# WHY JUSTICE THOMAS SHOULD SPEAK AT ORAL ARGUMENT

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## I. INTRODUCTION

The oral argument before the United States Supreme Court in *Morse v. Frederick*[1] began at 10:03 a.m.[2] in typical fashion, like a high-speed game of chess.[3] Forty-two seconds into the argument, Justice Anthony Kennedy cut off the advocate in mid-sentence.[4] For the next hour and ten minutes, the Justices interrupted the lawyers 152 times.[5] Justice Stephen Breyer, a former law professor, posed a multi-part hypothetical;[6] Justice Ruth Bader

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[*] J.D. 2009, University of Florida Levin College of Law. B.A. 1995, Yale University. For Marisa, who joined me on this adventure. Also thanks to Professors Sharon Rush and Michael Seigel, and to Ann Hove, Caroline McCrae, and Ben "Ziggy" Williamson, for their close reading of this Note.

1. 127 S. Ct. 2618 (2007).

2. *See* Transcript of Oral Argument at 1, 3, *Morse*, 127 S. Ct. 2618 (No. 06-278).

3. KEVIN MERIDA & MICHAEL A. FLETCHER, SUPREME DISCOMFORT: THE DIVIDED SOUL OF CLARENCE THOMAS 313 (2007).

4. *Hear* Recording of Oral Argument on Mar. 19, 2007, *Morse*, 127 S. Ct. 2618 (No. 06-278), *available at* http://www.oyez.org/cases/2000-2009/2006/2006_06_278/argument/.

5. *Id.*

6. *Id.*; *see* Michael Doyle, Wire Service Report, *Transcripts Give a Glimpse into Many Justices' Personalities*, MCCLATCHY NEWSPAPERS, May 16, 2007, *available at* 2007 WLNR 9287415 (describing Justice Breyer as "painfully professorial" and "the most verbose of the

Ginsburg, a civil procedure scholar, asked about a key detail in the record;[7] Justice Antonin Scalia's rejoinders drew laughs from the audience.[8]

The Court wrestled during the argument with the reach of a student's First Amendment right to unfurl a banner at a school-sponsored, off-campus event.[9] Yet, during the hour-long exchange, no Justice questioned the basic premise that students retain some First Amendment rights at school.[10] However, when the Court issued its opinion, Justice Clarence Thomas in a concurrence announced an extraordinary position: that the First Amendment does not apply at all to students.[11] He wrote that the Court should overrule the leading precedent, *Tinker v. Des Moines Independent Community School District*,[12] which has remained good law for thirty-eight years. Justice Thomas' conclusion surely surprised the parties. None had briefed the issue, and Justice Thomas had not asked them about it during oral argument.

In fact, Justice Thomas rarely utters a word from the bench.[13] Since

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justices" who has "unleashed nearly 35,000 words during oral arguments since January [of 2007]"); *see also* Jeffrey Toobin, *Breyer's Big Idea: The Justice's Vision for a Progressive Revival on the Supreme Court*, NEW YORKER, Oct. 31, 2005, at 36 ("Tall, thin, and nearly bald, he radiates nervous energy, rubbing his head as he puzzles over questions, and, in sessions at the Supreme Court, rocking in his leather chair—sometimes pitching so far forward that his chin almost rests on the bench.").

7. *Hear* Recording of Oral Argument on Mar. 19, 2007, *Morse*, 127 S. Ct. 2618 (No. 06-278), *available at* http://www.oyez.org/cases/2000-2009/2006/2006_06_278/argument/. Justice Ginsburg taught civil procedure for seventeen years, and enjoys speaking and writing about the subject. *See* Tony Mauro, *Seers Forecast Authors of Supreme Court Opinions*, 160 N.J. L.J. June 12, 2000, at 8, 8 ("If one of the pending cases involves civil procedure, Ginsburg might be the justice to bet on; she likes the subject."); Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, § 6 (Magazine), at 60.

8. *Hear* Recording of Oral Argument, *Morse*, 127 S. Ct. 2618 (No. 06-278), *available at* http://www.oyez.org/cases/2000-2009/2006/2006_06_278/argument/; see also Jay D. Wexler, *Laugh Track*, 9 GREEN BAG 2D 59, 60 (2005) ("Justice Scalia won the competition by a landslide, instigating 77 laughing episodes, while Justice Thomas instigated zero laughing episodes . . . .").

9. Transcript of Oral Argument at 49–58, *Morse*, 127 S. Ct. 2618 (No. 06-278).

10. *Id*. at 3–4. Kenneth Starr, the school district's attorney, argued that the Court could rule for the school without altering *Tinker*. *Id.*; *see also* Brief for Petitioner at 25, *Morse*, 127 S. Ct. 2618 (No. 06-278).

11. *Morse*, 127 S. Ct. at 2630 (Thomas, J., concurring).

12. 393 U.S. 503 (1969).

13. A range of commentators have noted Justice Thomas' silence at oral argument. *See* MERIDA & FLETCHER, *supra* note 3, at 309 ("Those who come to the Supreme Court to listen to oral arguments for the first time are often struck . . . by Thomas' nonparticipation. His silence has become one of his signature characteristics as a justice and a subject of ongoing fascination . . . ."); Guy-Uriel E. Charles, *Colored Speech: Cross Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. 575, 610 (2005) ("Justice Thomas' comments during oral argument in *Black* are noteworthy both because he rarely asks questions during oral arguments and because of the impact those comments had on his colleagues."); Scott D. Gerber, *Justice Clarence Thomas: First Term, First Impressions*, 35 HOW. L.J. 115, 128 (1992) ("[A]lthough Justice Thomas generally asked few questions during oral argument, such reserve was not present in his writing."); David G. Savage,

2004, when oral argument transcripts began identifying Justices by name,[14] Justice Thomas has made just eleven comments[15]—while sitting through more than 400 hours of argument.[16] He asked his last question on February 22, 2006, more than three years ago.[17]

Yet, rarely has a Justice said so little but had so much to say. As Professor Erwin Chemerinsky wrote: "Justice Thomas is the most radical member of the current Supreme Court, and likely one of the most radical justices in history in his desire to overrule precedent and dramatically change the law."[18] Justice Thomas' jurisprudence would revolutionize constitutional law, overturning precedents in areas of criminal procedure, the Takings Clause, reproductive rights, First Amendment rights, and the separation of church and state, among other areas.[19]

This Note argues that Justice Thomas' profound silence during oral argument undermines the Court's deliberative process—and weakens the legitimacy of the far-reaching conclusions, like those in *Morse*, that Justice

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*Say the Right Thing*, 83 A.B.A. J. 54, 55 (1997) ("Only Justice Clarence Thomas is silent on the bench. Roughly once per term, he asks a question during oral arguments. Still, Thomas' studied silence prompts lots of speculation. With his passive expression and long gazes at the ceiling, he looks out of place amid his engaged and animated colleagues."); Dahlia Lithwick, Op-Ed., *Personal Truths and Legal Fictions*, N.Y. TIMES, Dec. 17, 2002, at A35 ("Many of us in the courtroom were surprised simply at the sound of his voice; he speaks only four or five times a year, less often than most of his colleagues speak during an average morning.").

14. Press Release, Supreme Court of the United States, Oral Argument Transcripts (Sept. 28, 2004), http://www.supremecourtus.gov/publicinfo/press/pr_09-28-04.html.

15. Since the Court began identifying justices by name in transcripts on October 4, 2004, Justice Thomas has spoken in four cases. *See* Transcript of Oral Argument at 43, Holmes v. South Carolina, 547 U.S. 319 (2006) (No. 04-1327); Transcript of Oral Argument at 46, Rice v. Collins, 546 U.S. 333 (2006) (No. 04-52); Transcript of Oral Argument at 30, 51–52, Georgia v. Randolph, 547 U.S. 103 (2006) (No. 04-1067); Transcript of Oral Argument at 38, Veneman v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) (No. 03-1164).

16. For cases argued from the October Term 2004 to the October Term 2006, see GEORGETOWN UNIVERSITY LAW CENTER SUPREME COURT INSTITUTE, SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2006 OVERVIEW 10 (2007), http://www.law.georgetown.edu/sci/documents/GULCSupCtInstituteFinalReportOT2006_29June07.pdf. For cases argued during the October Term 2007, see Supreme Court of the United States Granted & Noted Case List (October Term 2007) at 13, http://www.supremecourtus.gov/orders/07grantednotedlist.pdf. For cases argued during the October Term 2008, see Supreme Court of the United States Granted & Noted Case List (October Term 2008) at 11, http://www.supremecourtus.gov/orders/08grantednotedlist.pdf.

17. Adam Liptak, *Rare Glimpse of Thomas, From Bench to Den*, N.Y. TIMES, Apr. 13, 2009, at A11; Mark Sherman, *Justice Thomas A Man of Very Few Words*, SEATTLE TIMES, May 19, 2007, at A5; *see supra* note 15 and accompanying text; *see also* Posting of Kedar Bhatia to Daily Writ, http://dailywrit.com/2007/12/06/updated-oral-argument-statistics/ (Dec. 6, 2007).

