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CLARENCE THOMAS THE QUESTIONER†

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ABSTRACT—One of Justice Clarence Thomas's most remarked upon characteristics is his reluctance to ask questions during oral argument. Some observers have criticized him for his silence, while others have defended him. What has been overlooked in this debate, however, is the fact that Justice Thomas is very talented at asking questions. Indeed, in many ways, he is a model questioner. Drawing on the most comprehensive collection of Justice Thomas's oral argument questions ever compiled, we urge the Justice to ask more questions for a new reason: he is good at it.

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INTRODUCTION

In the quarter century since Clarence Thomas took a seat at the bench for his first oral argument as a Justice of the United States Supreme Court,[1] one of his most-discussed attributes has been his silence. Indeed, Justice Thomas has spoken far fewer words over the course of his entire career than some of his colleagues speak in a single term,[2] and he only recently broke a decade-long streak of no questions at all from the bench.[3] This silence has been subject of significant discussion, debate, and criticism.

We wish that Justice Thomas would participate more often at oral argument, but our reasons differ from those that have been expressed in the past. In particular, we think Thomas should ask more questions because he is good at it. In fact, although counterintuitive, when it comes to asking questions, in many ways Thomas is the model Justice.

Our opinion that Justice Thomas is talented at posing questions is not based on anecdote. Rather, it is the result of empirical research. For this Essay, we have compiled every available question asked by Justice Thomas as a jurist in an appellate argument—both on the Supreme Court and on the D.C. Circuit. Reviewing these questions demonstrates that although

[1] *See Biographies of the Current Supreme Court Justices*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/L7LQ-KD4T].

[2] *See, e.g.*, Mark Sherman, *Silent Justice Thomas: Not a Word Spoken*, USA TODAY (May 18, 2007, 6:56 PM), https://usatoday30.usatoday.com/news/washington/2007-05-18-760030917_x.htm [https://perma.cc/4LVZ-ZXFZ] ("Thomas has spoken 281 words since court transcripts began identifying Justices by name in October 2004. By contrast, Thomas'[s] neighbor on the bench, Justice Stephen Breyer, has uttered nearly 35,000 words since January.").

[3] *See, e.g.*, Adam Liptak, *Thomas Ends 10-Year Silence on the Bench*, N.Y. TIMES, Mar. 1, 2016, at A1.

Thomas has not frequently spoken, when he *has* posed questions, they have been thoughtful, useful, respectful, and beneficial to his colleagues of whatever ideological stripe.

Indeed, the picture of Justice Thomas the Questioner that emerges is one that exemplifies key attributes of model judicial questioning. Thomas is a Fact Stickler, Boundary Tester, Attorney Respecter, Statute Parser, Insight Provider, Plain Speaker, and Team Player. This combination makes Thomas a powerful questioner—when he chooses to ask questions. We thus conclude that Court's oral arguments would be enhanced if Thomas more regularly did so.

I. BACKGROUND

Clarence Thomas's conduct as a Justice presents a puzzle. On one hand, he has more to say than the rest of his colleagues—at least when it comes to written opinions. On this measure, Thomas is far and away the most productive member of the Court.[4] Yet on the other hand, it sometimes seems like he has nothing to say at all. This is especially true when it comes to oral argument; there, he is notorious for not asking questions. In fact, despite the unmatched volume of his written production, some list silence as one of his "signature characteristics."[5]

It is no secret that Justice Thomas is often mum at oral argument. Indeed, he is the most silent Justice in modern history[6]—so silent, in fact, that when he does ask a question, it elicits gasps in the courtroom and spurs news headlines.[7] Even hearing his voice is deemed newsworthy.[8]

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[4] *See, e.g.*, Adam J. White, *Justice Thomas, Undaunted*, WKLY. STANDARD, July 18, 2016 ("Thomas has been writing a lot—far more than his colleagues, despite his reputation as a 'silent' [J]ustice. In the Court's just-concluded term, Thomas wrote 39 opinions, more than double the next most active writer (Alito, with 19). The prior year, he wrote 37 opinions, nearly tripling the output of his colleague and friend, Justice Ruth Bader Ginsburg.").

[5] KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS 309 (2007).

[6] *See, e.g.*, Adam Liptak, *A Thomas Milestone Likely to Pass Quietly*, N.Y. TIMES, Feb. 2, 2016, at A20 ("It has been at least 45 years since any other member of the court went even a single term without asking a question.").

[7] *See, e.g.*, Ariane de Vogue, *Justice Clarence Thomas Breaks 10-year Streak; Asks Question in Court*, CNN (Feb. 29, 2016, 10:58 PM), http://www.cnn.com/2016/02/29/politics/supreme-court-clarence-thomas-10-year-streak-question/ [https://perma.cc/3EZ7-64MC]; Ron Elving, *Clarence Thomas Speaks: After a Decade, Questions from the Quiet Justice*, NPR (Feb. 29, 2016, 5:22 PM) http://www.npr.org/2016/02/29/468600863/after-a-decade-questions-emerge-from-the-quiet-justice [https://perma.cc/8DB4-24YM].

[8] *See, e.g.*, Robert Barnes, *The Question of Clarence Thomas*, WASH. POST (Feb. 17, 2013), https://www.washingtonpost.com/politics/the-question-of-clarence-thomas/2013/02/17/90f6e678-76e1-11e2-aa12-e6cf1d31106b_story.html?utm_term=.7bf8f86a0085 [https://perma.cc/KU2G-LX8D] (noting that after seven years of silence, "Thomas's joke from the bench last month hit with the surprise

This silence is surprising, especially because it was so unexpected. By all accounts, Justice Thomas is not a shy person. Indeed, anyone who knows him will attest that his is a boisterous personality. Before joining the Supreme Court on October 23, 1991, Thomas was a judge on the D.C. Circuit. There, no one dubbed him the "silent judge"—instead, one of his D.C. Circuit colleagues observed that "[h]e was talkative, gregarious on our court, a real participant."[9] He also asked questions as a new Justice, with his first questions coming on November 5, 1991.[10]

Even so, upon joining the Court, he has never been an especially active questioner. Tellingly, as early as 1994, a media report recorded that Justice Thomas's colleagues "seemed startled when Thomas's deep voice resounded from the right side of the bench."[11] Then, in 2006, Thomas essentially stopped asking questions at all—going a full decade before asking another question.[12] Silence does not bother the Justice: he is reported to have said, "One thing I've demonstrated often in 16 years is that you can do this job without asking a single question."[13]

Over the years, Justice Thomas has suggested possible explanations for his silence and commentators have speculated as to others.[14] Some

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and impact of a Russian meteor"); Adam Liptak, *Breaking the Silence*, N.Y. TIMES, Jan. 15, 2013, at A14 (describing how Justice Thomas apparently inserted a joke, suggesting "that a law degree from Yale could actually be proof of incompetence or ineffectiveness").

[9] ANDREW PAYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 471 (2001).

