument*, WASH. POST (Feb. 29, 2016), https://www.washingtonpost.com/politics/courts_law/for-first-time-in-10-years-justice-thomas-asksquestions-during-argument/2016/02/29/b47f2558-df00-11e5-846c-10191d1fc4ec_story.html; Garrett Epps, *Clarence Thomas Breaks His Silence*, ATLANTIC (Feb. 29, 2016), https://www.theatlantic.com/politics/archive/2016/02/clarence-thomas-supreme-court/471582/.

44. 136 S. Ct. 2272 (2016).

members, and probably a few colleagues, when he spoke, not only once, but uttered substantive questions and comments eleven separate times.[45] Given the media's previously disproportionate coverage of a law school joke in *Boyer*, it is unsurprising that several major publications devoted entire articles to detailing an almost play-by-play account of Thomas' behavior.[46] *The Atlantic*, for example, provided the following commentary:

> Though the vigilant marshals keep a tight lid on noise, it's safe to say that not since Clarence Darrow for the defense called prosecutor William Jennings Bryan himself to the stand has an American courtroom been so startled. Thomas has not asked a question in court since February 22, 2006.[47]

Even *National Public Radio*, normally immune to hyperbole or sensationalist reporting, noted that Thomas' oral argument performance "drew gasps" before also reiterating the length of time since his last in-Court comments.[48]

In addition to reporting upon the novelty of Thomas' participation, the prevailing theory about why he broke his silence centered on Scalia's death just two weeks earlier. Media accounts suggested Thomas spoke to fill the silence emanating from Scalia's former seat next to the Chief Justice.[49] *The Atlantic* suggested, "of course, [Justice Thomas'] sudden loquacity comes barely two weeks after his comrade in arms, Antonin Scalia, died,"[50] while *The New York Times* speculated Scalia had "passed the baton" to Thomas in order to keep the spirit of

45. *See* Transcript of Oral Argument at 51, Voisine v. United States, 136 S. Ct. 2272 (2016) (No. 14-10154), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-10154_g31h.pdf.

46. *See, e.g.*, Stern, *supra* note 43; Barnes, *supra* note 43.

47. Epps, *supra* note 43.

48. Laura Wagner, *Clarence Thomas Asks 1st Question from Supreme Court Bench in 10 Years*, NPR (Feb. 29, 2016, 1:40 PM), https://www.npr.org/sections/thetwo-way/2016/02/29/468576931/clarence-thomas-asks-1st-question-from-supreme-court-bench-in-10-years.

49. Epps, *supra* note 43.

50. Epps, *supra* note 47.

originalism alive.[51] Whether or not these accounts accurately explain his sudden (and unexpected) outburst, Thomas quickly slipped back into the judicial silence for which he had become (in)famous.

A final wrinkle in the media's coverage of Thomas revealed itself three years later following arguments in *Flowers v. Mississippi*[52]—a case focused on racial discrimination in jury selection. Although news stories presented the common refrain that Thomas had "surprised court watchers on Wednesday when he made a rare intervention in court arguments,"[53] some media outlets suggested he had a particular interest in *Flowers* because race was a key issue.[54] Specifically, Thomas questioned petitioner's counsel about the race of any jurors preemptively struck by Flowers's trial attorney,[55] an exchange that led CNN news correspondent Joan Biskupic to conclude that when Thomas does speak "it has often related to race."[56]

Clearly, the media has taken a keen interest in Thomas' oral argument behavior but have not provided systematic explanations for why he chooses to break his silence when he does. That has not prevented speculation, however. Beyond generally conjecturing about his taciturn nature, accounts suggest two main reasons for why Thomas chooses to speak: to fill the originalism void left by Scalia and to offer comment upon issues related

51. Adam Liptak, *Clarence Thomas Breaks 10 Years of Silence at Supreme Court*, N.Y. TIMES (Feb. 29, 2016), https://www.nytimes.com/2016/03/01/us/politics/supreme-court-clarence-thomas.html.

52. 139 S. Ct. 2228 (2019).

53. Adam Shaw, *Clarence Thomas Makes Rare Intervention During Supreme Court Arguments*, FOX NEWS (Mar. 20, 2019), https://www.foxnews.com/politics/clarence-thomas-makes-rare-intervention-during-supreme-court-arguments.

54. *See* Jordan S. Rubin & Greg Stohr, *Thomas Asks Rare Question About Race in Jury Selection (4)*, BLOOMBERG L. (Mar. 20, 2020, 1:45PM), https://news.bloomberglaw.com/us-law-week/thomas-asks-rare-questions-about-race-in-jury-selection-4.

55. Transcript of Oral Argument at 57, Flowers v. Mississippi, 139 S. Ct. 2228 (2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-9572_2c8f.pdf.

56. Joan Biskupic, *Justice Clarence Thomas Asked a Question for the First Time in 3 Years—Here's Why*, CNN POL. (Mar. 20, 2019, 6:52 PM), https://www.cnn.com/2019/03/20/politics/clarence-thomas-question/index.html.

to race.[57] Because neither of these accounts have been verified, we next go straight to the source and detail Thomas' own stated oral argument philosophy.

C. Thomas' Account of His Silence

Although Thomas generally refrains from speaking to the press and participating during oral arguments, he does talk regularly and publicly about his oral argument behavior. He offers a number of reasons for his silence, beginning with a general reticence to speak at all in public. When asked about his lack of oral argument participation during a December 12, 2000, Question and Answer session, Thomas revealed that he grew up speaking a country dialect—Geechie Gullah—and therefore lacked the confidence to speak up: "[T]hey used to make fun of us back then. . . . [I] just started developing the habit of listening."[58]

Beyond the issue with his childhood dialect, Thomas believes lawyers should be allowed to present arguments without constant interruption. Instead of speaking so much, he would rather the Justices "hear a coherent presentation by counsel without unnecessary interruptions by his colleagues."[59] In other words, it seems he would prefer oral arguments to proceed as they did prior to 1850. During these early years, attorneys—such as Daniel Webster—were as much orators as they were legal analysts and so Justices largely listened to the arguments rather than engaging with counsel.[60] As Thomas puts it, "I think we should listen to lawyers who are arguing their cases, and I think we should allow the advocates to advocate."[61]

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57. *See, e.g.*, Epps, *supra* note 43; Rubin & Stohr, *supra* note 54.

58. Neil A. Lewis, *The Election; Clarence Thomas Speaks Out*, N.Y. TIMES (Dec. 17, 2000), https://www.nytimes.com/2000/12/17/weekinreview/the-election-clarence-thomas-speaks-out.html.

59. Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court, October Terms 1958-60 and 2010-12*, 2015 UTAH L. REV. 1005, 1012 (2015).

60. JOHNSON, *supra* note 9, at 2.

61. Liptak, *supra* note 51.

For Thomas, allowing the advocates to advocate means eliminating nearly all questions from the bench: "Unless I want an answer I don't ask things. . . . I don't ask for entertainment, I don't ask to give people a hard time."[62] Thomas has even gone so far as to express disdain for the *Family Feud* atmosphere created by the Justices' jockeying for turns to pose questions or to offer comments about a case.[63] Stemming from his desire for the Justices to treat advocates courteously, Thomas seems unwilling to add to the chaos in an attempt to "[get] a word in edgewise" when surrounded by his more loquacious colleagues.[64]

Perhaps, most succinctly, Thomas says he does not ask questions during oral argument because, for him, there are simply "too many questions" already asked.[65] This indicates Thomas values hearing the lawyers' arguments more than (what he considers) the unnecessary questions and comments made by his colleagues. In short, he believes questions should not be the focus of oral arguments: "I don't see where that advances anything. . . . Maybe it's the Southerner in me. Maybe it's the introvert in me, I don't know. I think that when somebody's talking, somebody ought to listen."[66]

Thomas offers one final (empirically disputed)[67] reason for his minimal participation at oral arguments:

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62. Lewis, *supra* note 58.

63. Adam Liptak, *No Argument: Thomas Keeps 5-year Silence*, N.Y. TIMES (Feb. 12, 2011), https://www.nytimes.com/2011/02/13/us/13thomas.html?_r=1&ref=clarencethomas.

64. Liptak, *supra* note 42.

65. Kaitlynn Riely, *A Supreme Presence in Pittsburgh*, PITTSBURG POST-GAZETTE, Apr. 10, 2013, at Local Section, https://www.pressreader.com/usa/pittsburgh-post-gazette/20130410/281943130355271.

66. Eric Stirgus, *Clarence Thomas Gives Supreme Court History Lesson*, POLITIFACT (Apr. 16, 2012), https://www.politifact.com/georgia/statements/2012/apr/16/clarence-thomas/clarence-thomas-gives-supreme-court-history-lesson/.