18. Erwin Chemerinsky, Foreword: Justice Thomas and the First Amendment, First Amendment Center (Oct. 8, 2007), http://www.firstamendmentcenter.org/analysis.aspx?id=19158. Professor Chemerinsky writes mainly about Justice Thomas' First Amendment jurisprudence, but he also argues that Justice Thomas "is ready and willing to refashion large areas of constitutional law." *Id.*

19. *See infra* Part III and text accompanying footnotes 81–122.

Thomas reaches without the benefit of briefing or oral argument. By removing himself from oral argument, Justice Thomas' opinions do not benefit from the full adjudicative process designed to test theories in open court. Many of his opinions, therefore, read less like the product of actual litigation, and more like constitutional commentary on issues related to—but not directly raised in—a case. Justice Thomas' silence on the bench is more than a peculiarity; it allows him to announce new theories of the Constitution without vetting those theories in open court.

This Note focuses on Justice Thomas because his silence is so unrelenting, his opinions are so far-reaching, and his position on the nation's highest court is so influential. It argues that Justice Thomas should end his silence, both for his own benefit and for the Court's.

Part II of this Note discusses the role of oral argument in shaping the law and enhancing the legitimacy of the Court. Part III demonstrates that Justice Thomas often remains silent during oral arguments even when his written opinions depart from precedent and the framework of the Court's debate. Part IV explains how Justice Thomas' silence removes him from the adjudicative process. Part V discusses, and counters, Justice Thomas' reasons for keeping quiet on the bench. Part VI discusses how Justice Thomas has used oral argument effectively in one case.

## II. THE VALUE OF ORAL ARGUMENT

The Constitution grants the Supreme Court authority to exercise "[t]he judicial Power of the United States,"[20] but it does not tell the Court how it should exercise this power.[21] Federal law only requires the Court to meet each year on the first Monday in October[22] with at least six Justices present.[23] The law does not require the Justices to decide cases,[24] read briefs,[25] issue written opinions,[26] speak during[27]—or even hold—oral

20. U.S. CONST. art. III, § 1.

21. Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit writes that "the term 'judicial Power' in Article III is more likely descriptive than prescriptive" and does not require courts to follow any procedure other than those procedures, such as the right to trial by jury, specified in the Constitution. Hart v. Massanari, 266 F.3d 1155, 1161 & n.5 (9th Cir. 2001).

22. 28 U.S.C. § 2 (2006); *see also* SUP. CT. R. 4.1.

23. 28 U.S.C. § 1; *see also* SUP. CT. R. 4.2.

24. *See* 28 U.S.C. §§ 1–5.

25. However, the Court has adopted its own rules requiring counsel to submit briefs. "Counsel should assume that all Justices have read the briefs before oral argument." SUP. CT. R. 28.1.

26. *Hart*, 266 F.3d at 1160.

27. When a Justice cannot attend an oral argument, the Justice will typically vote in the case after listening to the oral argument on audiotape. *See* ROBERT STERN ET AL., SUPREME COURT PRACTICE 715 (8th ed. 2002) (citing Justice Kennedy's participation in *Agostini v. Felton*, 521 U.S. 203 (1997), after missing oral argument); *see also* Linda Greenhouse, *States' Rights Defense Falters in Medical Marijuana Case*, N.Y. TIMES, Nov. 30, 2004, at A20 (noting that Chief Justice William Rehnquist, who was suffering from thyroid cancer, would vote in *Ashcroft v. Raich*, 543

arguments.[28] A Justice could sleep during argument—and apparently some have.[29] Of course, the vast majority of Justices perform the time-consuming tasks of asking questions, reading briefs, and writing opinions because these endeavors make up the essence of what it means to be a judge.[30]

Although no law requires it, judges have adhered to the ritual of oral argument since the beginning of the republic. American jurists adopted the practice from Great Britain, where oral argument still dominates the decision-making process.[31] In its earliest days, the Supreme Court only heard from advocates.[32] It did not require parties to submit written briefs until 1821.[33] The Court's first arguments could stretch for days.[34] Orators such as Daniel Webster and Henry Clay would keep packed courtrooms spellbound.[35] In the famous case of *Trustees of Dartmouth College v. Woodward*,[36] Webster spoke for four hours and brought the audience and several Justices to tears.[37] In *Gibbons v. Ogden*,[38] the Court heard arguments four hours per day for five consecutive days.[39] The arguments turned into social events, drawing large crowds.[40] Through the 1920s, the Court regularly gave litigants two hours each to present a case.[41] Later, the

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U.S. 977 (2004), after reading the briefs and a transcript of the oral argument). Justices are not required to listen to the tapes; the fact that they do suggests that Justices consider oral arguments valuable.

28. In many of the cases resolved on summary disposition, the Supreme Court does not hold oral argument. SUP. CT. R. 18.12.

29. Justice Oliver Wendell Holmes took catnaps during some oral arguments. *See* DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 260 (5th ed. 2000). Other times, Holmes wrote letters during arguments. *Id*. at 257.

30. *See generally* Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905, 920–22 (2007) (stressing the importance of written decisions because of the inherent difference between what is thought and what is written down).

31. William H. Rehnquist, *"Oral Advocacy: A Disappearing Art,"* 35 MERCER L. REV. 1015, 1020 (1983) (noting that a typical British appellate judge sits for oral arguments for more than five hours per day, issues opinions from the bench, and participates in oral argument in place of reading briefs).

32. William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 1–2 (1999).

33. *Id.*

34. *Id.* at 3.

35. TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 2 (2004).

36. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

37. JOHNSON, *supra* note 35, at 1–2; see also FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 128 (1994) (quoting Justice Joseph Story's recollection of the scene).

38. 22 U.S. (9 Wheat.) 1 (1824).

39. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 275 (1987).

40. JOHN P. FRANK, MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE 91–92 (1958).

41. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS: AN INTERPRETATION 61 (1928).

Court reduced the time per side to an hour.[42] Today, the Court grants each party thirty minutes to argue a case, absent unusual circumstances.[43]

Though shorter, oral argument still serves an important purpose. Citizens line up for hours outside the Court's front portico to watch, if only for a few minutes, the Justices in session.[44] For many, the arguments symbolize the judiciary at work. Especially in an institution whose authority rests on the public's respect for its position, "[s]ymbols are important."[45] In fact, "the symbol of the Court as a fair and just tribunal where constitutional arguments will be made and carefully evaluated by the justices is a symbol of fundamental societal importance."[46]

Oral arguments also hold the Justices accountable. By forcing judges to focus on a case and demonstrate knowledge of it publicly, oral argument reassures citizens that judges are doing their jobs, just as calling on law students reassures professors that students have read.

> [T]he public nature of the event creates an incentive for judges to come to a full understanding of the case so as not to appear unprepared or incompetent before the public. In addition, the nature of oral argument effectively guarantees that the judges will focus their attention exclusively on the case under consideration for the full period of the argument.[47]

The Court's deliberative process also legitimizes the Court's power. Since courts cannot command armies or even the U.S. Marshals Service,[48]

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42. *Id.*

43. SUP. CT. R. 28.3. Although parties may seek extra time for oral argument, "[a]dditional time is rarely accorded." *Id.* However, Chief Justice Roberts, who argued 39 cases before the Court as a lawyer, has relaxed the rules. MERIDA & FLETCHER, *supra* note 3, at 314. *See also* Library of Congress, Presidential Nominations, John G. Roberts, Cases—Argued, http://www.loc.gov/law/find/roberts.php (last visited Mar. 25, 2009). In the 2007 term, Chief Justice Roberts gave counsel in one case an extra twenty-six minutes—"a bonus of nearly 50 percent that would have been unthinkable under his predecessor, Chief Justice William H. Rehnquist. Chief Justice Rehnquist was famous for cutting off lawyers in midsentence, even midsyllable, as soon as the red light on the lectern came on to signal that time was up." Linda Greenhouse, *Case of Texas Murderer Engrosses Supreme Court*, N.Y. TIMES, Oct. 11, 2007, at A24; *see also* Transcript of Oral Argument at 18, 39, Medellin v. Texas, 128 S. Ct. 1346 (2007) (No. 06-984).

44. Supreme Court of the United States, Visitor's Guide to Oral Argument at the Supreme Court of the United States at 2, *available at* http://www.supremecourtus.gov/visiting/visitorsguidetooralargument.pdf [hereinafter Visitor's Guide].

45. HOWARD BALL, JUDICIAL CRAFTSMANSHIP OR FIAT? DIRECT OVERTURN BY THE UNITED STATES SUPREME COURT 144 (1978).

46. *Id.*

47. Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 766 (2006) (citation omitted).

48. The President appoints the U.S. Marshal in each judicial district to provide security in United States courthouses. U.S. MARSHALS SERV., U.S. DEP'T OF JUSTICE, U.S. MARSHALS FACT SHEET: UNITED STATES MARSHALS 1 (2007), *available at* http://www.usmarshals.gov/duties/factsh

the Court depends on the public to recognize the wisdom of its decisions. By continuing a tradition that the public has respected for years, oral argument gives court proceedings authenticity.[49] By involving parties in the decision-making process, oral argument makes the Court's decisions more enforceable simply because parties are more likely to obey decisions they participated in. As the late Professor Lon L. Fuller wrote, "[T]he distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor."[50]

Oral arguments also improve the quality of the Court's thinking. "In the judicial process . . . the judge and the advocate complement each other, for, as Thoreau said, 'It takes two to speak the truth—one to speak and another to hear.'"[51] Indeed, many judges believe the three-dimensional interplay[52] between judges and opposing advocates assists the Court in its search for

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eets/general.pdf. However, Congress delegates to the Court the power to appoint the Marshal to help administer the Court and oversee the Supreme Court Police. *See* 28 U.S.C. § 672 (2006). But the Marshal does not have total control over the Court grounds—the Architect of the Capitol does. *See* 40 U.S.C. § 6111 (West 2008) (formerly 40 U.S.C. § 13a (2000)).