[10] *See, e.g.*, Judy Wiessler, *Liability Case Elicits Thomas' First Query*, HOUS. CHRON., Nov. 6, 1991, at A3 (listing questions for *Collins v. City of Harker Heights*, 503 U.S. 115 (1992), and *Union Bank v. Wolas*, 502 U.S. 151 (1991)).

[11] Tony Mauro, *Heads Turn as Thomas Asks a Question*, USA TODAY, Nov. 9, 1994, at 13A.

[12] *See, e.g.*, 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?utm_term=.7537f39118db [https://perma.cc/42L4-BGNC] ("Justice Clarence Thomas on Monday broke his 10-year streak of not asking questions during oral arguments, one of the public's most enduring curiosities about the Supreme Court.").

[13] Mark Sherman, *Thomas: No Questions in 2 Years*, USA TODAY (Feb. 25, 2008, 12:10 PM), https://usatoday30.usatoday.com/news/washington/2008-02-25-2677613413_x.htm [https://perma.cc/Q39B-6KHE].

[14] *See, e.g.*, Josh Gerstein, *Clarence Thomas Defends Silence in Supreme Court Health Care Arguments*, POLITICO (Apr. 6, 2012, 11:19 AM), http://www.politico.com/blogs/under-the-radar/2012/04/clarence-thomas-defends-silence-in-supreme-court-health-care-arguments-119823 [https://perma.cc/5J2Z-72XJ] (quoting Thomas as saying of Justices' questions, "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."); Jena McGregor, *Clarence Thomas's Supreme Silence*, WASH. POST (Jan. 17, 2013), https://www.washingtonpost.com/national/on-leadership/2013/01/17/ffd9cf1c-60b4-11e2-9940-6fc488f3fecd_story.html?utm_term=.9c243f94062e [https://perma.cc/LYA2-LHX6] (noting that commentators have suggested that Thomas's "brutal confirmation proceedings" may contribute to his "taciturn tenure"); Jeff Nesbit, *The Real Reason Clarence Thomas Rarely Speaks*, U.S. NEWS & WORLD REP. (Mar. 30, 2016, 12:01 AM),

commentators, moreover, have been quite critical of his silence. In fact, some critics have blasted Thomas's refusal to ask questions—and his apparent dismissal of the oral argument process[15]—as disrespectful to the Court, unfair to litigants, and evidence that he is not carrying his weight.[16] Thomas, of course, has defenders who note that oral argument has changed in modern times,[17] and that a Justice can do the job just fine without dominating questioning.[18] Even his defenders, however, generally wish he would ask more questions—if for no other reason than to quiet the issue so that commentators will instead focus on Thomas's contributions to the law and the work of the Court.[19]

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https://www.usnews.com/news/articles/2016-03-30/why-clarence-thomas-rarely-speaks-from-the-supreme-court-bench [https://perma.cc/3GKM-JZGL] (citing Justice Thomas's history as a speaker of Gullah in the South and "fear that any trace of that former life . . . would somehow work its way into his speech"); Debra Cassens Weiss, *How Long Has Justice Thomas Declined to Ask Oral Argument Questions? An Anniversary Nears*, ABA J. (Feb. 3, 2016, 6:15 AM), http://www.abajournal.com/news/article/how_long_has_justice_thomas_declined_to_ask_oral_argument_questions_an_anni [https://perma.cc/H3EH-6DB9] ("Thomas has offered differing reasons for declining to talk, but he most often says he believes the constant questions are impolite.").

[15] *See, e.g.*, Adam Liptak, *No Argument: Thomas Keeps 5-Year Silence*, N.Y. TIMES (Feb. 12, 2011), http://www.nytimes.com/2011/02/13/us/13thomas.html?_r=0 [https://perma.cc/C3UN-7ZGC] ("Justice Thomas will spend the arguments as he always does: leaning back in his chair, staring at the ceiling, rubbing his eyes, whispering to Justice Stephen G. Breyer, consulting papers and looking a little irritated and a little bored.").

[16] *See, e.g.*, David Karp, *Why Justice Thomas Should Speak at Oral Argument,* 61 FLA. L. REV. 611, 614, 624 (2009) (arguing that "Thomas'[s] nonparticipation in oral argument leaves him unrestrained to advocate far-reaching theories never contemplated by the litigants" and that his "opinions do not benefit from the full adjudicative process"); Editorial, *The Thomas Issue*, N.Y. TIMES (Feb. 17, 2011), http://www.nytimes.com/2011/02/18/opinion/18fri3.html [https://perma.cc/M989-QY87] (arguing that Justice Thomas needs to take part in oral arguments to "convey that he honors" the principle of "consider[ing] both sides' arguments," to "show[] open-mindedness in exchanges with them" and to "show his dedication to the court's impartiality and to its integrity as an institution"); Liptak, *supra* note 15 ("His views can be idiosyncratic, and some say lawyers deserve a chance to engage him before being surprised by an opinion setting out a novel and sweeping legal theory.").

[17] *See, e.g.*, Maureen E. Mahoney, *Texas A&M University School of Law's Distinguished Practitioner Speaker Series Keynote Speaker*, 1 TEX. A&M L. REV. 801, 805 (2014) ("In a nutshell, Justice Thomas does not ask questions because he is too polite, and here is the history. Right now, the Court is in an era where grilling advocates is the norm . . . . But it was not that way in 1979 when I was a clerk there. First of all, oral arguments were not filled with questions. Advocates got up and told their story. They would get interrupted now and then, but it was not constant interruption. Justice Brennan, who has been described as the [J]ustice who choreographed the liberal takeover of the Court, did not do it by asking questions at oral argument. He did not ask many questions at all.").

[18] *See, e.g.*, David Yin, *In Defense of Clarence Thomas*, HARV. L. & POL'Y REV. (Dec. 20, 2011), http://harvardlpr.com/2011/12/20/in-defense-of-clarence-thomas/ [https://perma.cc/976X-5UQ3] ("I enjoy the verbal sparring and the extemporaneous thinking questioning creates. But to indicate that Thomas'[s] non-participation is somehow indicative of a lack of intelligence or lack of regard is to ignore the history of the Supreme Court . . . .").

[19] *See, e.g.*, Ilya Somin, *Observing Clarence Thomas at Oral Argument*, WASH. POST: VOLOKH CONSPIRACY (Feb. 25, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/25/observing-clarence-thomas-at-oral-argument/?utm_term=.e9b5594c837d [https://perma.cc/D2CT-

II. METHODOLOGY

Much has been written about Justice Thomas's silence on the bench. Our claim, however, is new. We agree that Thomas should ask more questions, but not for the reasons others have offered. Instead, we contend he should ask more questions because he is very good at it. Indeed, we think that judges everywhere can learn lessons from him.