67. *See* BLACK ET AL., *supra* note 17, at 13–17; Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161, 1168 (2019); Johnson et al., *supra* note 15, at 55–57; Timothy R. Johnson, Ryan C. Black, Jerry Goldman & Sarah Treul, *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL'Y 241, 244–45 (2009) [hereinafter *Inquiring Minds*]; Timothy R. Johnson, James F. Spriggs & Paul J. Wahlbeck, *Supreme*

according to him, they don't matter much. He believes briefs are the most useful for providing the Court with arguments about which side should win a case, and why.[68] The bottom line is that, whether for personal or practical reasons, and with the exception of a few cases over the course of his career, Thomas has simply chosen not to participate during oral arguments in any meaningful way.

D. Scholarly Interpretations of Thomas' Silence

While Thomas provides consistent reasons for his silence at oral argument it is unclear whether these personal reasons explain, systematically, his judicial behavior. In our survey of scholarly literature, we were able to find only one single article dedicated exclusively to Clarence Thomas' oral argument behavior.[69] Written much like a love letter, RonNell Jones and Aaron Nielson express their admiration for Thomas' questioning style and implore him to participate more often in these proceedings.[70] They also compile an impressive dataset comprised of (at the time) every traceable utterance voiced by Thomas in open Court.[71] With these data, Jones and Nielson categorize Thomas' remarks in order to create a (sort of) custom-built speaking profile including him acting as a "Fact Stickler, Boundary Tester, Attorney Respecter, Statute Parser, Insight Provider, Plain Speaker, and Team Player."[72] From this paradigm, Jones and Nielson offer some of the same theories for why Thomas remains quiet (respect for attorneys) and for why he

Court Oral Advocacy: Does it Affect the Justices' Decisions?, 85 WASH. U. L. REV. 457, 468 (2007).

68. Michael L. Huggins, *Best Approach to Oral Arguments from the Bench?*, AM. BAR ASS'N (Feb. 2, 2016), https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2016/best-approach-to-oral-arguments-from-bench/.

69. RonNell Andersen Jones & Aaron L. Nielson, *Clarence Thomas the Questioner*, 111 NW. U. L. REV. 1185 (2017).

70. *Id.* at 1186.

71. *Id.* at 1190–92.

72. *Id.* at 1187.

sometimes chooses to speak (issues that pique his interest such as race).

Beyond Jones and Nielson, several scholarly accounts move past the basic observation that Thomas is mostly silent on the bench.[73] What these additional works have in common is that they all draw a direct connection between his comments in *Virginia v. Black* and his racial identity. The arguments range from the generic: "race plays [a prominent role] in many facets of Thomas' jurisprudence,"[74] to extended analyses on the interaction between race and judicial decision-making.[75] On the latter point, Onwuachi-Willig and Charles, for example, argue (separately) that Thomas' comments in *Black* were especially persuasive to his colleagues.[76] More specifically, Charles claims Thomas' past experiences as an African-American man "brought sensitivity to the issue" and spurred him to "analyz[e] the harm caused by cross burning from his perspective as a person of color."[77] Onwuachi-Willig echoes this sentiment, attributing Thomas' persuasiveness to his "race and experiences with racism as a black man growing up in the segregated South that shaped his view of a burning cross."[78]

Beyond these scant accounts, scholars who study Supreme Court oral arguments largely leave Thomas out of their analyses because his silent behavior, for the most part, makes statistical models intractable.[79] Of course,

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73. *See generally, e.g.*, Scott D. Gerber, *Justice for Clarence Thomas: An Intellectual History of Justice Thomas' Twenty Years on the Supreme Court*, 88 U. DET. MERCY L. REV. 667 (2011); Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. 575 (2004); Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005).

74. Gerber, *supra* note 73, at 679.

75. *See generally* Charles, *supra* note 73; Onwuachi-Willig, *supra* note 73.

76. *See generally* Charles, *supra* note 73; Onwuachi-Willig, *supra* note 73.

77. Charles, *supra* note 73, at 608.

78. Onwuachi-Willig, *supra* note 73, at 1004.

79. *Cf., e.g.*, Ryan C. Black, Sarah A. Treul, Timothy R. Johnson & Jerry Goldman, *Emotions, Oral Arguments, and Supreme Court Decision Making*, 73 J. POL. 572 (2011) (using a statistical model that does not mention Justice

these omissions create their own set of problems, namely that political scientists and legal scholars know very little about what drives Thomas' silence or what, more importantly, drives him to speak in specific cases. In the next section we provide such an explanation.

II. JUSTICE THOMAS AND ORAL ARGUMENT: A CAREER OF (RARE) INTERRUPTED SILENCE

Thomas' behavior is interesting precisely because he doesn't act when most others do. He speaks so infrequently that many analyses of oral argument actually exclude him to avoid skewed results.[80] Our study, which focuses especially on his change in behavior due to the telephonic sessions, provides in-depth attention to each of his oral argument utterances in a way not done for any other Justice. To do so, we build a profile of his behavior through a variety of lenses and, ultimately, offer a statistical model to explain his speaking patterns for the in-person sessions.[81] We simultaneously explore (and compare) his oral argument behavior in the ten telephonic sessions from May 2020 and conclude with, perhaps, the most important question—what effect (if any) does Thomas have when he breaks his silence in open court?

We begin our profile with a focus on the cases in which Thomas spoke (39 out of 2,284), a number small enough to depict in Tables 1a and 1b. Specifically, it lists his participation from 1991–2018 (Table 1a) and in 2019 (Table 1b). A cursory glance at Table 1a reveals that several cases where Thomas broke his silence are high-profile, or salient,[82] including major decisions regarding free

Thomas); Johnson et. al, *supra* note 67 (using multiple techniques to improve statistical modeling of oral argument).

80. *Cf., e.g.*, Black et al., *supra* note 79; Johnson et al., *Inquiring Minds*, *supra* note 67.

81. For the sake of clarity, we draw a bright line at the Court's oral argument rule change that took effect in May of 2020. We therefore refer to arguments occurring prior to this line as either *pre-May 2020*, or *in-person*, and label those after the cut point as *May of 2020* or *telephonic* sessions.

82. *See generally* Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000).

speech (*Wisconsin v. Mitchell*[83] and *Virginia v. Black*[84]), separation of church and state (*Lamb's Chapel v. Center Moriches Union Free School District*),[85] criminal procedure (*Voisine v. United States*[86] and *Flowers v. Mississippi*[87]), gerrymandering of Congressional districts (*Miller v. Johnson*),[88] and affirmative action (*Gratz v. Bollinger*).[89]

Table 1a: In-Person Arguments in which Thomas Spoke (1991–2018)[90]

Term	Case
1991	United States v. Fordice
1991	Collins v. City of Harker Heights
1991	Union Bank v. Wolas
1991	Morales v. Trans World Airlines, Inc.
1991	Evans v. United States
1991	Ankenbrandt v. Richards
1991	Burlington Northern Railroad Company v. Ford
1992	Arave v. Creech
1992	City of Cincinnati v. Discovery Network, Inc.
1992	United States v. Olano
1992	Lincoln v. Vigil
1992	**Lamb's Chapel v. Center Moriches Union Free School**
1992	Building & Construction Trade Council v. Associated Builders & Contractors
1992	Smith v. United States
1992	**Wisconsin v. Mitchell**

83. 508 U.S. 476 (1993).
84. 538 U.S. 343 (2003).
85. 508 U.S. 385 (1993).
86. 136 S. Ct. 2272 (2016).
87. 139 S. Ct. 2228 (2019).
88. 515 U.S. 900 (1995).
89. 539 U.S. 244 (2003).
90. Cases in bold type (in both Table 1a and 1b) are considered salient by a leading measure (see *supra* note 82). Because Epstein and Segal's measure is updated only through 2009, we conducted their same search for whether a case after the 2009 term appears on Page 1A of the New York Times. Two post-2009 cases in Table 1a meet this criterion (*Voisine* and *Flowers*) and four cases in Table 1b meet it (*McGirt*, *Little Sisters*, *Vance*, and *Mazars*).

1994	United States v. National Treasury Employees Union
1994	**Miller v. Johnson**
1994	Capitol Square Review and Advisory Board v. Pinette
1995	United States v. Chesapeake & Potomac Telephone
1996	Robinson v. Shell Oil Company
1996	Klehr v. A.O. Smith Corporation
1996	Boggs v. Boggs
1997	Rogers v. United States
1997	Pennsylvania Department of Corrections v. Yeskey
1998	NASA v. Federal Labor Relations Authority
1999	Nixon v. Shrink
1999	Apprendi v. New Jersey
2000	Buckhannon Board & Care Home, Inc. v. West Virginia
2001	Lorillard Tobacco Company v. Reilly
2001	U.S. Airways v. Barnett
2001	Department of Housing and Urban Development v. Rucker
2001	United States v. Drayton
2002	Virginia v. Black
2002	**Gratz v. Bollinger**
2005	Georgia v. Randolph
2005	Holmes v. South Carolina
2005	Rice v. Collins
2015	**Voisine v. United States**
2018	**Flowers v. Mississippi**

These high-profile cases comprise just over 15 percent (six out of thirty-nine) of all cases in which Thomas spoke. This is consistent with the rate of cases considered salient by Epstein and Segal's measure. On the other hand, they represent only 1.75 percent of all the cases where Thomas was present for in-person oral arguments (39 out of 2,284). Thus, even in many salient cases he remained silent.