49. The custom that judges wear robes reportedly began in the 1600s when British judges wore black robes to observe mourning in 1685 for King Charles II and in 1694 for Queen Mary. Symbols of Authority, Michigan Supreme Court Learning Center, http://courts.michigan.gov/lc-gallery/symbols_authority.htm (last visited Feb. 18, 2009). At the first session of the U.S. Supreme Court, Chief Justice John Jay wore a black robe with salmon-color facing. *Id.* Others have described a "'cult of the robe'" that transforms a judge into "a high priest of justice with special talents for elucidation of 'the law.'" WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 13 (1964).

50. Oldfather, *supra* note 47, at 751 (quoting Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978)).

51. Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801, 863 (1951).

52. Rehnquist, *supra* note 31, at 1022. Chief Justice Rehnquist compared oral argument to the experience of attending a parade in small-town Glover, Vermont. *Id.*

> It may be that personal attendance at public ceremonies is on its way out, what with large cities, television coverage of major events, and the traffic congestion . . . . But I am reminded of an event which my wife and I attended this summer in northern Vermont; it was the celebration by the town of Glover of the two-hundredth anniversary of its founding. . . . None of the events or performers came close to the sophistication or talent to be seen on television in the Rose Bowl Parade. . . . And yet my wife and I received a completely different sense of enjoyment from the celebration at the Town of Glover . . . . It was a three-dimensional experience, if I may use the term, unlike the two-dimensional experience one gets from watching the Rose Bowl Parade on television.
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> I wonder if something of the same may not be said for oral argument before an appellate court. . . . The sense of immediacy and involvement—the three-dimensional experience—one gains from such a proceeding is especially important to the judges.

*Id.*

truth, in the same way the Socratic method develops minds.[53] In England, common-law judges believed that rigorous deliberation enabled courts to find the law, as a scientist might discover the properties of a molecule.[54] Judges believed they belonged to a discipline that engaged in an exhaustive process of research, analysis, and argument.[55] "[T]he job of courts is not merely one of an umpire in disputes between litigants," wrote the late Justice John M. Harlan.[56] "Their job is to search out the truth . . . ."[57] This search for truth gives a judicial decision a richer character than a police officer's snap judgment or a general's command.[58]

While some judges discount oral argument, scores of Justices and judges attest to its value. [59] "The intangible value of oral argument is, to my mind, considerable," the late Chief Justice William Rehnquist wrote.[60] Justice John Harlan described oral argument as "very important" and a "frequently underestimated" part of the appellate process.[61] Justice Robert Jackson wrote that "the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations."[62] Former Justices William Brennan and Harry Blackmun both have spoken about the benefits of oral argument,[63] as have Justices Antonin Scalia,[64] Anthony Kennedy, [65]

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53. *See* Thomas E. Baker, *A Compendium of Proposals to Reform the United States Courts of Appeals*, 37 FLA. L. REV. 225, 231 (1985) (describing Justice Felix Frankfurter's idea that the idealized appellate process includes oral argument in the Socratic style); *see also* John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 7 (1955).

54. Hart v. Massanari, 266 F.3d 1155, 1163–64 (9th Cir. 2001) (citing Bole v. Horton, (1672) 124 Eng. Rep. 1113, 1124 (C.C.P.)). *See also* Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285, 290 (2009).

55. While some commentators see the deliberative process as scientific, others describe the process as almost mystical. Former Justice Benjamin Cardozo wrote about judges relying on their subconscious in deciding cases. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11 (1921).

56. Harlan, *supra* note 53, at 7.

57. *Id.*

58. For a discussion of the role of oral argument in decision-making, see Stephen A. Higginson, Essay, *Constitutional Advocacy Explains Constitutional Outcomes*, 60 FLA. L. REV. 857 (2008).

59. *See* Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 39–40 (1986).

60. Rehnquist, *supra* note 32, at 1021.

61. John M. Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108, 115 (1959).

62. Jackson, *supra* note 51, at 801.

63. COFFIN, *supra* note 37, at 135.

64. O'BRIEN, *supra* note 29, at 260. "Things can be put in perspective during oral argument in a way that they can't in a written brief," Justice Scalia has said. *Id*.

65. *Id.* Justice Kennedy said that during oral argument "the court is having a conversation with itself through the intermediary of the attorney." *Id.* He added:

John G. Roberts, Jr.,[66] John Paul Stevens,[67] Ruth Bader Ginsburg,[68] and Samuel Alito.[69] Oral argument proved so valuable for Justice Lewis F. Powell, Jr.,[70] he often read over transcripts when writing an opinion for the Court.[71]

The give-and-take of oral argument sharpens the Court's concentration by requiring judges and counsel to look at each other. In oral argument, "you've got a chance . . . to talk to them. And see what's up. And watch their faces."[72] In the Supreme Court, the lectern stands just a few feet from the Court's bench,[73] removing the distance between the lawyer and the nation's most powerful judges. "[Y]ou are close enough to look someone right in the eye," lawyer Stuart M. Riback wrote.[74] "My standing so close to the bench made the argument feel almost like a conversation, similar to the bull sessions I had with friends in law school, where we sat around discussing legal issues."[75]

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> Does oral argument make a difference? Of course it makes a difference. . . . It has to make a difference. That's the passion and the power, and the poetry of the law—that a rhetorical case can make a difference, because abstract principles have to be applied in a real-life situation.

*Id.* at 261.

66. John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 69 (2005).

67. Video: Inaugural Marshall M. Criser Distinguished Lecture, A Conversation with U.S. Supreme Court Associate Justice John Paul Stevens & U.S. District Court Judge Jose A. Gonzalez, Jr. (University of Florida Fredric G. Levin College of Law Nov. 17, 2008), http://www.law.ufl.edu/justicestevens/.

68. *See* Ruth Bader Ginsburg, *The Obligation to Reason Why*, 37 FLA. L. REV. 205, 210 (1985).

69. *See* Joan Biskupic, *Alito Puts Rookie Year Behind, Gets a Few Words in*, USA TODAY, Nov. 1, 2007, at 10A (reporting comments of Justice Samuel Alito on the value of oral argument).

70. *See* JOHNSON, *supra* note 35, at 97.

71. *Id.* Empirical research also substantiates these impressions. In *Oral Arguments and Decision Making on the United States Supreme Court*, Professor Timothy R. Johnson compared oral argument transcripts and briefs to internal Court documents prepared by former Justices William O. Douglas, William J. Brennan, and Lewis F. Powell, Jr. between 1972 and 1986 to see whether justices based decisions on issues raised during oral argument. *Id.* at 73, 75, 133. He found that about 80% of the Justices' questions at oral argument dealt with topics not raised in the briefs, *id.* at 126, about 45% of the issues discussed during conference came exclusively from oral argument, *id.* at 80, and between 24% and 33% of information in the Court's majority opinion came solely from oral argument. *Id.* at 98, 99. The percent of information coming only from oral argument varied depending on whether amici filed briefs in the case or not. *Id*.

72. Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 7 J. APP. PRAC. & PROCESS 173, 188–89 (2005).

73. *See* Visitor's Guide, *supra* note 44, at 2.

74. Stuart M. Riback, *First Argument Impressions of the Supreme Court*, 5 J. APP. PRAC. & PROCESS 133, 149 (2003).

75. *Id.*

Oral argument also provides the primary opportunity for the Justices to direct the discussion. While counsel sets the agenda by writing a brief, the Court controls the conversation by asking questions. Through their questions, the Justices focus on the most important issues. Reading a brief or listening to a lecture from counsel in silence does not provide the same benefit.[76] As former Chief Justice Rehnquist wrote:

> You could write hundreds of pages of briefs, and, you are still never absolutely sure that the judge is focused on exactly what you want him to focus on in that brief. Right there at the time of oral argument you know that you do have an opportunity to engage or get into the judge's mental process.[77]

Not only do Justices learn from counsel, but they learn from each other as well.[78] "Oral argument is really the first stage of the conferencing among the judges," wrote former Judge Frank Coffin of the U.S. Court of Appeals for the First Circuit.[79] "By their questions and comments to counsel, judges telegraph their concerns and preferences to the other judges."[80]

## III. THE SOUND OF SILENCE

For nearly an hour,[81] the Supreme Court grappled with the question: Could a federal court require rural Bleckley County, Georgia, to change its form of government?[82] A group of black voters had sued the county under the Voting Rights Act of 1965,[83] alleging that the countywide system of government diluted the strength of black voters.[84] By concentrating all power in the hands of one commissioner elected countywide, the voters

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76. *See, e.g.*, E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285, 298–99 (1953).