To illustrate this point, we have attempted to build the most comprehensive collection of Thomas questions ever assembled. The Supreme Court's oral argument transcripts first began identifying Justices by name during the Supreme Court's 2004 term.[20] Gathering Justice Thomas's questions since that time thus was fairly simple. We ran a search for "Justice Thomas" in Westlaw's U.S. Supreme Court Oral Arguments database looking for the capitalized phrase "JUSTICE THOMAS," which indicated that he had spoken. This search produced six oral arguments, two of which contained nonsubstantive comments rather than questions.[21] To confirm that we had all the relevant questions from this period, we compared these results with information from several news reports that discussed Justice Thomas's questions.[22]

We next turned to the process of identifying questions by Justice Thomas before 2004. Because oral argument transcripts during this period only included the generic descriptor "Question" when a Justice spoke,[23] Westlaw was no help.[24] We thus called upon the Oyez Project, the popular multimedia archive. Oyez contains approximately 10,000 hours of Supreme

84L8] (defending Justice Thomas, but agreeing "that he should probably ask more questions at oral argument").

[20] *See, e.g.*, Lee Epstein, William M. Landes & Richard A. Posner, *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. LEGAL STUD. 433, 438 (2010).

[21] It may be of interest to note that one of these nonquestions, a statement in *Veneman v. Livestock Marketing Ass'n* (later *Johanns v. Livestock Marketing Ass'n*) that has often been attributed to Justice Thomas, was not said by him. While the transcripts on Westlaw and Oyez continue to attribute the comment to Justice Thomas, the official transcript has been changed to reflect that this statement was from counsel. *See* Transcript of Oral Argument, Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) (Nos. 03-1164, 03-1165).

[22] *See* Liptak, *supra* note 3; Liptak, *supra* note 8 (discussing Justice Thomas's remark in *Boyer v. Louisiana*).

[23] Ryan C. Black, Timothy R. Johnson & Justin Wedeking, ORAL ARGUMENTS AND COALITION FORMATION ON THE U.S. SUPREME COURT: A DELIBERATE DIALOGUE 20 n.3 (2012).

[24] However, Westlaw did provide us with some instances in which counsel responded directly to Justice Thomas by name, giving us a roundabout way to find relevant oral arguments. One study indicates that in addition to the post-2004 transcripts, some transcripts from the 1960s were indexed. James C. Phillips & Edward L. Carter, *Source of Information or "Dog and Pony Show"?: Judicial Information Seeking During U.S. Supreme Court Oral Argument, 1963–1965 & 2004–2009*, 50 SANTA CLARA L. REV. 79, 82 (2010).

Court oral argument audio files and accompanying transcripts beginning with the Court's 1955 term.[25] Although not for this specific purpose, a similar methodology has been employed by others in evaluating Supreme Court questions.[26] (An alternative to Oyez—which we also pursued—was gathering news reports that mentioned Thomas speaking during the 1990s and early 2000s.[27] Although gathering these sources helps identify many questions, it does not generate a complete list.)

Oyez, however, has limitations. First, it does not have a function that searches all of its transcripts at once.[28] Second, while most transcripts identify the Justices by name, some do not. Accordingly, to create a comprehensive list of Justice Thomas's questions we opted to manually review all of the transcripts available on Oyez from the 1991–2003 terms. This task was assigned to a set of research assistants who examined 1,115 individual transcripts, searching for Thomas's name.[29] At the same time,

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[25] *See generally About Oyez*, OYEZ, https://www.oyez.org/about [https://perma.cc/C5S2-GSR5] ("[Oyez] is a complete and authoritative source for all of the Court's audio since the installation of a recording system in October 1955.").

[26] *See, e.g.*, Timothy R. Johnson, Ryan C. Black & Justin Wedeking, *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments,* 55 LOY. L. REV. 331, 337 n.34 (2009).

[27] *See, e.g.*, DAVID C. FREDERICK, SUPREME COURT AND APPELLATE ADVOCACY 119–22 (2010) (discussing Justice Thomas's questioning in *NASA v. Federal Labor Relations Authority*); Kenneth M. Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247, 258 (2000) (discussing Justice Thomas's questioning in *Collins v. City of Harker Heights, Texas*); Joan Biskupic, *Potent Questions from Quiet Justice*; *Clarence Thomas Speaks Up in Two Significant Sessions*, WASH. POST, May 29, 1995, at A13 (discussing Justice Thomas's questioning in *Capitol Square Review and Advisory Board v. Pinette* and *Miller v. Johnson*); Tony Mauro, *Breyer's Quick, Costly Way Out*, LEGAL TIMES, Nov. 21, 1994, at 10–11 (discussing Justice Thomas's questioning in *United States v. National Treasury Employees Union*); Jeffrey Rosen, *Bad Thoughts*, NEW REPUBLIC (July 4, 1993), https://newrepublic.com/article/73891/bad-thoughts [https://perma.cc/6ZJ3-VPCH] (discussing Justice Thomas's questioning in *Wisconsin v. Mitchell*); Tony Mauro, *Justice Thomas Won't Be Reading This*, LEGAL TIMES, Mar. 16, 1992, at 7–8 (discussing Justice Thomas's questioning in *Morales v. TWA Inc.*); Mike Sacks, *Clarence Thomas' Questions, Part 3: The Myth of Scalia's Puppet Is Quashed as Quickly as It's Created*, HUFFINGTON POST (Nov. 21, 2011, 3:07 PM), http://www.huffingtonpost.com/2011/11/21/clarence-thomas-antonin-scalia_n_1105776.html [https://perma.cc/54ZX-NGUT] (discussing *United States v. Fordice*); Alyssa Work, *Justice Thomas, Speaking (Or Not) About the First Amendment*, FIRST AMEND. CTR. (Oct. 8, 2007), http://www.firstamendmentcenter.org/justice-thomas-speaking-or-not-about-the-first-amendment [https://perma.cc/CHK6-KGS3] (listing seven First Amendment cases).

[28] SCOTUS Search (currently in beta) is a website that makes it possible to search across Supreme Court oral argument transcripts. At the time of this writing, however, SCOTUS Search could not search by Justice without also entering some search term. Additionally, since much of its data comes from Oyez, it suffers from some of the same indexing problems that Oyez does, which it clearly points out in its search guide. *Guide*, SCOTUS SEARCH (Nov. 23, 2015), http://www.scotussearch.com/pages/guide [https://perma.cc/WJ8M-X5MM].

[29] Upon opening each oral argument transcript, research assistants would perform a "Control+F" search for "Clarence," looking for any relevant hits. Oyez transcripts identify the Justices by first and

the research assistants also checked each transcript to determine whether it indicated the names of the Justices who were speaking. This process produced a preliminary list of oral arguments in which Thomas had spoken, as well as a list of 119 oral arguments whose transcripts did not identify the Justices. We contacted Oyez about these transcripts and they graciously were able to update many of them. Our research assistants checked the updated transcripts and discovered three additional oral arguments in which Thomas had spoken. In order to ensure completeness, we assigned another set of research assistants to examine the transcripts from 1991–2003 to see if any questions had been missed.[30] At the end of this review we identified (by our count) 87 oral arguments with outstanding problems, including 14 with no audio at all. Research assistants listened to the 73 oral arguments that had audio and were able to identify two additional oral arguments in which Thomas spoke.[31]

All told, our efforts have produced the most complete compendium of Justice Thomas's oral argument questions to date.