We turn next to Table 1b, which presents us with an interesting conundrum. Because COVID-19 impacted the Court's schedule beginning in March of 2020—when it still had twenty cases left to hear—ten were docketed for telephonic arguments and ten were held over to the October 2020 term. As Adam Liptak notes, the ten

scheduled for arguments were "most of the major ones."[91] These included disputes concerning access to President Trump's tax returns (*Trump v. Vance* and *Trump v. Mazars U.S.A., LLP*), a jurisdiction case that reaffirmed Native American treaty rights to a large portion of eastern Oklahoma (*McGirt v. State of Oklahoma*), and a religious freedom case (*Little Sisters of the Poor Saint Peter and Paul Home v. Pennsylvania*). In summary, while Thomas spoke in all four salient telephonic cases, he also spoke (multiple times) in every telephonic case.

Table 1b: Telephonic Arguments in Which Thomas Spoke (2019 Term)

Term	Case Name
2019	**McGirt v. State of Oklahoma**
2019	Agency for International Development v. Alliance for Open Society International, Inc.
2019	Our Lady of Guadalupe School v. Morrissey-Berru
2019	**Little Sisters of the Poor Saint Peter and Paul Home v. Pennsylvania**
2019	Patent and Trademark Office v. Booking.com B.V.
2019	Chiafalo v. Washington
2019	Colorado Department of State v. Baca
2019	Barr v. American Association of Political Consultants, Inc.
2019	**Trump v. Vance**
2019	**Trump v. Mazars U.S.A., LLP**

Overall, these initial tables provide the sum total of all cases in which Thomas spoke at oral argument since he joined the Court in 1991. And, while it is true that he had perfect participation during the telephonic sessions, it is premature to conclude that the Court's change in format is the single driver of his behavioral change. Despite the salience of many of these cases, it was far from certain that Thomas would participate. As we elucidate in the sections below, the defining trait of Thomas'

91. Adam Liptak, *The Supreme Court Will Hear Arguments by Phone. The Public Can Listen In.*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/2020/04/13/us/politics/supreme-court-phone-arguments-virus.html.

historical oral argument style was, after all, one of taciturnity.

A. Thomas' Term Level Speaking Data

Beyond examining the lists of cases in which Thomas spoke, another useful way to analyze change in his oral argument behavior is to examine his participation over time. In so doing, we ask whether his 100 percent participation rate in the telephonic arguments was part of a larger trend, or whether his speaking patterns truly changed once the Court altered its oral argument procedures.

To establish a baseline pattern of behavior, Table 2 contains the frequency of Thomas' participation and his total speaking turns, by term. Note that, in the first twelve terms of his career (1991–2002), he was reticent to speak but was not completely silent in the way he was for most of his remaining service. Although he did not participate during the 1993 term, Thomas spoke in seven and eight cases, respectively, over his first two terms and spoke in at least one case per term between 1994 and 2002. In general, during his first twelve terms on the Court, Thomas' speaking average was more than two cases per term.

Table 2: Cases and Total Speaking Turns per Term, 1991–2019

Term	Arguments in Which Thomas Spoke	Total Speaking Turns
1991	7	21
1992	8	30
1993	0	0
1994	3	28
1995	1	3
1996	3	29
1997	2	20
1998	1	29
1999	2	16
2000	1	5
2001	4	18
2002	2	12
2003	0	0
2004	0	0
2005	3	10
2006	0	0
2007	0	0
2008	0	0
2009	0	0
2010	0	0
2011	0	0
2012	0	0
2013	0	0
2014	0	0
2015	1	11
2016	0	0
2017	0	0
2018	1	3
1991–2018 (total)	**39**	**235**
2019 (live)	0	0
2019 (telephonic)	10	78

Figure 1 presents these data in a starker way by breaking down the percent of cases per term (top panel) and per month of the 2019 term (bottom panel) in which Thomas spoke at least once in a case. Consider, first, the

top panel. The left half of the figure documents a period of varying participation for Thomas, punctuated by one term of silence. During this talkative stretch (1991–2002), he still never spoke in more than 7.1 percent of cases per term (1992) and only breached the 5 percent mark one other time—in his first term (1991). That said, Thomas was not completely silent: through the 2002 term, he never went more than one term without speaking (1993).

Figure 1: Participation in Oral Argument Over Time

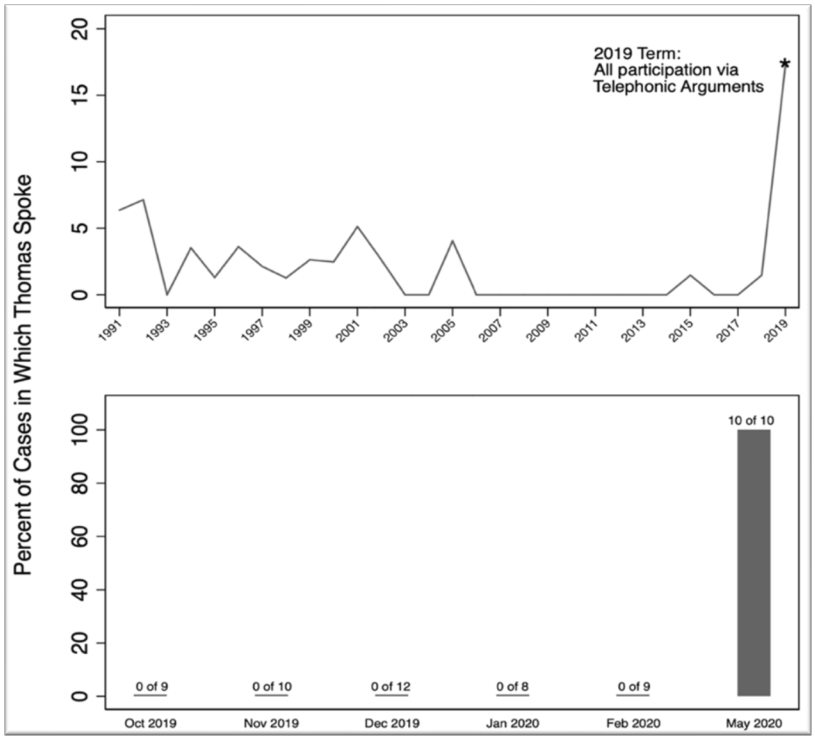

Figure 1: Percent of cases per term (top panel) and per month (bottom panel) in which Thomas spoke. Top panel depicts 1991–2019 while bottom panel specifies May of 2020.

In contrast, the next era (2003–2018) which we dub "mostly silent," shows Thomas breaking his silence in only three of the next sixteen terms (2005, 2015, 2018)

before a veritable eruption of utterances in May 2020. Indeed, in stark contrast to Thomas' "mostly silent" and even "talkative" eras, the apex of the top panel of Figure 1 is a dramatic increase. This peak of 17.2 percent participation for the 2019 term represents Thomas' career high (a full 2.4-fold increase from his prior career high) and is clearly driven, exclusively, by his loquacity in the Court's telephonic arguments.

To unpack the point that Thomas' transformation is seemingly driven by the Court's change to telephonic arguments and the procedures involved in them, the bottom panel of Figure 1 divides the 2019 term into its monthly argument sittings. Across the forty-eight in-person argument sessions held between October 2019 and February 2020, Thomas uttered not a single word in open court. In contrast, in May 2020, he spoke in 100 percent of the telephonically argued cases. Nobody, perhaps not even his colleagues on the bench, could have predicted such behavior from a Justice who, for so long, and so publicly, dismissed oral arguments and eschewed his fellow Justices for their vigorous participation!

To flesh out these data, we turn to several examples of Thomas' participation behavior. After not speaking at all in the 2003 and 2004 terms, he spoke in three criminal rights cases during the 2005 term: *Georgia v. Randolph*[92] (a search and seizure case), *Rice v. Collins*[93] (a *habeas corpus* case), and *Holmes v. South Carolina*[94] (a due process case). In *Holmes*, argued on February 22, 2006, Thomas made his last oral argument remarks for ten terms by quibbling with the Assistant Deputy Attorney General for South Carolina about the specifics of a key precedent—*State v. Gregory*[95]:

> **Justice Thomas**: Counsel, before you change subjects, isn't it more accurate that the trial court

92. 547 U.S. 103 (2006).

93. 546 U.S. 333 (2006).

94. 547 U.S. 319 (2006).

95. 198 S.C. 98 (1941). What is impressive about Thomas' focus on *Gregory* is that it is a South Carolina State Supreme Court decision—an area of law in which he would not necessarily be versed.