77. Bright, *supra* note 59, at 36–37.

78. REHNQUIST, *supra* note 39, at 277. "The judges' questions, although nominally directed to the attorney arguing the case, may in fact be for the benefit of their colleagues." *Id.* Justice Ginsburg listens to colleagues' questions for concerns she might address; she also asks questions to persuade colleagues. Ginsburg, *supra* note 68, at 210–11. "I will not deny that questions may be framed to elicit a concession, which later turns up in a footnote to the opinion . . . ." *Id.* at 210. Justice Brennan agreed: "I have had too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself were I to be denied oral argument." COFFIN, *supra* note 37, at 135. "It is not rare that a justice says in conference that oral argument turned me around," Justice Blackmun said. *Id.*

79. COFFIN, *supra* note 37, at 133.

80. *Id.* at 132–33.

81. *Hear* Recording of Oral Argument on Oct. 4, 1993, Holder v. Hall, 512 U.S. 874 (1994) (No. 91-2012), *available at* http://www.oyez.org/cases/1990-1999/1993/1993_91_2012/argument/.

82. Transcript of Oral Argument at 2–6, 46–47, *Holder*, 512 U.S. 874 (No. 91-2012).

83. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006).

84. *Holder*, 512 U.S. at 877–78.

alleged that the system sapped the strength of black citizens, who made up about one-fifth of Bleckley's population.[85] During oral argument, the Justices questioned how a federal court could justify creating a five-member commission, rather than, say, a three-member commission.[86] Why couldn't the Court create a ten-member commission?[87] Justice Kennedy asked: Hadn't the court simply added enough seats to ensure that an African-American got elected?[88]

"No sir," replied Christopher Coates, an attorney for the black voters.[89] The lower court had enlarged the commission to five members based on statewide standards[90]—in Georgia, all but eleven of 159 counties had five-member commissions.[91]

As the Justices turned the question over, Justice Thomas sat in silence.[92] Yet, when the Court released its opinion, Justice Thomas, as he would later do in *Morse*, analyzed the case from an entirely new perspective—one never broached in briefs or raised in oral argument.[93] Justice Thomas wrote in a sixty-five page concurrence[94] that the Court should engage in "[a] systematic reexamination" of the Voting Rights Act.[95] Although the Court had not accepted certiorari on the question,[96]

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85. Brief for the Petitioners at 4 & n.2, *Holder*, 512 U.S. 874 (No. 91-2012); *see also* Bill Torpy, *Sole Commissioners Fading Lawsuit Against Bleckley County Threatens 10 of 19 Left in State*, ATLANTA J.-CONST., July 5, 1992, at A1.

86. Transcript of Oral Argument, at 3–4, *Holder*, 512 U.S. 874 (No. 91-2012).

87. *Id.* at 36–37.

88. *Id.*

89. *Id.* at 38.

90. *Id.*

91. *Id.* at 34, 38.

92. David G. Savage, *Ginsburg Shines in Debut on High Court*, L.A. TIMES, Oct. 7, 1993, at 16.

> Ginsburg's performance contrasts vividly to that of Justice Clarence Thomas, the justice who preceded her to the court. Thomas rarely participates in the arguments.
>
> Now beginning his third year on the bench, Thomas usually rocks back in his chair and seemingly pays little attention to the arguments. In three days on the bench this week, he did not ask a single question.
>
> While Ginsburg quizzed the lawyers in the mine safety case . . . Thomas rubbed his eyes often and gazed at the ornate ceiling.

At the time of the argument in *Holder*, Justice Thomas had not said a single word on the bench for an entire year. David G. Savage, *In the Matter of Justice Thomas: Silent, Aloof and Frequently Dogmatic, Clarence Thomas' Judicial Persona Emerges*, L.A. TIMES, Oct. 9, 1994, (Magazine), at 14 [hereinafter Savage].

93. *See, e.g.*, Transcript of Oral Argument at 3–4, *Holder*, 512 U.S. 874 (No. 91-2012); Brief for the Petitioners at 13, *Holder*, 512 U.S. 874 (No. 91-2012).

94. *See Holder*, 512 U.S. at 891–955 (Thomas, J., concurring).

95. *Id.* at 914.

96. The question presented by Petitioners was: "Whether the Court of Appeals erred in

Thomas wrote that the Voting Rights Act of 1965 prohibited courts from ordering any voter-dilution remedies at all, even though courts had been ordering those remedies for thirty years.[97] Discounting a 1986 precedent,[98] Justice Thomas found that the Voting Rights Act did not prohibit "voter dilution." He instead believed the law only prohibited practices that affected the ability of minority voters to cast a ballot and have their ballot counted.[99] He wrote:

> We have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of "political apartheid."[100]

Justice Thomas had not hinted during oral arguments that black voters in his home state of Georgia supported political apartheid. Nor had Justice Thomas suggested that he wanted to reverse years of case law. As in *Morse*, Justice Thomas had not given the attorneys before him the opportunity to be heard on any of his theories.

Justice Thomas' silence might not be insidious if it did not permit him to offer a far-reaching revision of constitutional law. "Justice Thomas' willingness to hit the constitutional 'reset' button and start over from scratch is not confined to" one or two cases.[101] He has written opinions that would overturn the constitutional order in First Amendment law, both in free speech cases and religious freedom cases; in Sixth Amendment law; in Fifth Amendment Takings law; and in the jurisprudence of reproductive rights.[102] Justice Thomas would also dramatically scale back the power of

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holding that governance by a single county commissioner, rather than a multi-member board of commissioners, is subject to challenge as dilutive under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. Section 1973." Brief for the Petitioners, *Holder*, 512 U.S. 874 (No. 91-2012).

97. *See Holder*, 512 U.S. at 892 (Thomas, J., concurring).

98. Justice Thomas said he would have overturned the leading precedent on the issue, Thornburg v. Gingles, 478 U.S. 30 (1986). *Holder*, 512 U.S. at 885–86 (O'Connor, J., concurring) ("We know that Congress intended to allow vote dilution claims to be brought under § 2." (citation omitted)). Additionally, in five other cases, the Court found the size of government to be "a 'standard, practice, or procedure with respect to voting' under § 5" of the Voting Rights Act. *Id.* at 886; *see also id.* at 957–66, 960 n.2 (Stevens, J., separate opinion) (pointing out that Congress reenacted the Voting Rights Act in 1970 after the Court determined the Act should not be narrowly construed).

99. *See id.* at 955 (Thomas, J., concurring).

100. *Id.* at 905 (citing Shaw v. Reno, 509 U.S. 630, 647 (1993)).

101. Thomas C. Goldstein, *Justice Thomas: Constitutional 'Stare Indecisis'*, First Amendment Center (Oct. 8, 2007), http://www.firstamendmentcenter.org/analysis.aspx?id=19133.

102. *Id.*

the federal government under the Commerce Clause[103] by preventing Congress from passing laws governing agriculture and manufacturing.[104] "Justice Thomas' approach to constitutional law is that he is thinking about—more important, rethinking—profound questions. And he is willing to embrace what are, under current law, radical new approaches. He packs hand grenades, not scalpels, in his constitutional satchel."[105]

He throws his grenades in surprise attacks. In *Elk Grove Unified School District v. Newdow*,[106] a case in which a parent challenged the mandatory recital in public schools of the words "One nation under God" in the pledge of allegiance,[107] Justice Thomas failed to ask any questions during oral argument. Nevertheless, in his opinion, Justice Thomas wrote that the First Amendment's prohibition on the establishment of religion applied only to the federal government.[108] Thus, Justice Thomas argued, the Constituion does not prevent states from establishing official state religions.[109]

Justice Thomas did not ask a single question either in *Gonzales v. Carhart*,[110] in which the Court upheld a federal statute banning certain abortion procedures.[111] Yet, Justice Thomas suggested in concurrence that Congress lacks power under the Commerce Clause to regulate abortion at all.[112] In *Kelo v. City of New London*,[113] Justice Thomas did not ask a question during oral argument even though he wrote in his dissent that he would undo decades of jurisprudence that govern the Fifth Amendment's

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103. U.S. CONST. art. I, § 8, cl. 3.

104. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 100 (2007); *see also* United States v. Lopez, 514 U.S. 549, 584, 587, 590–91 (Thomas, J., concurring) (arguing that Congress lacks the power to regulate gun possession, agriculture, and manufacturing).

105. Goldstein, *supra* note 101.

106. 542 U.S. 1 (2004).

107. *Id.* at 4–6.

108. *Id.* at 49 (Thomas, J., concurring).

109. *Id.* at 49–50. Even more remarkable, Justice Thomas reached such a sweeping conclusion in a case where the Court found the plaintiff lacked standing to sue. *See id.* at 17–18.

110. 550 U.S. 124 (2007).

111. *Id.* at 168.

112. *Id.* at 168–69 (Thomas, J., concurring). At least in *Gonzales*, which consolidated *Carhart* and its companion case, the issue that Justice Thomas raised in his concurring opinion had been briefed by amici and raised by Justices Ginsburg and Stevens during oral argument. *See* Transcript of Oral Argument at 20–23, *Gonzales*, 550 U.S. 124 (2006) (No. 05-1382); Brief of Amicus Curiae Cal. Med. Ass'n in Support of Respondents at 3, *Gonzales*, 550 U.S. 124 (2006) (No. 05-1382). Ironically, Justice Thomas did not vote to strike down the federal statute because, he wrote, the issue of the statute's constitutionality as a valid exercise of Congress's Commerce Clause power had not been raised below. *Gonzales*, 550 U.S. at 169 (Thomas, J., concurring). The lack of briefing has not stopped Justice Thomas from deciding issues in other cases. *See supra* Parts I, III. In *Planned Parenthood Federation of America v. Ashcroft*, the District Court had actually raised Congress' power under the Commerce Clause to regulate abortion. 320 F. Supp. 2d 957, 1012 (N.D. Cal. 2004).