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last names, allowing the searcher to use "Clarence" instead of the more common "Thomas" as the primary search term.

[30] This process was necessary because it was discovered that while some transcripts indicated Justices' names for part of the oral argument, a large portion of the transcripts did not indicate which Justices were speaking.

[31] This leaves fourteen cases that have not been checked because no audio was available from Oyez. Half of these oral arguments, however, are from the 1993 term, which some sources indicate was Justice Thomas's first term without asking questions. *See, e.g.*, Joan Biskupic, *Justices Question Honoraria Ban; Limits on Federal Workers' Speech Criticized in Oral Arguments*, WASH. POST (Nov. 9, 1994), https://www.washingtonpost.com/archive/politics/1994/11/09/justices-question-honoraria-ban/2ffb077c-d7f5-41a2-8ac1-d339a0a81967/?utm_term=.9036f529eea1 [https://perma.cc/C5QG-7FXW] (stating that Justice Thomas had not posed a question "for more than a year").

The process of manually examining the transcripts, while tedious for our dutiful research assistants, proved invaluable—particularly in instances where Oyez's identification of Justices was incomplete. One example of the value of this process can be seen when looking at a study that analyzed the Justices' use of oral argument to communicate with each other. *See* Johnson, *supra* note 26. A portion of that study examined how often individual Justices spoke at argument. *Id.* at 341. For each argued case during the 1998–2006 terms, the authors "downloaded the voice-identified transcripts from the Oyez Project and counted the number of times each Justice spoke." *Id.* at 337. The authors identified 34 utterances by Justice Thomas. *Id.* at 343 n.46. After Oyez added Justice identification for a number of cases during our project, 34 utterances seemed low. To test our suspicion, we looked at the Oyez transcript for each case in which we knew Thomas had spoken and counted the number of times he was named. We counted 90 utterances during the 1998–2006 terms. Similarly, the First Amendment Center has collected a list of Thomas's questions in First Amendment cases that notes that because Oyez had not identified Justices by name in all oral arguments it was possible that Justice Thomas had spoken in other First Amendment cases that were not listed. In fact, one of the cases discovered in our process, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), was a First Amendment case.

III. ANALYSIS

With so much focus on Justice Thomas's failure to speak, little attention has been given to quality and character of the questions the Justice has actually asked. To be sure, in a few instances, it has been noted that his questions have impacted the argument, seemingly influencing both the dialogue and perhaps even the ultimate resolution of a case.[32] But in dozens of other less-recognized instances, Thomas's contributions during oral argument have aided the Court's inquiry in concrete ways, and his pattern of questioning has been consistently beneficial. Our review of the full set of questions asked by Thomas reveals that when he acts as questioner, he exemplifies a number of model behaviors for judges at oral argument.

A. Fact Stickler

First, Justice Thomas's style of questioning indicates that he is very much a Fact Stickler—a jurist who uses his queries to hone in on the crucial factual details of the case and to highlight aspects of the record that might alter the analysis, impact the outcome, or both. A review of his questions reveals a consistent mastery of the factual record and a commitment to clarifying the aspects of the record that remain unclear or that have been muddled by counsel.

Indeed, Justice Thomas's oral argument questioning shows him to be quick when invoking relevant portions of the record that seem to contradict arguments offered by counsel. For instance, he regularly points to pages within the joint appendix, cites specific findings from the court below, or reads exact language from the record, and then asks something like, "Doesn't *X* aspect of the record conflict with much of what you've just said?" or "Isn't it more accurate to say that the trial court found *Y*?"[33] When attorneys assert that a particular behavior might occur or a particular risk

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[32] *See, e.g.*, Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits*, 93 GEO. L.J. 575, 610 (2005) (noting that "by all accounts, Justice Thomas's statements" during oral argument in *Virginia v. Black*, which focused on the history of cross burning "appeared to have a tremendous effect on his fellow Justices").

[33] *See*, *e.g.*, Oral Argument at 43:29, Holmes v. South Carolina, 547 U.S. 319 (2006) (No. 04-1327), https://www.oyez.org/cases/2005/04-1327 [https://perma.cc/4BCY-TJQ7] (quoting the record and asking, "Isn't it more accurate that the trial court actually found that the evidence met the *Gregory* standard?"); Oral Argument at 4:05, United States v. Chesapeake & Potomac Tel. Co., 516 U.S. 415 (1996) (No. 94-1893) [hereinafter *Chesapeake* Oral Argument], https://www.oyez.org/cases/1995/94-1893 [https://perma.cc/B6N7-Z4YT] ("Well, doesn't the Third Report . . . conflict with much of what you've just said[?]"); Oral Argument at 26:19, Morales v. Trans World Airlines, 504 U.S. 374 (1992) (No. 90-1604) [hereinafter *Morales* Oral Argument], https://www.oyez.org/cases/1991/90-1604 [https://perma.cc/XW8V-Q323] (citing and quoting language from a specific page in the Joint Appendix and pointing out, "That seems to undermine what you just said.").

might exist, he asks if they know of specific instances or can offer actual examples.[34] While avoiding a "gotcha" tone, his questioning demonstrates fidelity to precision, coupled with a keen awareness of the facts.

Nor are the Justice's fact-focused inquiries and frequent references to the lower court record empty pop quizzes.[35] They have evident purpose. Sometimes they position the attorney to offer to the Court a tutorial about the real-world operation of a particular legal or business scheme.[36] Sometimes they tee up clarifications.[37] In short, they focus the Court on the real story.

B. Boundary Tester

A second prominent trait of Justice Thomas as an oral argument questioner is that he repeatedly and consistently has been a Boundary Tester—posing smart, precise hypotheticals that explore the scope of the arguments and that are designed to help the Court work out the edges of the legal principles at stake.

This testing of boundaries regularly comes in the form of compare-and-contrast questions, with Justice Thomas asking advocates to articulate

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[34] Oral Argument at 41:50, NASA v. FLRA, 527 U.S. 229 (1999) (No. 98-369) [hereinafter *NASA* Oral Argument], https://www.oyez.org/cases/1998/98-369 [https://perma.cc/7KBX-PU43] ("Do you know of any instance where . . . an IG has been directed by an agency head to conduct an audit?"); *id.* ("Now, do you have any examples of that?").

[35] *See*, *e.g.*, Oral Argument, Rogers v. United States, 522 U.S. 252 (1998), (No. 96-1279) [hereinafter *Rogers* Oral Argument], https://www.oyez.org/cases/1997/96-1279 [https://perma.cc/VT6P-Z2S9]; *Morales* Oral Argument, *supra* note 33.