> actually found that the evidence met the *Gregory* standard?
>
> **Mr. Zelenka**: No. He specifically found, I believe, from my reading—
>
> **Justice Thomas**: Well, he says—
>
> **Mr. Zelenka**: —that it didn't meet the *Gregory* standard.
>
> **Justice Thomas**: Well, he says at first blush, the above arguably rises to the *Gregory* standard. However, the engine that drives the train in this *Gregory* analysis is the confession by Jimmy McCaw White. And then he goes on to say that that, of course, can't be introduced because it's hearsay. So it—it seems as though he says that if it is to be believed what Jimmy White says, it meets the *Gregory* standard. So I don't quite understand where *Gay*,[96] which is subsequent to—to this case—where *Gay* comes in because it didn't seem to be the standard that the trial court applied.

And then there was silence—for exactly ten years and one week—until the Court heard arguments in *Voisine v. United States* on February 29, 2016.[97] *Voisine*, another criminal rights case, concerned whether bodily injury via recklessness qualified as a misdemeanor crime of domestic violence, thus triggering federal suspension of Second Amendment rights.[98] Thomas was insistent with his questioning and clearly viewed the law at issue as an overreach of federal power.[99] When Assistant Solicitor General Ilana Eisenstein argued on behalf of the United States he spoke an astonishing eleven times—the most since 2001 when he spoke fourteen times in *U.S. Airways, Inc. v. Barnett*.[100] In *Voisine*, Thomas was

96. State v. Gay, 343 S.C. 543 (2001).

97. 136 S. Ct. 2272 (2016). *Holmes* was argued February 22, 2006 and *Voisine* was argued February 29, 2016.

98. The key issue focused more specifically on the provision of federal law that prohibited people who had committed domestic violence misdemeanors from obtaining a firearm.

99. Oral Argument at 41:57, Voisine v. United States, 136 S. Ct. 2272 (2016) (No. 14-10154), https://www.oyez.org/cases/2015/14-10154.

100. 535 U.S. 391 (2002).

particularly concerned with whether the Court had ever allowed a fundamental right to be stripped for someone who had simply committed a misdemeanor:

> **Justice Thomas**: Ms. Eisenstein, one question. Can you give me—this is a misdemeanor violation. It suspends a constitutional right. Can you give me another area where a misdemeanor violation suspends a constitutional right?
>
> **Ilana Eisenstein**: Your Honor, I—I'm thinking about that, but I think that the—the question is not—as I understand Your Honor's question, the culpability necessarily of the act or in terms of the offense—
>
> **Justice Thomas**: Well, I'm—I'm looking at the—you're saying that recklessness is sufficient to trigger a violation—misdemeanor violation of domestic conduct that results in a lifetime ban on possession of a gun, which, at least as of now, is still a constitutional right.
>
> **Ilana Eisenstein**: Your Honor, to address—
>
> **Justice Thomas**: Can you think of another constitutional right that can be suspended based upon a misdemeanor violation of a State law?[101]

Thomas ultimately voted against the United States, which is consistent with a line of legal and political science research that demonstrates Justices speak more often to the attorney of the litigant against whom they are more likely to vote.[102] However, a host of commentators

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101. Transcript of Oral Argument at 35–36, Voisine v. United States, 136 S. Ct. 2272 (2016), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-10154_g31h.pdf.

102. The first studies to reach this conclusion were based on very small sample sizes. In a study of ten oral arguments in the October 2002 Term, Shullman noted, among other things, that the Justices generally ask more questions (helpful or hostile) of litigants who went on to lose. Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. APP. PRAC. & PROCESS 271, 273 (2004). In 2005, John Roberts (who was then a regular Supreme Court advocate) found that eighty-six percent of the time the party receiving the most inquiries from the bench ultimately lost the case in a study of twenty-eight cases. John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 75 (2005). In 2009, Johnson et al. found the same result in a

suggested that, perhaps, Thomas was speaking in an effort to fill the void left by the Court's most conservative voice—Scalia—who had died just over two weeks prior to the argument session.[103] While this was certainly a reasonable hypothesis given the timing, Thomas returned to his silent ways for more than three terms after *Voisine*, effectively refuting this claim.

When Thomas again spoke, he did so in *Flowers v. Mississippi*,[104] yet another criminal rights case concerning racially motivated preemptive strikes used by the prosecution during *voir dire*. This time, however, he spoke only three times and suggested race may not have been a key factor in Mississippi's use of preemptory challenges. And, as in *Voisine*, Thomas dissented based on this point. After *Flowers*, his silence returned for the remainder of the 2018 term and for the vast majority of the 2019 term.

This chronological analysis of Thomas' participation suggests three broad conclusions—first, in the early years of his tenure (1991–2002), he was "talkative"—at least mildly active with 87.5 percent (thirty-five of thirty-nine) of his in-person utterances emanating from these terms. Second, the sporadic behavior during his "mostly silent" period (2003–2018) seems at least partially driven by Thomas' interest in criminal rights cases; during these terms he spoke in five cases—all covering varying aspects of criminal procedure or criminal due process rights. Finally, the bottom panel of Figure 1 leads us to the inescapable conclusion that the Court's change to

larger more rigorous study. Timothy R. Johnson, Ryan Black, Jerry Goldman & Sarah Treul, *Inquiring Minds Want to Know: Do Justices Tip Their Hands with Questions at Oral Argument in the U.S. Supreme Court?*, 29 WASH. U. J.L. & POL'Y 241, 259 (2009).

103. *See, e.g.*, Robert Barnes, *For First Time in 10 Years, Justice Clarence Thomas Asks Questions During an Argument*, WASH. POST (Feb. 29, 2016), https://www.washingtonpost.com/politics/courts_law/for-first-time-in-10-years-justice-thomas-asksquestions-during-argument/2016/02/29/b47f2558-df00-11e5-846c-10191d1fc4ec_story.html; Mark Joseph Stern, *Welcome to the Show, Clarence Thomas*, SLATE (Feb. 29, 2016), https://slate.com/news-and-politics/2016/02/why-voisine-v-united-states-a-case-about-domestic-violence-and-gun-rights-inspired-clarence-thomas-to-break-his-10-year-silence.html.

104. 139 S. Ct. 2228 (2019).

telephonic arguments produced a profound change in Thomas' rate of participation. The interesting question (which we address in the conclusion) is how he will act if, or when, the Court retreats to its original oral argument format.

B. Thomas' Focus on Substantive Issues

Given Thomas' apparent interest in criminal rights cases, and to determine what, if any, other issue areas interested him, we turn next to a breakdown of the types of cases in which he spoke. To make this determination we utilize the Supreme Court Judicial Database (SCDB),[105] which provides data on a variety of variables relating to Court decisions including the *Issue* involved in a case.[106] Tables 3a (in-person arguments) and 3b (telephonic arguments) list every case, organized by the SCDB variable *Issue,* where Thomas spoke at least one time.

Table 3a: Legal/Policy Issue Areas in Which Justice Thomas Spoke, 1991–2019[107]

Issue Area	Number of Cases	Number of Speaking Turns	Mean Turns per Case
Criminal Rights	11 (28.20%)	38 (16.17%)	3.5
Civil Rights	9 (23.08%)	45 (19.15%)	5.0
Free Speech	5 (12.82%)	44 (18.72%)	8.8
Judicial Power	4 (10.26%)	20 (8.51%)	5.0
Federalism	4 (10.26%)	25 (10.64%)	6.3
Religion	2 (5.13%)	20 (8.51%)	10.0
Economic Activity	2 (5.13%)	9 (3.83%)	4.5

105. Harold J. Spaeth, Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, Theodore J. Ruger & Sara C. Benesh, *The Supreme Court Database*, WASH. U. L. (Sept. 2019), http://Supremecourtdatabase.org.

106. Spaeth et al., *Supreme Court Database Codebook* 19 (2019), http://scdb.wustl.edu/_brickFiles/2019_01/SCDB_2019_01_codebook.pdf.

107. Italicized issues are aggregations of several categories because, for instance, the SCDB has *Issue* codes for both free exercise and religious establishment cases. Here, we combined the two categories into one. Similarly, we combined various aspects of criminal procedure and due process cases (related to criminal procedure) into a larger category *Criminal Rights.*

Unions	1 (2.56%)	29 (12.34%)	29.0
Attorneys	1 (2.56%)	5 (2.13%)	5.0

The breakdown of *Issue Areas* contained in Table 3a provides many insights to Thomas' pre-May 2020 behavior. To begin, there is no doubt that he cares more about some issues than he does about others. Most prominently, Table 3a makes clear the merit of our discussion about Thomas' interest in criminal rights cases (including *voir dire*, search and seizure, sentencing, and the death penalty). He also spoke quite often in civil rights and free speech cases. Interestingly, he showed some increased interest in federalism and judicial power cases as well.