113. 545 U.S. 469 (2005).

Takings Clause.[114] In *Hudson v. McMillian*,[115] Justice Thomas did not ask any questions about his belief—expressed later in dissent—that the constitutional prohibition on cruel and unusual punishment does not prevent prison guards from beating inmates.[116] In *44 Liquormart, Inc. v. Rhode Island*,[117] Justice Thomas—without a word during an oral argument—cast aside the Court's long-standing *Central Hudson* commercial-speech test[118] in favor of a categorical rule against restrictions on advertising intended to influence consumer spending.[119] In *Doggett v. United States*,[120] Justice Thomas wrote that the Constitution's guarantee of a speedy trial does not protect a defendant who waited eight years for trial due to the prosecutor's delays.[121] Yet, during oral argument, Justice Thomas did not say a word to hint how he would re-write the Constitution. This behavior follows a practice: Justice Thomas' revision of the constitutional order emerges from his chambers without exposure to public debate.

## IV. THE EFFECT OF SILENCE

Despite his silence on the bench, Justice Thomas speaks through his writing with perhaps the richest and clearest voice of any current Justice. His opinions are forceful, his reasoning is cogent, and his positions appeal to core American virtues such as self-reliance. Yet, Justice Thomas' opinions often read like position papers—if not manifestos—because Justice Thomas' views are so far removed from the oral adjudicative process that engages the rest of the Court. Oral argument, and the Court's other deliberative traditions, usually force the Court to decide a case within a record and on the question presented to the litigants. Justice Thomas' nonparticipation in oral argument leaves him unrestrained to advocate far-reaching theories never contemplated by the litigants.

On one level, Justice Thomas' disengagement from oral argument is simply unfair to the litigants. As former Chief Justice Charles Evan

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114. *Id.* at 506 (Thomas, J., dissenting) (quoting U.S. CONST. amend. V).

115. 503 U.S. 1 (1992).

116. *Id.* at 18–19 (Thomas, J., dissenting) (stating that the Eighth Amendment only applies to sentences, not post-sentence treatment of inmates).

117. 517 U.S. 484 (1996).

118. Cent. Hudson Gas & Elec. Corp. v. Publ. Serv. Comm'n, 447 U.S. 557 (1980); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1089–90 (3d ed. 2002).

119. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (Thomas, J., concurring); *see also id.* at 517–18 (Scalia, J., concurring); David L. Hudson, Jr., *Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector*, 35 CREIGHTON L. REV. 485, 496–98 (2002). *See generally* Transcript of Oral Argument, *44 Liquormart, Inc.*, 517 U.S. 484 (1995) (No. 94-1140) (discussing repeatedly the *Central Hudson* test).

120. 505 U.S. 647 (1992).

121. *Id.* at 669–71 (Thomas, J., dissenting).

Hughes wrote: Advocates "prefer an open attack to a masked battery."[122] If Justice Thomas holds a strong view of the law in a case, he should offer it. Litigants could then counter it, or try to do so. It is not enough that Justice Thomas merely attend oral argument if he does not participate in argument meaningfully. The tradition that a court engage in oral argument rests on the same principle of fundamental fairness[123] that generally requires a court to refrain from deciding a question without the benefit of argument or briefing.[124]

As a question of fairness, reconsider the argument in *Morse v. Frederick*,[125] in which Justice Thomas listened for an hour as counsel answered the other Justices' questions—none of which touched upon the fundamental shift in First Amendment law that Justice Thomas advocated in his concurring opinion.[126] In *Holder v. Hall*,[127] Justice Thomas allowed counsel to pursue an hour-long line of argument that proved utterly irrelevant to his thinking. He never once asked about the scope of the Voting Rights Act, even though his theory of the Act's scope would have sweeping implications. In *Missouri v. Jenkins*,[128] Justice Thomas accused African-American parents of acting on a theory of racial inferiority because the parents sought a court order to integrate schools.[129] Yet, when Justice Thomas stood a few feet away from the parents' lawyer, Theodore M. Shaw, an African-American who has spent his career litigating civil rights cases,[130] Justice Thomas did not ask Shaw a single question about his theory of racial inferiority. By preventing Shaw from hearing his theories, Justice Thomas deprived Shaw of the chance to challenge those theories before the case concluded.

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122. HUGHES, *supra* note 41, at 62.

123. Courts have long considered the right to be heard a fundamental element of fairness. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 183 (9th ed. 2005).

124. Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1260 (2002). *See generally* Arthur Selwyn Miller & Jerome A. Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1190–91 (1975) ("If the real information base for decision is not revealed to counsel and to litigants, the Court is deprived of the reaction of counsel to that information.").

125. 127 S. Ct. 2618 (2007).

126. *See supra* Part I. For a rich analysis of student speech rights after *Morse*, see Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027 (2008), and Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. 63 (2008).

127. 512 U.S. 874 (1994).

128. 515 U.S. 70 (1995).

129. *Id.* at 119 (Thomas, J., concurring).

130. *See* NAACP Legal Defense and Educational Fund, Inc., News, Biographies, Theodore M. Shaw, http://www.naacpldf.org/content.aspx?article=47 (last visited Feb. 18, 2009); *see also* Fred A. Bernstein, The Future of Diversity, COLUM. NEWS, June 4, 2007, http://www.columbia.edu/cu/news/07/06/diversity.html.

Justice Thomas' opinions and his silence transform him almost into a commentator on the Constitution, rather than an adjudicator of questions presented in cases. The Court's deliberative traditions, such as oral argument, act to restrain judges—so they concentrate on facts presented by litigants. Justice Thomas' non-participation fails to display the judicial "modesty" prized by jurists.[131] "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research," wrote then-Judge Antonin Scalia in 1983.[132] "Th[is] rule . . . distinguishes our adversary system of justice from the inquisitorial one."[133] Justice Thomas has himself acknowledged that "the Court should not pass on [issues], even in dicta, without the benefit of the parties' briefing and argument."[134]

A judge's conduct must be egregious to violate a litigant's due process rights.[135] Justice Thomas' non-participation in oral argument falls short of that constitutional bar. After all, due process should not serve as a straightjacket on appellate judges. The law should let Justices and judges adopt their own styles in deciding cases—within limits. By nature, some Justices will be more talkative than others will. Some may be oral learners; other may think by writing. As Justice Thomas has pointed out, Justices Marshall and Powell spoke only occasionally during oral argument[136]—although they never sat silent for years as Justice Thomas has.

At the same time, Justice Thomas' abandonment of oral argument should not be treated merely as another personal preference. His silence, taken to an extreme, undermines the judicial process too severely to be entirely ignored. His conduct falls in a gray zone, short of due process, but beyond personal prediliction. While due process does not enshrine all the

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131. For a discussion of judicial modesty, see William H. Pryor Jr., *The Perspective of a Junior Circuit Judge on Judicial Modesty*, 60 FLA. L. REV. 1007, 1020–21 (2008).

132. Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983).

133. United States v. Burke, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) (citing United States v. Pryce, 938 F.2d 1343, 1355 (D.C. Cir. 1991)).

134. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 221 (1999) (Thomas, J., dissenting) (arguing that the Court should not rule on Minnesota's authority to regulate the activities of the Chippewa Indian tribe on land ceded in an 1837 treaty).

135. A judge violates due process only when her conduct "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Speiser v. Randall, 357 U.S. 513, 525 (1958) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)); *see* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (ruling that a judge cannot constitutionally hear a criminal case when the judge is paid only if he convicts the defendant). For example, a judge who acts as both prosecutor and adjudicator may violate due process. Withrow v. Larkin, 421 U.S. 35, 53 (1975). Likewise, a judge should not preside over a case where she is the victim. Del Vecchio v. Ill. Dep't of Corrections, 31 F.3d 1363, 1392 (7th Cir. 1994) (Easterbrook, J., concurring). Nor should a judge exercise contempt powers over a litigant where the judge is "embroiled in a running controversy" with the litigant. Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971).

136. Steve Kroft, *Clarence Thomas: The Justice Nobody Knows*, 60 MINUTES, Sept. 27, 2007, http://www.cbsnews.com/stories/2007/09/27/60minutes/main3305443.shtml?source=search_story.

customs of adjudication into law, the common law traditions of written opinions and oral argument underpin the structural role under Article III of the Constitution that judges play as independent arbiters of the law. The Constitution grants judges independence and life tenure[137] because we expect judges to follow common law traditions designed to create a deliberative judiciary. By jettisoning one part of this deliberative tradition, Justice Thomas undermines the limited role that judges play in our system of government.

## V. "MY COLLEAGUES SHOULD SHUT UP!"[138]

Justice Thomas' silence on the bench may be the most puzzling because he remains one of the most outspoken Justices off the bench. Court employees describe Justice Thomas as gregarious and good-natured—he talks to everyone, including the janitors, learns the names of each law clerk every year, and will opine for hours about law and sports with students he invites back to his chambers.[139] Justice Thomas' autobiography is perhaps the most candid of any Supreme Court Justice in history. In it, he discusses how he toyed with suicide,[140] how as EEOC chairman he could not pay his American Express bill,[141] how he despaired over his first failed

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137. U.S. CONST. art III, § 1.