[36] *See*, *e.g.*, Oral Argument at 53:07, Boggs v. Boggs, 520 U.S. 833 (1997) (No. 96-79) [hereinafter *Boggs* Oral Argument], https://www.oyez.org/cases/1996/96-79 [https://perma.cc/AJS7-WDF7] ("[W]ould you explain for us what happened to the lump sum that was alienated, or that was distributed?"); *Chesapeake* Oral Argument, *supra* note 33, at 4:05 ("[T]he cable industry is no longer at its infancy state; it is a developed industry with over 90 percent saturation, right?"); Oral Argument at 15:21, Union Bank v. Wolas, 502 U.S. 151 (1991) (No. 90-1491) [hereinafter *Wolas* Oral Argument], https://www.oyez.org/cases/1991/90-1491 [https://perma.cc/NU7R-B9QE] ("[A]re [the fees and the interest payments] due monthly, or are they long-term debt also?").

[37] Oral Argument at 53:31, Rice v. Collins, 546 U.S. 333 (2006) (No. 04-52) [hereinafter *Rice* Oral Argument], https://www.oyez.org/cases/2005/04-52 [https://perma.cc/YH4P-DGRM] ("Counsel, is there anything in the record to alert us to the race of the prosecutor?"); Oral Argument at 18:56, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (No. 00-1770), https://www.oyez.org/cases/2001/00-1770 [https://perma.cc/7MUM-ZS6T] ("How big a problem is this in the housing authority?"); Oral Argument at 55:01, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (No. 94-780) [hereinafter *Capitol Square* Oral Argument], https://www.oyez.org/cases/1994/94-780 [https://perma.cc/2VVG-9EW5] ("As I understand the record, there were some concerns that some of the citizens of Columbus, when they saw that, could actually see fire on that cross . . . . But doesn't the record suggest, though, that there was some concern that people would see more than the religious symbol in that cross?"); Oral Argument at 12:43, Arave v. Creech, 507 U.S. 463 (1993) (No. 91-1160), https://www.oyez.org/cases/1992/91-1160 [https://perma.cc/A5BE-FLUZ] (clarifying findings from a sentencing judge that a murder "took on many aspects of an assassination").

distinctions between differently situated people or entities, different legal rules, or different motivations.[38] He asks lawyers to consider whether one set of arguments is stronger than another, or whether they might have a better case if something about the facts or law was changed.[39] In so doing, the Justice not only demonstrates sophisticated analysis, but also helps his colleagues develop the rule of law beyond the four corners of the case at hand. Because of these sorts of questions, the principle ultimately announced by the Court will reflect more nuanced and farsighted analysis.

Justice Thomas the Boundary Tester has such a propensity for asking questions that tweak the facts that the "let me change the facts just a little"[40] setup may be the most common theme of his entire oral argument repertoire. "Would it change your analysis," he asked counsel in his very first oral argument as a Justice, if the individual bringing the Section 1983

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[38] *See*, *e.g.*, Oral Argument at 41:36, Voisine v. United States, 136 S. Ct. 2272 (2016) (No. 14-10154) [hereinafter *Voisine* Oral Argument], https://www.oyez.org/cases/2015/14-10154 [https://perma.cc/S48J-8GDL] ("Can you give me another area where a misdemeanor violation suspends a constitutional right?"); Oral Argument at 56:59, Gratz v. Bollinger, 539 U.S. 244 (2003) (No. 02-516) [hereinafter *Gratz* Oral Argument], https://www.oyez.org/cases/2002/02-516 [https://perma.cc/28GW-AK3C] ("Would the same arguments with respect to diversity apply to those institutions?"); Oral Argument at 54:38, Wisconsin v. Mitchell, 508 U.S. 476 (1993) (No. 92-515) [hereinafter *Wisconsin* Oral Argument], https://www.oyez.org/cases/1992/92-515 [https://perma.cc/L9L7-68WC] ("Let's assume that five were told to attack a white person and five said they would attack a black person, for whatever reasons. Now, the first five of course would be covered by the statute. Would the second five not be covered?"); Oral Argument at 46:10, Ankenbrandt v. Richards, 504 U.S. 689 (1992) (No. 91-367) [hereinafter *Ankenbrandt* Oral Argument], https://www.oyez.org/cases/1991/91-367 [https://perma.cc/68MJ-2JCY] ("Let's assume that the domestic relations exception applies to the father, Respondent Richards. How does it apply to his companion, Respondent Kesler?"); *Wolas* Oral Argument, *supra* note 36 at 15:21 ("Is there any distinction between the fees and the monthly payments of interest, and the actual pay-down of the principal?"); *see also Rice* Oral Argument, *supra* note 37 at 53:44 ("Would it make any difference? There seemed to be some suggestion that there are stereotypes at play in these Batson cases."); Oral Argument at 28:02, Georgia v. Randolph, 547 U.S. 103 (2006) (No. 04-1067) [hereinafter *Georgia* Oral Argument], https://www.oyez.org/cases/2005/04-1067 [https://perma.cc/Q448-BW68] ("Mr. Dreeben, is it . . . is this case materially different if she simply ran upstairs, grabbed the straw, brought it down, and handed it to the police officer?"); Oral Argument at 23:41, United States v. Olano, 507 U.S. 725 (1993) (No. 91-1306), https://www.oyez.org/cases/1992/91-1306 [https://perma.cc/7LSF-Q2UA] ("General Starr, would we analyze this differently if there had been a consent to the alternate jurors?").

[39] *See*, *e.g.*, *Voisine* Oral Argument, *supra* note 38, at 46:23 ("Would you have a better case if this were a gun crime?"); *Boggs* Oral Argument, *supra* note 36, at 56:00 ("But do you have a better argument for the lump sum than the annuity?"); Oral Argument at 56:51, United States v. Nat'l Treasury Emps. Union, 513 U.S. 454 (1995) (No. 93-1170) [hereinafter *Nat'l Treasury* Oral Argument], https://www.oyez.org/cases/1994/93-1170 [https://perma.cc/F73F-76DG] ("Do you think that the Government could, consistent with the First Amendment, simply ban all moonlighting? . . . So it would seem to me that the Government would have a stronger case for banning moonlighting than it does for speeches at the civil servant level.").

[40] Oral Argument at 31:12, Miller v. Johnson, 515 U.S. 900 (1995) (No. 94-631) [hereinafter *Miller* Oral Argument], https://www.oyez.org/cases/1994/94-631 [https://perma.cc/C7RM-RE2X] ("Mr. Parks, let me change the facts just a little.").

suit for injury while cleaning the sewers "were a city prisoner" rather than a municipal employee?[41] This approach—using questions that start with "let's say . . ." or "what if . . ."[42] is his calling card. Indeed, the most recent line of questioning from Thomas, in the February 2016 case of *Voisine v. United States*,[43] took this same format. In that case, which focused on a statute forbidding those convicted of misdemeanor crimes of domestic violence from possessing firearms, the Justice offered a "let's say" hypothetical question,[44] and then followed it up with two classic compare-and-contrast questions: "[H]ow is that different from . . . ?" and "Would you have a better case if . . . ?"[45] Thomas made headlines for those questions, which marked the first time he had spoken from the bench in over a decade. Unrecognized, though, was the fact that his boundary-testing approach had picked up exactly where it had left off.