Another way to consider the data in Table 3a is by the mean number of Thomas' speaking turns, per case, for each issue category. These data reveal contradictions in his speaking patterns. For example, while he participates most often in criminal rights cases he also speaks, on average, the fewest times in such cases. Contrast this with his participation in *NASA v. Federal Labor Relations Authority*,[108] the unions case in which he spoke an astonishing twenty-nine times. While this may not be a fair comparison given there is only one unions case in the data, he also spoke, on average, ten times in each of the religion clause cases and nearly nine times in each of the five free speech cases. Finally, his focus on the rights of minority groups (civil rights cases) elicited almost five turns per case. The key is that Thomas spoke in a wide range of arguments from 1991 to February 2019 with clear variation in how much he spoke when he did so.

Table 3b extends our analysis to examine issues from the telephonic cases that piqued Thomas' interest (i.e., all cases). Recall from our discussion above that, in May 2020, the Court scheduled telephonic arguments for "most of the major" cases and held the remaining ten over for the following term.[109] In other words, the issues,

108. 527 U.S. 229 (1999).

109. *See* Liptak, *supra* note 91.

and the cases categorized within them, are of higher salience, on average.

Table 3b: Legal/Policy Issue Areas
in Which Thomas Spoke, May 2020

Issue Area	Number of Cases	Number of Speaking Turns	Mean Turns per Case
Executive Authority	2 (20%)	24 (30.77%)	12.0
Article II (Electoral College)[110]	2 (20%)	18 (23.08%)	9.0
Religion	2 (20%)	14 (17.95%)	7.0
Free Speech	2 (20%)	13 (16.67%)	6.5
Native Americans and State Juris.	1 (10%)	5 (6.41%)	5.0
Trademarks	1 (10%)	4 (5.13%)	4.0

Indeed, four of the issue areas include two cases (executive power, Article II, religion, and free speech) with the remaining two issue areas (Native American law/ treaties and trademark law) each containing one case. Unlike the data in Table 3a, Thomas' mean speaking turns per case do not contradict his overall participation. Recall that during in-person cases, Thomas spoke least often (3.5 turns per case) in the issue area where he participated the most frequently (criminal rights). Alternatively, his mean turns per case in Table 3b (the top four issue areas) received much more of Thomas' attention than did the bottom two. Specifically, he averaged 8.6 speaking turns across the four primary issue areas versus only 4.5 turns across the less-salient categories. As with the data from Figure 1, these data demonstrate that Thomas exhibited a loquaciousness that was, at a minimum, unexpected.

In the end, it seems clear that during in-person and telephonic arguments Thomas often chose to speak in cases focused on highly salient issues. This is consistent with existing literature that correlates speaking turns at

110. The Supreme Court database does not have a code for Electoral College cases (although the update that includes the 2019 term surely will). As such, we added this code to the table.

oral argument with the degree to which a case is considered important to the Justices.[111]

C. Types of Questions and Comments Raised by Thomas

We turn to a final way of understanding Thomas' oral argument behavior by examining his unique questioning style. In particular, we utilize a taxonomy that details the types of information Justices seek during oral argument—from policy concerns, constitutional matters, how external actors (e.g., Congress) may react to decisions, the facts of the case, possible controlling precedents, and threshold issues (e.g., mootness or ripeness).[112] Using these categories, Johnson showed that, as policy oriented actors, Justices focus the vast majority of their oral argument turns seeking information about policy and external actors' preferences.[113] Table 4 depicts Thomas' utterances coded by Johnson category, and separated by in-person and telephonic arguments. Comparing Thomas' questioning style with Johnson's findings yields interesting results.

Table 4: Focus of Justice Thomas' Speaking Turns During Oral Arguments[114]

Issue Type	1991–2018	May 2020
Policy Issues	117 (52.95%)	40 (56.34%)

111. *See generally* Ryan C. Black, Maron W. Sorenson & Timothy R. Johnson, *Towards an Actor Based Measure of Supreme Court Salience: Information Seeking and Engagement During Oral Arguments*, 66 POL. RES. Q. 804 (2013); RYAN C. BLACK, AMANDA BRYAN & TIMOTHY R. JOHNSON, ISSUE SALIENCE IN INTERNATIONAL POLITICS 241(Kai Opperman & Henrike Viehrig eds., 1st ed. 2011).

112. For a full description of each type see JOHNSON, *supra* note 9, at 33 (Table 2.1).

113. JOHNSON, *supra* note 9, at 40 (Table 2.4).

114. The numbers in columns 1 and 2 differ from Thomas' total utterances for two reasons. First, not all speaking turns fall into a specific category. Second, as per Johnson's analysis (Table 2.4) utterances may be double counted (i.e., they could be policy and constitutional questions at the same time). *Note*: Issue areas may be double-counted, as per Johnson (2004).

Constitutional Issues	19 (8.60%)	10 (14.08%)
External Actors' Preferences	10 (4.52 %)	10 (14.08%)
Facts	62 (28.05%)	1 (1.41%)
Precedent	13 (5.88%)	8 (11.27%)
Threshold Issues	0 (0.00%)	2 (2.82%)

Consider, first, Thomas' focus on policy issues, which Johnson defines as "legal principals the Court should adopt, courses of action the Court should take, or a Justice's beliefs about the content of public policy."[115] Thomas' attention to policy issues is consistent across in-person and telephonic arguments (52.95% and 56.34%, respectively) and comports with Johnson's findings. In addition, during the telephonic sessions, Thomas uses the same number of turns to speak about the preferences of Congress (or other external actors). However, as a percentage, he shows a clear increase in how many of his speaking terms he dedicates to these utterances. Finally, note the precipitous drop in Thomas' turns devoted to clarifying case facts. These utterances comprised 28.05% of his in-person turn but decreased to just 1.41% of them during the telephonic cases. This change clearly comports with Jones and Nielsen's argument that Thomas is often a "Fact Stickler."[116]

Taken together, we posit that these significant changes in Thomas' questioning behavior are a product of the telephonic procedures: he was called upon and allowed time to speak without the cacophony of the Court's typical in-person, free-for-all, sessions. While we do not have enough data to test this hypothesis, one potential explanation is that, with the telephonic sessions, Thomas knew he would be called upon to speak. Due to the expectations that come with being called upon, he prepared questions (and comments). He then spoke as he knew he could do so without being interrupted by his (usually) more loquacious colleagues. This preparation, and knowledge, in turn led Thomas to act just like other

115. JOHNSON, *supra* note 9, at 40.

116. Jones & Nielson, *supra* note 69, at 198.

Justices have for some time—as policy-minded seekers of legal and policy information that will help him decide a case as close as possible to his preferred outcome.

III. SYSTEMATIC ANALYSIS OF THOMAS' DECISION TO SPEAK DURING ORAL ARGUMENT

The data from the previous sections paint an interesting picture of how Thomas acted during in-person argument sessions (1991 to February 2019) and how his behavior changed during telephonic arguments. In this section we seek systematic evidence as to whether two of the key explanations offered for his silence—*cases that address race* and the *verbosity of his colleagues*—are accurate. Further, we seek to determine whether Thomas' *ideological position* on the bench may influence his behavior during oral arguments. We do so by analyzing all cases where Thomas sat for oral arguments between the 1991 and 2018 terms.[117] More specifically, we examine the oral argument transcripts from these cases,[118] which includes 2,062 orally argued cases. Since we model why Thomas chooses to speak, we code our dependent variable as one if he participates in a case and zero otherwise.

117. We do not include the 2019 term in this model because the data from the SCDB does not yet exist for the recently ended term. Further, theoretically, we view the ten telephonic arguments, where the Chief called on each Associate Justice to speak in order of seniority, as fundamentally different from the in-person, free-for-all sessions. Thus, we lose these fifty-eight cases but believe it is the correct choice for this model.

118. In order to determine the cases in which Thomas spoke, we parsed the oral argument transcripts using Oyez's "speaker" JSON encoding. This initially yielded thirty-eight cases where he participated. We removed one of the thirty-eight and added two cases after verifying the findings of Jones and Nielsen. Jones & Nielson, *supra* note 69, at 201–03. They found that Thomas was misidentified as having participated in *Booth v. Churner*, 532 U.S. 731 (2001), when he did not, and was not identified in two transcripts where audio makes clear he did so. Thus, we have thirty-nine cases (prior to May 2020) where Thomas spoke at least once.

A. Variables of Interest

The model includes several explanatory variables to test the extent to which the above descriptive findings, as well as key claims from media and scholarly accounts, systematically affect Thomas' propensity to speak at oral argument. We are particularly interested in three phenomena.