138. Speaking at Hillsdale College in Michigan, Justice Thomas urged his colleagues to "shut up" during oral argument, although he suggested the comment was a joke. Posting of Mike Nizza to The Lede, Notes on the News, http://thelede.blogs.nytimes.com/2007/11/30/clarence-thomass-case-for-shutting-up/ (Nov. 30, 2007, 11:59 EST).

139. TOOBIN, *supra* note 104, at 103.

140. CLARENCE THOMAS, MY GRANDFATHER'S SON 173 (2007). Justice Thomas wrote:

> I sometimes wonder how I got through the summer of 1983 without falling apart. As we say in Georgia, I was lower than a snake's belly . . . . The mad thought of taking my own life fleetingly crossed my mind. Of course I didn't consider it seriously, if only because I knew I couldn't abandon Jamal as I had been abandoned by C.

*Id.*

141. *Id.* at 174. As a nominee for Assistant Secretary of Education for Civil Rights, Justice Thomas was "on the brink of financial ruin." *Id.* at 139. He wrote:

> But even after I paid the bill, American Express cut me off. From then on Diane had to book me into hotels that would accept cash. On one of my trips to Massachusetts to attend a meeting of the Holy Cross board of trustees, I tried to rent a car at the Boston airport with an old Sears credit card. The clerk at the Budget rental desk called the company, then told me that Sears had ordered him to destroy the card. He cut it up on the spot as I looked on in horror. I had to beg him to let me rent a car so that I could get to my meeting.

*Id.* at 174.

marriage,[142] and how he drank himself into misery, spending "too many nights in the early eighties, drinking alone in a dreary efficiency apartment" in Washington.[143]

Justice Thomas has offered personal, as well as philosophical, explanations for his silence. Yet, each explanation, instead of clearing the mystery, makes his conduct even more enigmatic.

For incidence, Justice Thomas has traced his reluctance to speak to his childhood. Growing up in Georgia, he spoke a dialect called Geechee that made it difficult for him to master standard English.[144] Because of his accent, Justice Thomas rarely talked in grade school. He said he preferred to listen.[145] His shyness continued at Yale Law School, where he marveled at the self-confidence of his classmates.[146] Yet, Justice Thomas' explanation of his adolescent fear of public speaking hardly justifies his shyness as an adult. Certainly, Justice Thomas is not the same man he was as a child. As a judge on the U.S. Court of Appeals for the District of Columbia Circuit, then-Judge Thomas actively participated in oral argument.[147] In fact, since his appointment to the Court, Justice Thomas has demonstrated his public speaking prowess. At times, he can hold an audience spellbound. On the day in 1991 that President Bush nominated him to the Court, then-Judge Thomas, overcome by emotion, stopped twice as he told a nationwide television audience about his impoverished upbringing in Savannah.[148] When confronted with allegations of sexual harassment during his confirmation hearing, he accused the Senate Judiciary Committee of conducting a "high-tech lynching."[149] His defiant

142. *Id.* at 145, 150, 175.

143. *Id.* at 145; *see also id.* at 158.

144. MERIDA & FLETCHER, *supra* note 3, at 315–16; THOMAS *supra* note 140, at 34.

145. TOOBIN, *supra* note 104, at 106.

146. THOMAS, *supra* note 140, at 71.

147. Savage, *supra* note 92.

148. Maureen Dowd, *Conservative Black Judge, Clarence Thomas, Is Named to Marshall's Court Seat*, N.Y. TIMES, July 2, 1991, at A1 ("When Judge Thomas stepped up to the microphone, his hands clasped tightly in front of him, he had to stop speaking twice, as he tried to thank his grandparents, sharecroppers from rural Georgia, who had raised him in a tenement with no indoor plumbing.").

149. Most famously, he told the committee in response to accusations of sexual harassment by former employee Anita Hill:

> This is a circus. It is a national disgrace. And from my standpoint, as a black American, as far as I am concerned, it is a high-tech lynching for uppity-blacks who in any way deign to think for themselves, to do for themselves, to have different ideas, and it is a message that, unless you kow-tow to an old order, this is what will happen to you, you will be lynched, destroyed, caricatured by a committee of the U.S. Senate, rather than hung from a tree.

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tone and direct language gripped the nation.[150]

### A. *Decorum*

By allowing advocates to speak without interruption, the Court is simply being polite, Justice Thomas has said.[151] The barrage of questions is rude.[152] "[W]e look like the Family Feud," Justice Thomas has said.[153] "If I invite you to argue your case, I should at least listen to you."[154] He explained:

> There are times I've gone across the country, and I'll meet a small town lawyer who says, "You know, I was up at your Court and they never let me say what I wanted to say." That isn't what I want to hear. I prefer to hear, "I made it all the way to Court and I got to tell you what I really thought."[155]

To be sure, no litigant will be heard if the Justices all talk at the same time.[156] Oral argument should not be a version of *The McLaughlin*

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*States Before the S. Comm. on the Judiciary*, 102d Cong. 157–58 (Oct. 11, 1991) (statement of nominee).

150. More than 27-million people in homes watched Thomas' Senate confirmation hearings on Sunday night, compared to 9.2-million people in homes who watched the Major League Baseball game aired on CBS. Joel Kurtzman, *Business Diary/October 13–18*, N.Y. TIMES, Oct. 20, 1991, § 3, at F2; *see also* Bill Carter, *Why the Thomas Hearings Were a Sometime Thing on TV*, N.Y. TIMES, Oct. 20, 1991, at E3.

151. MERIDA & FLETCHER, *supra* note 3, at 314.

152. *See id.*

153. *Id.* at 312; *see also* Alan Cooper, *Thomas: Internet Offers New Issues*, RICH. TIMES DISPATCH, May 20, 2000, at B3.

154. *Id.*

155. Posting of Jan Crawford Greenburg, Thomas and Oral Argument, Legalities, http://blogs.abcnews.com/legalities/2007/10/thomas-and-oral.html (Oct. 9, 2007, 16:50 EST). In fact, Justice Thomas has suggested that the practice of quizzing counsel from the bench may not even be appropriate for the profession. Washington Whispers, http://www.usnews.com/blogs/washington-whispers/2007/11/29/this-is-not-perry-mason.html (Nov. 29, 2007, 13:02 EST). Justices should behave more like surgeons, he told an audience at Hillsdale College in Michigan in 2007. *Id.*

> Suppose you're undergoing something very serious like surgery and the doctors started a practice of conducting seminars while in the operating room, debating each other about certain procedures and whether or not this procedure is this way or that way. You really didn't go in there to have a debate about gallbladder surgery. You actually went in to have a procedure done.

*Id.*

156. Justice Thomas is not alone in this criticism. During oral argument in *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008), Justice Breyer repeatedly asked counsel questions that Justice Scalia answered. After Justice Scalia answered the counsel's questions several times, Chief Justice Roberts interjected. He told counsel: "I think you're handling these questions very well." The audience laughed. Transcript of Oral Argument at 41–42, *Danforth*, 128 S. Ct. 1029 (2007) (No.

*Group*.[157] Justice Thomas may be right that Justices should allow counsel to finish their sentences. He may be right that some Justices hog the hour of argument—Justice Scalia even acknowledges he talks too much.[158] More decorum would enhance oral argument. But it makes no sense for Justice Thomas to respond to the cacophony by saying nothing—ever—for years at a time.

Justice Thomas' brand of hospitality does not serve the advocates or the deliberative process well, either. His courtesy is short-lived. In the long run, his silence is not actually polite if it enables him to cut counsel out of the decision-making process. Better to interrupt the advocate with a point that matters than let her carry on with an irrelevant lecture. Most lawyers would rather learn about a Justice's concern, rather than have his concern concealed.[159]

## B. *Listening*

Justice Thomas argues that he listens to counsel by letting them talk. However, this reasoning misconceives the nature of oral argument. Oral argument is not surgery, as Justice Thomas has suggested, where silence facilitates concentration.[160] The tools of oral argument are the questions. Attorney Carter G. Phillips, who has argued more than fifty cases before the Court,[161] has heard the same complaints that the Justices interrupt too much.[162] Phillips wrote that "[p]eople walk out of the Court and say, 'That was unbelievable. I got up there with five brilliant points that I just had to make, and those guys just kept interrupting me . . . .'"[163] These lawyers fail

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06-8273).

157. Other Justices agree with Justice Thomas' criticism of the Court's aggressive questioning. During argument on October 10, 2007, in *Medellin v. Texas*, 129 S. Ct. 360 (2008), a capital case, Justice John Paul Stevens asked his colleagues to hold off asking new questions until counsel had answered his old questions. Transcript of Oral Argument at 48, *Medellin*, 129 S. Ct. 360 (2007) (No. 06-984). "It's critical to me to understand the effect of the judgment, and you said there are six reasons why it's not an ordinary judgment," Justice Stevens asked the lawyer representing the state of Texas. *Id.* "I really would like to hear what those reasons are without interruption from all of my colleagues." *Id.*

158. "It is the academic in me," Scalia said, "I fight against it. The devil makes me do it." O'BRIEN, *supra* note 29, at 261.