Boundary testing, of course, can be dangerous. Oral argument centered on hypotheticals, counternarratives, and fact swaps can easily become meandering and puzzling—even a series of Justice-focused soliloquies rather than a productive information-seeking exchange with an

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[41] Oral Argument at 41:25, Collins v. City of Harker Heights, 503 U.S. 115 (No. 90-1279), https://www.oyez.org/cases/1991/90-1279 [https://perma.cc/H52W-FJSX] ("Would it change your analysis, Mr. Powe, if Mr. Collins were a city prisoner, required to clean the sewers?").

[42] *See*, *e.g.*, Oral Argument at 43:55, US Airways, Inc. v. Barnett, 535 U.S. 391 (2002) (No. 00-1250) [hereinafter *US Airways* Oral Argument], https://www.oyez.org/cases/2001/00-1250 [https://perma.cc/E3EL-KGFJ] ("Say that your client could be bumped by someone who's more severely handicapped if he were in that position?"); Oral Argument at 44:26, Booth v. Churner, 532 U.S. 731 (2001) (No, 99-1964), https://www.oyez.org/cases/2000/99-1964 [https://perma.cc/CA96-W5LN] ("Then what if your prison system, describing the procedure, says the following relief can be given and they give a bunch of examples, but none of them include the hypothetical you've given me?"); *Boggs* Oral Argument, *supra* note 36, at 53:07 ("Let's say that . . . she passed away in 1979, that he was quite grieved, and did not remarry. . . . What would the children get in those circumstances? . . . Okay, let's say he did not remarry."); Oral Argument at 55:42, *Capitol Square* Oral Argument, *supra* note 37, at 55:46 ("Let's say, 50-50, 50 whatever other reasons, and 50 religious, then how does that become a free exercise problem?"); *Miller* Oral Argument, *supra* note 40, at 31:12 ("Mr. Parks, let me change the facts just a little. Let's say that the Georgia legislature, anticipating that they were going to have some difficulty in retaining the white vote . . . ."); Oral Argument at 56:48, Lamb's Chapel v. Ctr. Moriches Union Free School Dist., 508 U.S. 385 (1993) (No. 91-2024) [hereinafter *Lamb's Chapel* Oral Argument], https://www.oyez.org/cases/1992/91-2024 [https://perma.cc/N87Q-SN7E] ("Well let's say it's an atheist and an agnostic debating one minister. . . . Well, I'm just wondering . . . what is it about the debate that changes when you add a minister to an atheist and an agnostic[?]"); Oral Argument at 51:52, Lincoln v. Vigil, 508 U.S. 182 (1993) (No. 91-1833), https://www.oyez.org/cases/1992/91-1833 [https://perma.cc/8GHC-MDGW] ("Let's say . . . they decided to deploy them to Phoenix.").

[43] 136 S. Ct. 2272 (2016).

[44] *See*, *e.g.*, *Voisine* Oral Argument, *supra* note 38, at 45:09 ("[L]et's say that a publisher is reckless about the use of children, and what could be considered indecent displays and that that triggers a violation of, say, a hypothetical law against the use of children in these ads, and let's say it's a misdemeanor violation.").

[45] *Id.* at 45:55 ("[H]ow is that different from suspending your Second Amendment right?"); *id.* at 46:23 ("Would you have a better case if this were a gun crime?").

advocate. But that risk never comes to fruition with Justice Thomas. His boundary testing avoids becoming circuitous, long-winded, or confusing.

C. Attorney Respecter

Justice Thomas's full oral argument record also demonstrates that he is an Attorney Respecter—the Justice's exchanges with counsel are characterized by politeness.

More often than not, when Justice Thomas has launched into a question, he has prefaced it with a courteous interjection[46]—or even an explicit apology for interrupting the attorney,[47] despite such interruptions being the increasingly common practice at the Court.[48] Occasionally, he has even asked the arguing attorney permission to ask a question.[49] When his questions are not sufficiently answered, he does not badger or disparage counsel, but instead politely presses for additional explanation, saying he "hate[s] to belabor the point,"[50] or he "[woul]d like to revisit" an issue.[51]

To be sure, he is not soft, and he does not merely walk away from a question if it has been dodged. But he treats the exchange with lawyers appearing before the Court as a conversation of equals, assuming the best of them, taking responsibility for any confusion that might be occurring in the exchange, and moving the discussion forward with civility and consideration.[52]

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[46] *Id.* at 41:36 ("Ms. Eisenstein, one question."); *Wisconsin* Oral Argument, *supra* note 38, at 54:32 ("One question, Mr. Adelman."); *Ankenbrandt* Oral Argument, *supra* note 38, at 46:10 ("Counsel, one question for clarification."); *Morales* Oral Argument, *supra* note 33, at 26:13 ("I'd like to ask you one question, counsel.").

[47] *Boggs* Oral Argument, *supra* note 36, at 56:00 ("I'm sorry to interrupt."); *Capitol Square* Oral Argument, *supra* note 37, at 54:15 ("Mr. Wolman . . . I hate to interrupt you."); *Miller* Oral Argument, *supra* note 40, at 32:22 ("I'm sorry to interrupt you.").

[48] *Clarence Thomas' Two Years of Silence*, NPR (Feb. 28, 2008, 1:00 PM) http://www.npr.org/templates/transcript/transcript.php?storyId=26913288 [https://perma.cc/2AG8-MBDP]. Supreme Court reporter Dahlia Lithwick opined that Justice Thomas's silence is particularly stark in contrast to a Court that is "particularly hot right now" such that "it's not just that he's quiet, it's that he's quiet in contrast to eight people who talk relentlessly." *Id.*

[49] Oral Argument at 46:55, Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (No. 95-1376) [hereinafter *Robinson* Oral Argument], https://www.oyez.org/cases/1996/95-1376 [https://perma.cc/H37Z-SRF6] ("Mr. Butler, may I ask you one question?"); *Capitol Square* Oral Argument, *supra* note 37, at 54:16 ("I'd like to ask just a couple of questions, if I may.").

[50] *US Airways* Oral Argument, *supra* note 42, at 52:00.

[51] *NASA* Oral Argument, *supra* note 34, at 40:01.

[52] *Gratz* Oral Argument, *supra* note 38, at 56:59 ("You may have misunderstood me. I mean . . . ."); Oral Argument at 49:53, Apprendi v. New Jersey, 530 U.S. 466 (2000) (No. 99-478), https://www.oyez.org/cases/1999/99-478 [https://perma.cc/6LXD-ZWPN] ("The difficulty I have is that nowhere have we defined what the distinction is between an element of the offense and an enhancement factor, and if you could do that in your few minutes it would be very helpful."); *Boggs* Oral Argument,

A related virtue is that Justice Thomas often does not ask questions until the end of counsel's presentation—before interrupting, he waits to see if counsel will answer his questions without his prompting. *Rogers v. United States* is an excellent example of this.[53] In this case, Justice Thomas actually spoke a great deal, but not until the argument was nearing its end. Indeed, he followed the same "wait and see" pattern *twice*—both when questioning the petitioner and when questioning the respondent.[54] Each time, he waited until everyone had their say, and only then did he begin asking his questions. This is par for the course for Thomas.[55]

In fact, in *Burlington Northern Railroad v. Ford*, Thomas did not ask his question until after counsel said "[i]f there are no further questions," at which point he said that he did have "one question," which consisted of a single sentence: "Did you consider arguing that this venue statute violated the commerce clause?"[56] It is safe to assume that the question was important to the Justice,[57] but not—in his view—important enough to interrupt counsel's prepared argument.