1. Case Addresses Race

First, given anecdotal accounts that Thomas was apt to participate in cases involving issues related to race, we include a variable—*Case Addresses Race*—that captures whether this issue was a predominant consideration in the case at hand. To create this variable, we began with cases from the SCDB that inescapably address this issue. These included the fine-grained issues of the Voting Rights Act of 1965, desegregation, desegregation of public schools, and affirmative action.[119] We then identified five additional issues that could, but did not necessarily, address race: voting, reapportionment, employment discrimination, *voir dire* jury influence, and death penalty jury influence. To ensure these cases actually addressed race, we read each case syllabus and only included them in our variable if race was a key factor.[120] Finally, we added cases that addressed racially motivated hate speech or crimes. To confirm we included the proper cases, we surveyed a prominent case book in the field, law review articles, and the ACLU's website documenting the effects of race in death penalty cases.[121] This

119. Spaeth et al., *supra* note 10606, at 98–99.

120. For example, employment discrimination cases can take on a variety of central complaints (*i.e.*, age, gender, race, disability), however reading an opinion's syllabus often makes abundantly clear the grounds for complaint (*e.g.*, "willful violation of the Age Discrimination in Employment Act of 1967" from *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)). In circumstances where the opinion syllabus did not clearly indicate the case was related to race, we coded our *case addresses race* variable as "no" (*e.g.*, Eldman v. Lynchburg College, 535 U.S. 106 (2002)).

121. *See generally* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE (10th ed. 2019);

process yielded a total of sixty-five cases that addressed race, seven of which feature oral argument utterances from Thomas.[122]

2. Colleagues' Verbosity

Second, Thomas has stated on numerous occasions that he believes his fellow Justices speak too much during oral argument.[123] In fact, this is one of the main reasons he proffers for not speaking during these proceedings. To determine if he is less likely to speak when his colleagues talk more in a case, we include *Verbosity*, which is a count of all utterances made by Thomas' colleagues in each case. We generated this variable by counting each Justices' speaking turns demarcated in the oral argument transcripts collected via Oyez.[124]

3. Ideological Position

Third, existing literature about judicial ideology and Supreme Court oral arguments suggests the possibility that Thomas' oral argument behavior may be affected by his ideological position relative to the Court's swing

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Thomas D. Brooks, *First Amendment—Penalty Enhancement for Hate Crimes: Content Regulation, Questionable State Interests and Non-Traditional Sentencing*, 84 J. CRIM. L. & CRIMINOLOGY 703 (1994); William B. Fisch, *Hate Speech in the Constitutional Law of the United States*, 50 AM. J. COMP. L. 463 (2002); *Race and the Death Penalty*, ACLU, https://www.aclu.org/other/race-and-death-penalty (last visited Aug. 7, 2020).

122. While the SCDB codebook stipulates that, "Although criteria for the identification of issues are hard to articulate, the focus here is on the subject matter of the controversy rather than its legal basis." Spaeth et al., *supra* note 105, at 45. This means that cases such as *RAV v. St. Paul*, 505 U.S. 377 (1992), and *Virginia v. Black*, 538 U.S. 343 (2003)—two cases that dealt with cross-burning as specifically intimidating to black citizens—are both coded in the Database as First Amendment issues. Although the subject matter of these controversies is whether or not historic symbols of hate are protected expressions under the First Amendment, the presence of racial issues plays a prominent role in these two (and other) cases. Thus, we included them in our count of race-based cases.

123. *See supra*, Part I, Section C.

124. *See supra* note 118.

vote.[125] The reason for this conjecture is intuitive. Note, first, that he has been the most ideologically extreme Justice since his appointment in 1991,[126] a position which often puts him in a bad bargaining position relative to his colleagues.[127] However, existing research demonstrates oral arguments begin the bargaining and opinion writing process for the Justices.[128] Thus, Thomas may be more likely to speak during these proceedings when his *Ideological Position* indicates he may be in a better position to influence his colleagues' views about the case (i.e., when he is less ideologically extreme). The point is that, despite always being the most conservative Justice, he is sometimes more ideologically aligned with his colleagues and therefore in a better position to bargain. Thus, we include a measure of this distance, which we calculate as the absolute value of the difference between Martin-Quinn ideal-point estimates for Justice Thomas and the median Justice.[129]

4. Control Variables

Beyond our three variables of interest, we include several variables to control for other explanations for Thomas' behavior. First, while scholars and news reporters focus on race as a driver of Thomas' behavior, Table 3a also suggests three other issues areas from the SCDB that draw his attention: *Criminal Rights*, *Civil Rights*, and *First Amendment cases*. We add a variable for each

125. *See generally* RYAN C. BLACK, TIMOTHY R. JOHNSON & JUSTIN WEDEKING, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE (2012).

126. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation Via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134, 145 (2017). Martin and Quinn scores are the accepted (and oft utilized) measure of Supreme Court Justice ideology.

127. *See generally* FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000).

128. *See generally* BLACK ET AL., *supra* note 125.

129. Martin-Quinn scores are scores created to measure the ideology of U.S. Supreme Court justices, Martin & Quinn, *supra* note 126.

of these categories, coded one if a case falls into the issue area and zero otherwise.

Third, we include a dichotomous variable—*Judicial Review*—that takes on a value of one for all cases that review the constitutionality of a state or federal law. We include this variable as a proxy for legal salience with the intuition that Justices are generally more interested (and therefore more likely to speak) in cases when they are asked to invoke this power.[130] While judicial review cases garner the attention of Court watchers, they account for only 29.2 percent of the cases in our dataset.

Finally, existing literature demonstrates the Court is reverse-minded.[131] In this vein, we control for the possibility that Thomas is similarly contrarian and, therefore, likely to speak more often in cases he believes were wrongly decided. Because Thomas has been the Court's conservative anchor since his appointment in 1991, we assume he generally disagrees with liberal lower court decisions. Thus, using the SCDB's variable, *Lower Court Decision Direction* (dropping the twenty-eight cases with unspecifiable decision directions) we code liberal lower court decisions as one and conservative ones as zero.[132]

B. Results

Because the dependent variable in our model is dichotomous, we estimate a logistic regression. The results, presented in Table 5, show that our model performs well despite the infrequency of Thomas' participation (he spoke in only thirty-nine cases prior to May 2020).[133] In particular, we find support for two of

130. MALTZMAN ET AL., *supra* note 127, at 46.

131. *See generally* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

132. For a discussion on how the SCDB determines *Lower Court Disposition Direction*, see Spaeth et al., *supra* note 105, at 37.

133. In addition to the model presented in Table 5, we estimated an additional model that adds a specific variable for *case salience*, as measured by Tom S. Clark, Jeffrey R. Lax & Douglas R. Rice, *Measuring the Political Salience of Supreme Court Cases*, HARV. DATAVERSE (2015), https://doi.org/10.7910/DVN/29637. We choose not to present those results as Clark's variable was only

our hypotheses: that Thomas is more apt to participate in cases that address race and in cases when he is more ideologically aligned with the Court median. In addition, civil rights cases are significantly related to whether or not he speaks.

generated through the 2009 term, cutting our observations nearly in half (N= *1392*). Despite this, the truncated model still performs well ($x^2_{(9)} = 44.15$; $p<.01$) and all of our statistically significant independent variables of interest remain significant and signed in the same direction. Details of this model are available from the authors upon request.

Table 5: The Propensity that Thomas Speaks at Oral Argument, 1991–2018

	Coef.	S.E.
Case Addresses Race	1.873**	(0.677)
Verbosity	-0.001	(0.002)
Ideological Distance from Median	-1.249**	(0.354)
Criminal Rights	0.538	(0.414)
Civil Rights	1.491*	(0.617)
First Amendment	0.304	(0.629)
Judicial Review	-0.054	(0.373)
Lower Court is Liberal	0.096	(0.350)
N	2062	
log-likelihood	-173.86	
$x^2_{(8)}$	48.91	

Table 5: Logistic regression of the probability Thomas participates in oral arguments. Robust standard errors reported in parentheses next to maximum-likelihood parameter estimates.

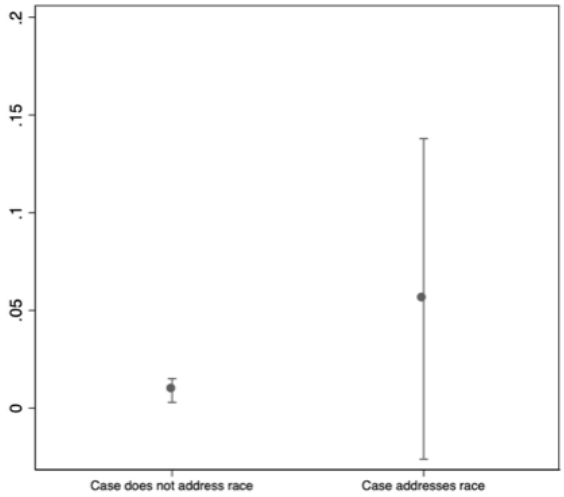
Significance level (two-tailed test): **1%, *5%.