159. Interestingly, in his autobiography, Justice Thomas writes with disdain for people who conceal their racial views. "At least southerners were up front about their bigotry: you knew exactly where they were coming from, just like the Georgia rattlesnakes that always let you know when they were ready to strike. Not so the paternalistic big-city whites . . . . Like the water moccasin, they struck without warning . . . ." THOMAS, *supra* note 140, at 75–76.

160. *See* Washington Whispers, *supra* note 155.

161. Sidley Austin LLP, Our People, Carter G. Phillips, http://www.sidley.com/ourpeople/detail.aspx?attorney=123 (last visited Feb. 19, 2009).

162. Carter G. Phillips, *"Advocacy Before the United States Supreme Court,"* 15 T.M. COOLEY L. REV. 177, 190 (1998).

163. *Id.*

to understand that a court communicates by interrupting. "[O]ne should realize . . . [y]ou now have a perfect window into the minds of the Justices. They are telling you exactly what is bothering them."[164]

Justice Thomas' view of oral argument overlooks the fact that by the time counsel appears before the Court, the Justices have already heard from the counsel—in the form of a 15,000-word brief.[165] The Justices, who have already read the brief, [166] gain little by listening to counsel recite the brief's contents again. As the late Chief Justice William Rehnquist wrote:

> An oral advocate should welcome questions from the bench, because a question shows that at least one judge is inviting him to say what he thinks about a particular aspect of the case. . . . If oral argument provides nothing more than a summary of the brief in monologue, it is of very little value to the Court.[167]

Writing years before Justice Thomas' appointment, Chief Justice Rehnquist explained, "If the judge simply sat silent during the oral argument, there would be no opportunity for the lawyer to correct the factual misimpression or to state his reasons for interpreting the particular case the way he does."[168]

### C. *Keeping an Open Mind*

Justice Thomas simply does not consider oral argument an important part of the deliberative process. "It's not a necessary part of the job," he told *Newsweek*.[169] "[It is] 'really not a critical part of the process.'"[170] By the time Justice Thomas sits for oral argument, he said he has already discussed the case with his law clerks, and read the briefs, the lower court opinions, and the record.[171] He does not need to hear from counsel to make

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164. *Id.*

165. SUP. CT. R. 33.1(g)(v).

166. Supreme Court of the United States, Guide for Counsel in Cases to be Argued Before the Supreme Court of the United States, Part II, at 9, 11 (Oct. Term 2008), www.supremecourtus.gov/oral_arguments/guideforcounsel.pdf, reprinted in STERN, *supra* note 27, at 983, 985 ("You should assume that all of the Justices have read the briefs filed in your case, including amicus curiae briefs. . . . Ordinarily, counsel for the petitioner need not recite the facts of the case before beginning argument. The facts are set out in the brief and they have been read by the Justices.").

167. REHNQUIST, *supra* note 39, at 279.

168. *Id.* at 277. Former Chief Justice Rehnquist was not commenting directly on Justice Thomas' practice when he wrote this comment in 1987, four years before Justice Thomas' appointment to the Court.

169. Lally Weymouth, *A Justice's Candid Opinions*, NEWSWEEK, Oct. 14, 2007, http://www.newsweek.com/id/43358/output/print.

170. Greenburg, *supra* note 155 (quoting Justice Thomas).

171. *Id.*

up his mind on the law. "'I know what I think without having heard argument or anything else,'" he said.[172]

Justice Thomas' stunning explanation underscores how his silence undercuts the adjudicative process. It leaves the impression that he comes to court with his mind closed. By appearing at oral argument with the outcome already determined, Justice Thomas might as well not attend the sessions at all. If oral argument does not influence a Justice or change his mind, at least occasionally, then the argument simply serves as theater.

It seems unbelievable that Justice Thomas genuinely has no questions to ask about any of the nation's most difficult cases. Even the most learned judge with well-developed outlooks on the law should have questions.

> Just as scientists have not discovered all of the great ideas in physics, and historians constantly unearth materials that give us a better understanding of previous eras, in the law it would be surprising if we were at the "end of history" with nothing profound left to be realized and announced.[173]

Indeed, Justices such as Antonin Scalia and Ruth Bader Ginsburg ask scores of questions.[174] Even though these Justices have firm philosophies of the law, they do not pretend to possess all the answers to the law. It demeans Justice Thomas to believe that his inquiry into the law has reached an end, and it belittles his individuality to believe that Justice Thomas can keep quiet because some other Justice will ask the same question he might pose.[175]

Even Justice Thomas' friends think he and the Court would benefit if he engaged advocates more often.[176] "'Listen, I can't figure it out,"[177] said Charles Fried, a Harvard Law School professor.[178] "'I think it's a shame, I think it's a pity . . . . It'd be good for him . . . . Because I think that when

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172. *Id.* (quoting Justice Thomas). Ironically, Justice Thomas regularly cites in his opinions statements made during oral arguments. According to one study, he cited oral argument transcripts in 68 of 323 opinions between the 1994 and 2007 terms. Frederick Liu, *Citing the Transcript of Oral Argument: Which Justices Do It And Why*, 118 YALE L.J. POCKET PART 32, 33–34 (2008).

173. Goldstein, *supra* note 101.

174. Doyle, *supra* note 6.

175. Amazingly, Justice Thomas has given this explanation for his silence. MERIDA & FLETCHER, *supra* note 3, at 315. "'[U]sually, if you wait long enough, someone will ask your question.'" *Id.* (quoting Justice Thomas).

176. *See id.* at 310–11.

177. *Id.* at 310.

178. Professor Fried has seen oral argument from both sides of the bench, as a former justice of the Massachusetts Supreme Judicial Court and as U.S. Solicitor General during the Reagan Administration. Harvard Law School, Faculty Directory, Charles Fried, http://www.law.harvard.edu/faculty/directory/facdir.php?id=21 (last visited Feb. 19, 2009).

you get into that it affects you and maybe it changes you a little bit . . . and he would learn from it.'"[179]

### D. *Broadening the Debate*

Through his silence, Justice Thomas not only evades the deliberative process, but he also diminishes his own influence. Justice Thomas' silence allows advocates to ignore him and his views. Because Justice Thomas rarely commands majorities in major cases[180] and, in fact, often takes lonely stances in dissent,[181] his silence makes it even less likely that colleagues and scholars will take stock of his perspective. By sitting on the riverbanks, critics can too easily cast Justice Thomas as out-of-the-mainstream. Yet, Justice Thomas' silence should not be ignored simply because his opinions often end up in dissent. Dissents matter and can profoundly affect the direction of the law. Many of the truths accepted today began as dissents.[182] Moreover, if Justice Thomas wants thinkers to take his ideas seriously, then he should use every tool at his disposal, including oral argument, to showcase his ideas and steer the direction of debate.

The Court's discussion grows richer when Justices broaden the debate. For the Court to work at its best, the Justices should constantly exchange ideas, and not just those ideas that sit in the center of legal thought. Indeed, "[f]or the law to mature and prosper, profundity needs to come from all ideological directions, and indeed from directions that defy ideology altogether. Genuine intellectual truth emerges from a vigorous competition between contested ideas; it is not conjured from thin air . . . ."[183] Precisely because he stands alone, Justice Thomas' participation in oral argument might benefit the Court's deliberations. Because of his willingness to rethink the constitutional order, Justice Thomas would force the Court to reconsider basic premises. Whether the Court casts away its ideals or reaffirms them, the process of rethinking essential questions exemplifies the highest calling of a court of law.

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179. MERIDA & FLETCHER, *supra* note 3, at 311 (quoting Charles Fried) (third omission in original).

180. *See* TOOBIN, *supra* note 104, at 102. Justice Thomas frequently uses concurrences and dissents to invite litigants to raise novel theories in later cases. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 168–69 (2007) (Thomas, J., concurring); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 486–87 (2001) (Thomas, J., concurring).

181. TOOBIN, *supra* note 104, at 102.

182. For example, Justice Oliver Wendell Holmes uttered the maxim that "the best test of truth is the power of the thought to get itself accepted in the competition of the market" in dissent. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Today, the sentiment serves as the foundation of First Amendment law. MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY, MASS MEDIA LAW 9–12 (7th ed. 2005).

183. Goldstein, *supra* note 101.

### E. *Diminishing His Stature*

Finally, the practice of sitting silent during oral argument detracts from Justice Thomas' reputation. His silence makes it easy to cast him as an intellectual lightweight. When Justice Thomas sits in silence, he can appear to the public as arrogant, rude, or uninformed. Consider this picture from *Federal Express Corp. v. Holowecki*.[184] Counsel, two of whom were making their first appearance at the Court,[185] might have expected Justice Thomas to be interested in the case, as it dealt with regulations issued by the EEOC, which Justice Thomas led from 1982 to 1990.[186] Perhaps, Justice Thomas—who did not ask any questions during the spirited argument[187]—was immersed in the case. Yet, he did not display any interest at all.[188] He did not even look at counsel during argument.[189] "As the other justices puzzled over regulations adopted during his tenure there[, Justice Thomas] leaned back in his chair and stared at the ceiling."[190]

Justice Thomas' actions make it look like he is unprepared for argument, even though that is undoubtedly not the case. Consider the impression left on eleven students from Benjamin Banneker High School in Washington D.C., who came to the Court for a field trip.[191] "'I thought he was meditating,'" one student said.[192] "'He was spinning around in his chair like a child,'" another said.[193] "'Maybe he stayed up all night reading the court case—he was tired,'" a different student said.[194] Still, one high school student said Justice Thomas' conduct just looked "'[w]eird . . . . [I]f you know people are going to be watching you, you'd think you should try to make yourself presentable.'"[195]

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184. 128 S. Ct. 1147 (2008).