Justice Thomas's approach to questioning shows respect for the attorneys who are the recipients of his questions and for the proceeding in which those questions occur. It preserves the decorum of the Court and furthers its ultimate goal of efficiently seeking the truth. Oral argument everywhere would be better off if Justice Thomas's example became the norm.

D. Statute Parser

A review of Justice Thomas's questions also reveals that he is a Statute Parser—inclined to focus both the parties and his colleagues on the specific language of the statute.

Consider the oral arguments for *Evans v. United States*,[58] a case about the scope of the offense of extortion "under color of official right" under the Hobbs Act. Here, Justice Thomas focused the entirety of his questioning on the key language of the Act. He compared that language to language in a similar statute, highlighted the differences between the two

supra note 36, at 56:00 ("I'm sorry to interrupt, but where you're losing me is, if he had not remarried, what is there to give away?").

[53] 522 U.S. 252 (1998).

[54] *Rogers* Oral Argument, *supra* note 35.

[55] *See, e.g.*, *Morales* Oral Argument, *supra* note 33; *Ankenbrandt* Oral Argument, *supra* note 38.

[56] Oral Argument at 52:30, Burlington N. R.R. v. Ford, 504 U.S. 648 (1992) (No. 91-779), https://www.oyez.org/cases/1991/91-779 [https://perma.cc/3PDZ-A7UT].

[57] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (offering detailed analysis of the Commerce Clause).

[58] 504 U.S. 255 (1992).

provisions,[59] and thrice read the statute's definitional phrase out loud to the advocate.[60] He structured his questions around that language, and when the attorney made arguments not rooted in the text, Thomas responded simply, "Well, I understand that, but the statute doesn't say that."[61]

Indeed, Justice Thomas has a laser-like focus on the text. He pushes advocates to break down statutory provisions to understand their peripheries, walks them through the scope of statutory exceptions, and poses specific questions designed to clarify application of statutory language to different individuals or circumstances.[62] Although respectful to other types of arguments,[63] his most common refrain is some variation of "the statute says . . . ."[64]

Putting aside the merits of textualism as an ending point—or even as a starting point—in statutory interpretation, the merits of having an active voice in oral argument that demands investigation of and discussion about the statutory language seem incontrovertible. The same is true of oral argument questioning that parses the complexities of statutory exceptions and wrestles with the hard questions of the scope of statutory application in differing scenarios. With Justice Antonin Scalia's departure from the U.S. Supreme Court, the need for a Justice to ask these sorts of questions is obvious. Hence, Justice Thomas's skills as a Statute Parser—evident in his full history of oral argument questioning—are more valuable today than ever before, and his silence potentially more harmful.

E. An Insight Provider

As the Court's only Southerner, African-American, former state attorney, former corporate counsel, and former head of a federal agency, Justice Thomas's background is unusual. Unsurprisingly, this distinct

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[59] Oral Argument at 47:59, Evans v. United States, 504 U.S. 255 (1992) (No. 90-6105) [hereinafter *Evans* Oral Argument], https://www.oyez.org/cases/1991/90-6105 [https://perma.cc/M5TW-L92H] ("Our statute is quite different. It refers only to obtaining property from another with his consent under color of official right. It doesn't have a limiting factor. It doesn't say in excess of.").

[60] *See id.*

[61] *Id.*

[62] *See, e.g.*, *Wisconsin* Oral Argument, *supra* note 38, at 54:38 (presenting a hypothetical to test the application of a sentence-enhancement statute to differently situated parties); *NASA* Oral Argument, *supra* note 34, at 45:11 ("[Y]ou can't point to any provision authorizing the agency head to direct the IG to include a union representative in such a meeting or interview.").

[63] *See, e.g.*, *Wisconsin* Oral Argument, *supra* note 38, at 54:38 (inquiring about the ways a statutory requirement had been interpreted in relevant cases).

[64] *See, e.g.*, *Nat'l Treasury* Oral Argument, *supra* note 39, at 59:16 ("This law simply says you can't get paid for speeches and articles, right?"); *Wisconsin* Oral Argument, *supra* note 38, at 55:02 ("The statute says because of race."); *Evans* Oral Argument, *supra* note 59, at 49:24 ("The statute doesn't say that.").

background often shines through in his questions. Indeed, by drawing on his experiences and infusing his inquiries with these real-world observations, Thomas can be a powerful Insight Provider.

Justice Thomas's path to the Court is a tale that has been told before.[65] For purposes here, it enough to observe that Thomas comes from a different place than the rest of the Justices—literally. He is the only Justice from the South, being raised primarily in Pin Point, Georgia, just outside of Savannah. He also, of course, is the Court's only African-American. And although "well-off by the standards of Savannah's black community"—Thomas, after all, had a "secure roof" and an "indoor toilet"—no one would say that Thomas grew up wealthy.[66] After graduating from law school, with a host of fascinating stories along the way, Thomas's first job was as an Assistant Attorney General in Missouri, where he practiced tax law. He then worked in-house for Monsanto Chemical Company, followed eventually by an eight-year stint as Chairman of the United States Equal Employment Opportunity Commission (EEOC).[67] No one else on the Court has a backstory even remotely like this.

This unusual path to the Supreme Court allows Justice Thomas to provide unique insights—most prominently about issues of race.

For instance, no doubt Justice Thomas's most famous argument exchange comes from *Virginia v. Black*, which addressed the constitutionality of Virginia's cross-burning statute.[68] It is impossible to forget Justice Thomas's powerful observation that "we had almost 100 years of lynching and activity in the South by the Knights of Camellia and the Ku Klux Klan, and this was a reign of terror, and the cross was a symbol of that reign of terror."[69] Not only was his moral authority obvious, but he also spoke with the power of superior knowledge—of all the Justices, he alone had experienced that life. Thomas also addressed the Ku Klux Klan's use of a cross in *Capitol Square Review & Advisory Board v. Pinette*, pointedly asking, "What is the religion of the Klan?" and whether, if the Klan were "carrying a cross down Pennsylvania Avenue," anyone would think it was "engaged in an exercise of religion" rather than "a

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[65] *See, e.g.*, CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007).

[66] KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 9, 18 (2004).

[67] *See, e.g.*, *id.* at 3 (recounting biography).

[68] *See* 538 U.S. 343, 343 (2003).