Because logistic regression estimates are non-linear, and therefore difficult to interpret, Figure 2 provides a graphical representation of our three key findings.[134] Consider, first, the left panel which depicts the effects of *Case Addresses Race*. Recall that this variable is dichotomous and that we predicted the presence of race-based factors would increase Thomas' probability of participating. The increase in point-estimate supports this prediction. Specifically, when a case does not address race, Thomas has just a 0.009 [0.003, 0.015] probability of participating in oral argument versus a 0.056 [-0.026, 0.138] probability when issues of race are present. This represents a six-fold increase in Thomas' participation rate and provides solid support for scholarly and media-based

134. At the outset of discussing our substantive results, we acknowledge that all of our graphed point estimates, while significant, fall below a 0.1 probability. We understand this is low, in an absolute sense. However, Thomas only participates in 1.75 percent of all cases so is not very likely to speak during in-person arguments at all. Thus, even though our predicted probabilities demonstrate he is still not very likely to speak in any case, he is significantly more likely to do so in the circumstances depicted in Figure 2.

assertions that he clearly pays attention when race-based factors are present.

Figure 2: Predicted Probabilities that Thomas Speaks at Oral Argument, 1991–2018



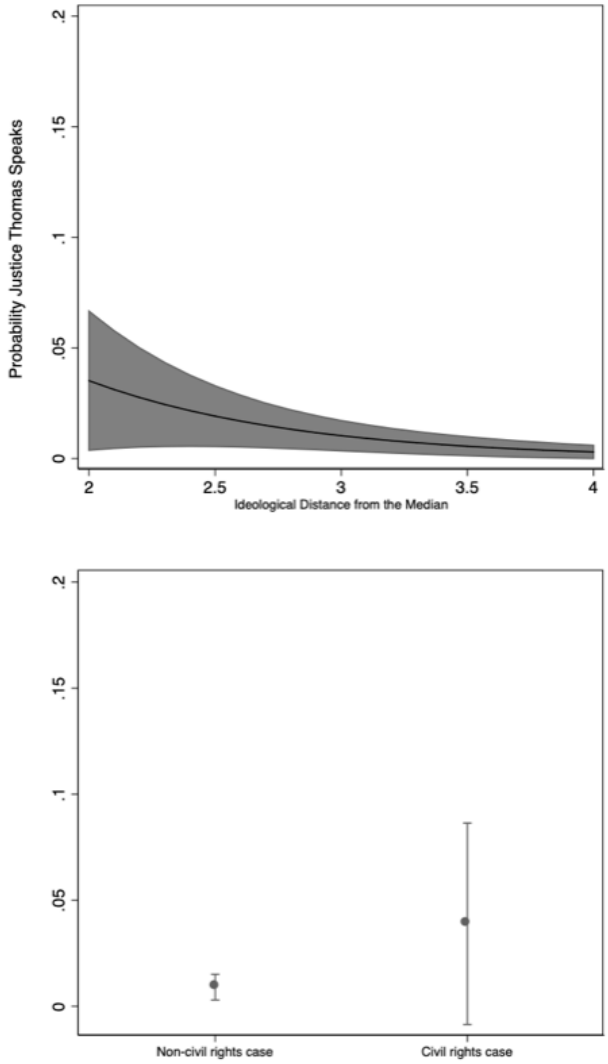


Figure 2: Predicted probability that Thomas participates in oral argument conditional on cases addressing race (left panel), ideological distance from the Court median (center panel), and cases addressing civil rights (right panel). All other variables held at their median or modal values.

Two examples represent the polar extremes of Thomas' increased propensity to participate in cases that

address race. Consider his, perhaps, most famous oral argument exchange from *Virginia v. Black*.[135] During the session he spoke seven times—all during the arguments presented by Deputy Solicitor General Michael Dreeben. Dreeben was arguing as *amicus curiae* for the United States in support Virginia's contention that its law (banning cross burning if it had the intent to intimidate others) did not violate the First Amendment. Thomas' first two turns make clear his disagreement with such an interpretation.[136]

> **Justice Thomas**: Mr. Dreeben, aren't you understating the . . . the effects of . . . of the burning cross? This statute was passed in what year?
>
> **Michael R. Dreeben**: 1952 originally.
>
> **Justice Thomas**: Now, it's my understanding that we had almost 100 years of lynching and activity in the South by the Knights of Camellia and . . . and the Ku Klux Klan, and this was a reign of terror and the cross was a symbol of that reign of terror. Was . . . isn't that significantly greater than intimidation or a threat?
>
> **Michael R. Dreeben**: Well, I think they're coextensive, Justice Thomas, because it is—
>
> **Justice Thomas**: Well, my fear is, Mr. Dreeben, that you're actually understating the symbolism on . . . of and the effect of the cross, the burning cross. I . . . I indicated, I think, in the Ohio case that the cross was not a religious symbol and that it has . . . it was intended to have a virulent effect. And I . . . I think that what you're attempting to do is to fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish and, indeed, that it is unlike any symbol in our society.

Thomas' exchange with counsel suggests a particular sensitivity to, and understanding of, cross burning that goes beyond Dreeben's initial description. But in a

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135. 538 U.S. 343 (2003).

136. Oral Argument at 23:21, Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107), https://www.oyez.org/cases/2002/01-1107.

different case (and context) he exhibits a quite disparate view of race. *Gratz v. Bollinger*[137] was an affirmative action case brought by two white students denied entry to the University of Michigan's undergraduate program. Thomas used oral arguments to probe the specific admissions policy:

> **Justice Thomas**: Mr. Payton, do you think that your admissions standards overall at least provide some headwind to the efforts that you're talking about?
>
> **John A. Payton**: Yes, I do. I think they do in all sorts of ways. They are certainly producing black students, white students, Hispanic students, Native American students who go out into our communities and change their communities.
>
> **Justice Thomas**: You may have misunderstood me. I mean the . . . Ms. Mahoney said earlier that the problem of law school admissions, in response to Justice O'Connor, that it was for the elite schools, it was more a problem at the elite schools, when she was talking about Boalt Hall, for example, you meant . . . you suggested or alluded to in your argument today that, you know, you don't want to choose between being an elite school and the whole diversity issue. It . . . would it be easier to accomplish the latter if the former were adjusted, that is the overall admissions standard?
>
> **John A. Payton**: I think that—
>
> **Justice Thomas**: Now, I know you don't want to make the choice, but will you at least acknowledge that there is a tension?

In contrast to his questions in *Black*, in *Gratz* Thomas seemed to argue against race-based considerations by pushing the University of Michigan to acknowledge that its affirmative action admissions program forces the school to choose between quality students and diversity in the student population. The point, for us, is that, however he viewed racial issues (more

137. 539 U.S. 244 (2003).

liberally as in *Black* or more conservatively as in *Gratz*) when they are a focal point in a case, Thomas is absolutely more likely to make comments, and question counsel.

The middle panel of Figure 2 depicts a probability curve for the impact of *Ideological Distance from the Median* on Thomas' propensity to speak. The downward slope aligns with literature that explains the role of ideology on the Court's decision-making process and on oral arguments specifically. Even if Thomas is never very close to the median Justice, when he does move in that direction, he is more willing to speak. Moving from the maximum ideological distance to the minimum ideological distance yields an 800 percent increase in the probability that he will participate in oral arguments (0.004 [0.001, 0.007] versus 0.036 [0.004, 0.068]). In other words, even the Court's most ideologically extreme conservative Justice realizes there are times when his bargaining position is greater and, when he knows this, he acts by speaking during oral argument.[138]

Finally, we examine results for our troika of control variables: *Criminal Rights*, *Civil Rights*, and *First Amendment Cases*. Although our preliminary analysis suggested Thomas would be more likely to speak in *Criminal Rights Cases*, our analysis indicates such disputes do not, in fact, impact the probability he will participate (z=1.3; p=0.193). The results are similar for *First Amendment Cases* (z=0.48; p=0.628). We do, however, find a significant relationship between *Civil Rights* and Thomas' propensity to speak. This relationship is depicted in the right-hand panel of Figure 2, which shows that Thomas is 4.3 times more likely to participate in a case containing civil rights issues (0.009 [0.003, 0.015] versus 0.039 [-0.009, 0.086].

These results lead to our final question: how does Thomas affect the proceedings when he does speak? It is to that question we now turn.

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138. *See* BLACK ET AL., *supra* note 125, at ch. 2.

IV. WHAT EFFECT DOES THOMAS HAVE WHEN HE DOES SPEAK DURING ORAL ARGUMENT?

Due to his silence in open court, scholars have debated the extent to which Thomas has an effect on how the Court makes decisions.[139] Others, however, point out that his silence in argument sessions makes no difference because the impact he does have manifests itself behind the scenes during the opinion-writing process and in later cases where his majority opinions are often viewed as quite influential.[140] But this does not mean that Thomas has not had a direct impact when he speaks during argument sessions. Here we provide data to support this claim.

We begin with data on the degree to which Thomas' colleagues pick up on his lines of questioning as well as on the comments he makes. While this is a difficult concept to operationalize, we do so by counting the number of times his colleagues refer back to questions or comments he made during an argument session. Table 6 presents these data for all cases prior to May 2020 (row 2) and for cases during the telephonic arguments (row 3).