[69] Oral Argument at 23:32, Virginia v. Black, 538 U.S. 343 (2003) (No. 01-1107), https://www.oyez.org/cases/2002/01-1107 [https://perma.cc/VBG8-J8HM].

political statement."[70] Similarly, Thomas expressed concern in *Gratz v. Bollinger* about historically black colleges.[71]

Justice Thomas's role as an Insight Provider, however, is not limited to race cases. His questions, for instance, also offer insights into discrimination. Consider, for instance, the oral argument in *Robinson v. Shell Oil Co.*[72] The question there was whether a *former* employee can bring an action under Title VII for actions allegedly taken in retaliation for filing a charge with the EEOC.[73] Thomas, presumably recalling his days at the EEOC, wondered aloud whether former employers, who often are asked to provide recommendations to future employers, really could say, "Look, you file a charge against me, and I will see to it that you will never work in this business again."[74] Similar recollections may have influenced his questioning in *Pennsylvania Department of Corrections v. Yeskey*, which addressed disability discrimination in the penal context.[75] Thomas explained that when it comes to "ramps" and the like, accommodating a disability seems "fairly easy and straightforward," but that "reasonable accommodation is a bit more difficult than our discussion's been so far"; after all, in a prison, what would be a reasonable accommodation for someone who, say, "has a history of claustrophobia"?[76] (In both cases, Thomas sided with the party alleging discrimination.)

Justice Thomas's ability to offer real-world experience is also shown in cases involving federal agencies. Again, recall that Justice Thomas headed the EEOC for eight years; few people, to say nothing of judges, have lived so many years so deep in the belly of administrative law. In *NASA v. FLRA*, Thomas drew on that experience to explain his understanding of the role of an agency head when it comes to inspectors general, suggesting that there was "an attitude in Congress that the investigation should not be controlled by the agency heads," and explaining that "if the Administrator can't direct the IG to do precisely [what the

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[70] *Capitol Square* Oral Argument, *supra* note 37, at 54:15, 57:11.

[71] *Gratz* Oral Argument, *supra* note 38, at 56:59; *see also* Oral Argument at 36:26, United States v. Fordice, 505 U.S. 717 (2012) (No. 90-1205), https://www.oyez.org/cases/1991/90-1205 [https://perma.cc/3NBP-VUTE] (asking about desegregation in Mississippi); *Miller* Oral Argument, *supra* note 40, at 31:12 (asking about distinguishing between political and racial gerrymandering in Georgia).

[72] 519 U.S. 337 (2003).

[73] *Id*. at 339.

[74] *Robinson* Oral Argument, *supra* note 49, at 47:11.

[75] 524 U.S. 206 (1998).

[76] Oral Argument at 45:21, Pa. Dep't. of Corrs. v. Yeskey, 524 U.S. 206 (1998) (No. 97-634), https://www.oyez.org/cases/1997/97-634 [https://perma.cc/WKW6-8KM7].

Administrator thinks] the IG should be doing, then I don't know how you can say that the IG reports to the Administrator."[77]

Justice Thomas, of course, is not the only Justice who brings a distinct background to the bench. Each sometimes plays the role of Insight Provider. But when Thomas has personal familiarity with the subject, his questions can be especially formidable.

F. A Plain Speaker and Team Player

Finally, two additional characteristics stand out: Justice Thomas is a Plain Speaker and Team Player. By this, we mean that his questions are crisp; he does not wander from his point or disrupt the flow of the argument. Instead, when it comes to asking a question, he gets in, gets out, and moves things along without wasting time or creating confusion.

It is no secret that the other Justices speak a lot during argument—indeed, "their barrage of questions sometimes leav[es] the lawyers arguing before them as bystanders in their own cases."[78] Frankly, this is concerning, particularly if it means that the Justices are talking more and listening less. In fact, this trend is one reason that Justice Thomas himself has offered to explain his reticence to ask questions at argument: "We have a lifetime to go back in chambers and to argue with each other," but counsel "have 30, 40 minutes per side."[79]

Especially in light of the modern Court's penchant for bombarding counsel with questions, there is much to be said for making sure that questions are succinct.[80] Here again, Justice Thomas is a model Justice. Consider, for instance, Thomas's approach to *Georgia v. Randolph*, which concerned whether a police officer may search a dwelling if one person there consents while the other person objects.[81] Thomas wondered why the woman who consented could not have just grabbed the evidence and given it to the police. If she could do that, how could it be unreasonable for the police—with her consent—to instead enter and obtain the same evidence? Rather than belabor that point, Thomas simply asked whether "this case [would be] materially different if she simply ran upstairs, grabbed the

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[77] *NASA* Oral Argument, *supra* note 34, at 46:39; *see also Nat'l Treasury* Oral Argument, *supra* note 39, at 59:38 (considering the difference between "moonlighting" and "honorariums" for government employees).

[78] Adam Liptak, *A Most Inquisitive Court? No Argument There*, N.Y. TIMES, Oct. 8, 2013, at A14.

[79] Gerstein, *supra* note 14.

[80] *Cf.* 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, 1028 n.60 ("[S]ome Justices may be more or less inclined to ask questions, and some Justices may be better questioners—or at least able to ask questions more succinctly—than others.").

[81] 547 U.S. 103 (2006).

straw, brought it down, and handed it to the police officer?"[82] His question had no lengthy wind-up, outlandish hypothetical, or attempt at humor. Instead, Thomas asked his question and then stepped back. In both his choice of questions and his rate of participation, he signals an awareness of the group nature of the endeavor and a commitment to using the limited argument time to benefit the full Court.

In short, Justice Thomas's questions do not represent wild tangents. They do not take up more than his share of the argument time. They are very often crisp, concise, and useful. They do not interrupt the line of inquiry of a colleague or detract from themes being developed by the other Justices. Indeed, Thomas often follows up on questions of other Justices.[83] To be sure, his questions sometimes suggest he disagrees with his colleagues and often present counterexamples to theirs. But his mode of questioning respects the give-and-take of the group dynamic. In total, the complete set of questions asked by Thomas suggest that he is not seeking to pontificate about his own pet issues, but rather to obtain answers to the questions he knows his colleagues have and to amplify the ideas they have already brought to the exchange.

CONCLUSION

Justice Clarence Thomas, known for his silence, ought to be known for his questions. When he has asked them, they have been almost uniformly well-constructed, contributory, interesting, and helpful to both the advocates and his peers on the Court. Whether he is clarifying the facts, parsing statutory language, or playing out a hypothetical to test the boundaries of a rule, his oral argument style is thoughtful, respectful to the attorneys, and cooperative with his fellow Justices. Using plain language, he asks questions that matter and offers insights without wasting time or drawing unnecessary attention to himself. In many key respects, Justice Thomas, the Justice least likely to ask a question, is a model questioner. He should ask more of them.

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[82] *Georgia* Oral Argument, *supra* note 38, at 43:29.

[83] *See, e.g.*, *Gratz* Oral Argument, *supra* note 38, at 56:59 (referencing an earlier question from Justice O'Connor in the same oral argument); *Rogers* Oral Argument, *supra* note 35, at 26:25 (following up on a question from Justice Breyer); *Lamb's Chapel* Oral Argument, *supra* note 42, at 55:35 (beginning his questioning with a reference to earlier questioning by Justice Stevens).