139. *See, e.g.*, Jamal Greene et al., *Does Clarence Thomas' Silence Matter?*, N.Y. TIMES (Feb. 16, 2011), https://www.nytimes.com/roomfordebate/2011/02/16/does-clarence-thomass-silence-matter.

140. *See, e.g.*, Emma Green, *The Clarence Thomas Effect*, ATLANTIC (July 10, 2019), https://www.theatlantic.com/politics/archive/2019/07/clarence-thomas-trump/593596/.

Table 6: Justice Thomas' Direct Impact on Oral Argument: Colleague References

Time Frame	Argument Sessions in which Thomas Spoke	References to Thomas
1991–Feb. 2019	39	11
May 2020	10	17

The data in Table 6 demonstrates that, when he does speak during oral argument, Thomas' colleagues pick up on his comments and lines of questioning.[141] They then seem to flesh out these points during both in-person arguments and telephonic sessions. Consider the following exchange from *Voisine*.[142] Here, the quintessential median, Justice Anthony Kennedy, referred back to Thomas' question about what explicitly might be a misdemeanor that triggers a federal ban on a given right.

> **Justice Kennedy**: I—I suppose one answer is—just a partial answer to Justice Thomas' question is SORNA, a violation of sexual offenders have to register before they can travel in interstate commerce. But that's not a prevention from traveling at all. It's just a—it's a restriction.

Later in the same argument, Justice Stephen Breyer also referenced Thomas' point, further demonstrating the importance of his line of questioning, even to the liberal wing of the bench.

> **Justice Breyer**: Do it—what is it we have—they raised this in their brief. They say, let's focus on the cases in which there is a misdemeanor battery conducted without an intentional or knowing state of mind. Now, they say if this, in fact, triggers—this is the question Justice Thomas asked—if this, in fact, triggers a lifetime ban on the use of a gun, then do

141. This is akin to Justices listening to one another in an attempt to build coalitions during the decision-making process. *See, e.g.*, BLACK ET AL., *supra* note 125, at 48–84; JOHNSON, *supra* note 9, at 57–70.

142. 136 S. Ct. 2272 (2016).

> we not have to decide something we haven't decided. And I think it would be a major question.

While Kennedy and Breyer pushed Thomas' point in *Voisine*, his impact on how his colleagues may think about a case during oral arguments is muted by the fact that he spoke so little during in-person sessions. As Table 6 shows, he did so in only thirty-nine cases between 1991 and February 2020 although his colleagues referenced back to utterances eleven times—about a third of the time.

This behavior changes, however, in the telephonic arguments. Remember that Thomas spoke in all ten of these cases. And, as he did, his colleagues referenced his questions or comments twelve times—or more than once per case. Like the old E.F. Hutton commercials it seems that, when Thomas spoke in May 2020, his colleagues listened.[143] Consider an example from *Trump v. Mazars*.[144] In this case Thomas spoke an astonishing fourteen times.[145] In turn, his colleagues referenced his questions or comments six times. Justice Breyer did so on a critical point:

> **Justice Breyer**: All right. I'd—I'd like to follow up on both Justice Thomas' and Justice Ginsburg's questions. As to Justice Thomas' questions, are you saying that Sam Ervin's subpoenas, which were done under the legislative power at the time of Watergate, which were fairly broad, are you saying they were unlawful, that a court should not enforce them? Yes or no? And as to Justice Ginsburg's question, I would like to know why, since in Watergate and other cases, Watergate particularly, the Court gave contested material involving the very workings of the Presidential office to the prosecutor, why isn't

143. For those too young to be familiar with the E.F. Hutton line of advertisements, we refer you to Eclecto Tuber, *Tom Watson In E.F. Hutton Commercial: When E.F. Hutton Talks . . .*, YOUTUBE (May 2, 2017), https://www.youtube.com/watch?v=wd7gC_IZmMM.

144. 140 S. Ct. 2019 (2020).

145. This is tied for the fourth most verbose case of Thomas' career. The reason it is astonishing is that, by the time *Mazars* was argued, it was clear the Chief was controlling when the associate Justices were allowed to ask questions and he, ostensibly sought to bring a level of equity to speaking time.

> whatever standard applies to personal papers a weaker one, not a stronger one?

The key is that, when he spoke, Thomas clearly had an impact on how the telephonic arguments progressed. This is consistent with Johnson's contention that speaking during oral arguments is essential for the Justices as they think about how they want to vote, what coalitions may form (both majority and dissenting), and what legal and policy arguments will control their votes.[146]

Beyond colleagues listening to him, Thomas had another effect on the arguments. This second effect, however, is one he purports to eschew—interrupting counsel while they are speaking. More to the point, and as we note above, Thomas says that one of the main reasons he does not speak is that he believes the proceedings should be a time for counsel to make their arguments—much as they did in earlier Court eras.[147]

The data in Table 7 tell a different story. During the thirty-nine in-person cases, Thomas interrupted counsel eighty times, or twice per case on average. While this average decreases during the telephonic arguments, he still interrupted counsel an average of once per case. Given existing findings that interruptions can and do have an effect on how the Court decides, it is interesting and surprising that the quietest Justice in modern history acts similarly to his colleagues when he chooses to speak.[148]

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146. Timothy R. Johnson, *When Justices Talk Among Themselves*, N.Y. TIMES, (Feb. 17, 2011), https://www.nytimes.com/roomfordebate/2011/02/16/does-clarence-thomass-silence-matter/when-justices-talk-among-themselves.

147. For a discussion of how argument sessions proceeded in the Marshall era, see JOHNSON, *supra* note 9, at 1.

148. Most literature on interruptions focuses on how Justices interrupt one another. *See generally* Timothy R. Johnson, Ryan Black & Justin Wedeking, *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments*, 55 LOY. L. REV. 331 (2009); Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379 (2017). However, Kimmel and his colleagues address how attorney interruptions affect the Court as well. *See* Christopher M. Kimmel, Patrick A. Stewart & William D. Schreckhise, *Of Closed Minds and Open Mouths: Indicators of Supreme Court Justice Votes During the 2009 and 2010 Sessions*, FORUM (July 31, 2012).

Table 7: Incidents of Justice Thomas Interrupting Counsel during Oral Arguments

Time Frame	Argument Sessions in which Thomas Spoke	Number of Times Thomas Interrupted Attorneys to Speak
1991–Feb. 2019	39	80
May 2019	10	10

V. CONCLUSION

The analysis we provide here tells a clear story about the U.S. Supreme Court's quietest Justice. As it turns out, even Thomas' scant speaking patterns comport with the behavior of Justices who have served with him since 1991. That is, he speaks in cases that include issues important to him and he speaks more often when he is ideologically closer to the median Justice. He also uses his speaking turns to raise policy related issues and questions about external actors' preferences.

Perhaps most interestingly, Thomas actually plays a key role for his colleagues when he speaks as they frequently reference issues he raises. And, finally, despite all his public statements about the extent to which he dislikes it when his colleagues interrupt attorneys' arguments, Thomas is also guilty of this sin. In short, he is, in the end, just a typical Justice who happens to be quiet most of the time. This lesson is an important one, but our analysis provides one additional insight.

Specifically, the changes in Thomas' behavior during the telephonic sessions—speaking multiple times in every case—are best explained by the alternate argument format and procedures. From his very first utterance on May 4, 2020 ("Yes, Ms. Ross—a couple of questions"),[149] it was clear Thomas came prepared and was determined to participate. Even when the Chief was forced to initially skip Thomas' turn during arguments

149. Oral Argument at 6:05, *supra* note 12.

in *Trump v. Vance*,[150] Thomas still got in a question. Indeed, as the transcript indicates, Roberts offered Thomas his turn but quickly moved on to Justice Ruth Bader Ginsburg when Thomas did not immediately respond:

> **Chief Justice Roberts**: Thank you, counsel. Justice Thomas? Justice Thomas? Justice Ginsburg?

Whether the Chief simply wanted to keep the argument moving or whether he believed, like many of those listening, that Thomas would remain silent, Roberts returned to Thomas following Ginsburg's interaction with counsel:

> **Chief Justice Roberts**: Thank you, counsel. Justice Thomas?
>
> **Justice Thomas**: Yes. Thank you, Chief. Counsel, the—I'm very interested, do you think that there are any implied powers for the Congress to request or to subpoena private documents?

Where, pre-May 2020, Thomas seemed entirely content to stay silent in over 98 percent of cases for which he heard arguments, during the telephonic sessions he took each and every opportunity to speak. Time will tell whether he will continue down this path or simply go back to his *status quo* silence. However, if the pandemic forces the Court to hold telephonic arguments when it opens the October 2020 term, we do not expect him to be silent. Perhaps the new Justice Clarence Thomas will be heard again.

150. Transcript of Oral Argument at 9–11, Trump v. Vance, 140 S. Ct. 2412 (2020), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/19-715_h3ci.pdf.