185. Linda Greenhouse, *Job Bias Case Turns on Filing Right Form*, N.Y. TIMES, Nov. 7, 2007, at A25.

186. Supreme Court of the United States, The Justices of the Supreme Court at 2, http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited Feb. 19, 2008).

187. *See, e.g.*, Transcript of Oral Argument at 70, *Federal Express Corp.*, 128 S. Ct. 1147 (No. 06-1322) (listing zero references in the transcript index for Justice Thomas).

188. Perhaps, Justice Thomas' manner of thinking about a case simply *appears* idiosyncratic. He may be concentrating on the case even as he looks away from counsel. Even so, appearances matter.

189. Justice Thomas is not the only justice in the history of the Supreme Court to ignore counsel. MERIDA & FLETCHER, *supra* note 3, at 310. Former Justice William O. Douglas piled books in front of him during oral argument so he could duck behind the stack and do other work. *Id.*

190. Greenhouse, *supra* note 185.

191. MERIDA & FLETCHER, *supra* note 3, at 320.

192. *Id.*

193. *Id.*

194. *Id.* at 321.

195. *Id.*

## VI. THE POWER OF WORDS

One might sit out oral argument if it were irrelevant. Yet, the best evidence of oral argument's ability to shape a debate comes from Justice Thomas' selective use of the forum. When Justice Thomas does speak during oral argument,[196] he changes the terms of the debate.[197] Until Justice Thomas injected himself into the argument in *Virginia v. Black*,[198] a challenge to a Virginia statute that outlawed cross burning,[199] many observers expected the Court to declare Virginia's cross-burning law unconstitutional.[200] The Court could have done so by applying two precedents:[201] *Texas v. Johnson*,[202] which struck down a law making it a crime to burn the American flag,[203] and in doing so characterized flag-burning as expressive conduct, and *R.A.V. v. City of St. Paul*,[204] which invalidated a city ordinance prohibiting the display of symbols such as a swastika and burning cross.[205] The facts of the two cross-burning cases were remarkably similar: In *R.A.V.*, teenagers burned a cross in the yard of an African-American family who lived across the street.[206] In *Black*, petitioners burned a cross in the yard of an African-American neighbor.[207]

During argument, Deputy Solicitor General Michael Dreeben attempted to characterize cross-burning as the type of expressive conduct that the First Amendment does not protect.[208] Justice Thomas interrupted:[209]

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196. For other examples of Justice Thomas' comments during oral arguments, see Alyssa Work, *Justice Clarence Thomas: Oral Arguments in First Amendment Cases*, First Amendment Center (Oct. 8, 2007), http://www.firstamendmentcenter.org/about.aspx?id=18926.

197. Lithwick, *supra* note 13 (Justice Thomas' "words changed the tenor of the debate, if not the minds of his colleagues, about the role of the law and the definition of justice."). Ironically, Lithwick argues that Justice Thomas improperly injected race into the argument by his charged comments. *Id.*

198. 538 U.S. 343 (2003).

199. *See* Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 893–94 (2005) (describing the facts of Virginia v. Black).

200. *See* James L. Swanson, *Unholy Fire: Cross Burning, Symbolic Speech, and the First Amendment* Virginia v. Black, 2002–2003 CATO SUP. CT. REV. 81, 86 (2003).

201. *Id.*

202. 491 U.S. 397 (1989).

203. *Id.* at 400, 420.

204. 505 U.S. 377 (1992).

205. *Id.* at 393.

206. *Id.* at 379.

207. Virginia v. Black, 538 U.S. 343, 350 (2003).

208. Transcript of Oral Argument at 20–21, *Black*, 538 U.S. 343 (2002) (No. 01-1107).

209. *Id.* at 21–24; *hear also* Recording of Oral Argument on Dec. 11, 2002, at 23:23 to 25:00, *Black*, 538 U.S. 343 (No. 01-1107), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_01_1107/argument/.

> [JUSTICE THOMAS]: [T]his statute was passed in what year?
>
> MR. DREEBEN: 1952 originally.[210]
>
> [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. [I]sn't that significantly greater than intimidation or a threat?
>
> MR. 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 . . . . 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. . . .
>
> There was no communication of a particular message. It was intended to cause fear . . . and to terrorize a population.[211]

The comments from Justice Thomas, the only Justice who grew up in the South under the Klan's shadow,[212] transformed the tone of the case.[213]

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210. Transcript of Oral Argument at 22, *Black*, 538 U.S. 343 (No. 01-1107); *hear also* Recording of Oral Argument on Dec. 11, 2002, at 23:23 to 25:00, *Black*, 538 U.S. 343 (No. 01-1107), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_01_1107/argument/. By asking the question, Justice Thomas raised a point he would bring up again in his opinion. *See Black*, 538 U.S. at 393–94 (Thomas, J., dissenting). In 1952, the same Virginia government that banned cross burning, nevertheless supported legalized segregation and, two years later, would engage in "massive resistance" to Brown v. Board of Education, 347 U.S. 483 (1954). *Id.* "Even for segregationists, violent and terroristic conduct, the Siamese twin of cross burning, was intolerable. The ban on cross burning with intent to intimidate demonstrates that even segregationists understood the difference between intimidating and terroristic conduct and racist expression." *Id.* at 394.

211. Transcript of Oral Argument at 22–24, *Black*, 538 U.S. 343 (No. 01-1107); *hear also* Recording of Oral Argument on Dec. 11, 2002, at 23:23 to 25:00, *Black*, 538 U.S. 343 (No. 01-1107), *available at* http://www.oyez.org/cases/2000-2009/2002/2002_01_1107/argument/. By signaling that he believes the case should not fit within the Court's framework of precedents, Justice Thomas gave both counselors the opportunity to argue whether the Court should depart from precedent.

212. THOMAS, *supra* note 140, at 21–22, 35, 46, 257. Besides writing about his experience growing up under the specter of the Klan, Justice Thomas also included in his autobiography a black-and-white photograph of a highway sign in Smithfield, North Carolina, that advertised the United Klans of America Inc. *Id.* at 179. The sign read: "Help Fight Communism & Intergration

As the *New York Times* reported on the "made-for-television" moment:

> During the brief minute or two that Justice Thomas spoke . . . the other justices gave him rapt attention. Afterward, the court's mood appeared to have changed. While the justices had earlier appeared somewhat doubtful of the Virginia statute's constitutionality, they now seemed quite convinced that they could uphold it as consistent with the First Amendment.[214]

Undoubtedly, Justice Thomas could have made the same point in his written opinion, or in the Court's private conference. By speaking during oral argument, he forced his colleagues—and indeed the nation—to reconsider the case through his eyes. His words prompted his colleagues to confront the history of the Klan. This "three-dimensional exchange," as the late Chief Justice Rehnquist described it, epitomized the way oral argument assists the Court in the search for truth.[215]

Arguably, because of Justice Thomas' comments, the law changed, too. Perhaps in direct response to Justice Thomas' uncompromising view on the limits of expressive conduct, the Court in *Black* announced that a state could outlaw cross burning by crafting a statute more narrowly than Virginia had.[216] Even though Justice Thomas dissented in *Black* (he would have gone further—and given cross burning no expressive content worthy of First Amendment protection at all),[217] many commentators credit Justice Thomas with moving the Court's center of gravity in the case.[218]

## VII. CONCLUSION

A lawyer's journey to oral argument at the United States Supreme Court begins in the morning outside the four-story, Vermont marble

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[sic] Join & Support United Klans of America Inc. KKK Welcomes You to Smithfield." *Id.* In the caption that accompanies the photograph, Justice Thomas points out the error in the ad: "Note the spelling of integration!" *Id.*

213. *See also* Lithwick, *supra* note 13. Lithwick wrote that "with his personal narrative, Justice Thomas changed the terms of the legal debate." *Id.*

214. Linda Greenhouse, *An Intense Attack by Justice Thomas on Cross-Burning*, N.Y. TIMES, Dec. 12, 2002, at A1.

215. Rehnquist, *supra* note 31, at 1022.

216. The Court invalidated Virginia's statute only because the law impermissibly made the act of cross burning prima facie evidence of intimidation. *Black*, 538 U.S. at 347–48, 367. A statute that did not create the same prima facie presumption—but required the state to make an individualized showing that the defendant had burned the cross to intimidate—would be constitutional. *Id.* at 365–67.

217. *Id.* at 388, 400 (Thomas, J., dissenting).

218. Charles, *supra* note 13, at 610. "One cannot help but believe that Justice Thomas's active participation . . . best explains the Court's decision to turn away from the absolutist position of R.A.V. . . . ." *Id.*

building that houses the Court.[219] Forty-four steps carry the lawyer up to the front portico, through bronze doors, and into the Great Hall, where busts of former Chief Justices gaze out at visitors.[220] Oak doors open into the courtroom, with its forty-four foot ceiling and twenty-four columns of Old Convent Quarry Siena marble.[221] When an attorney's case is called, she proceeds to the lectern in front of the Justices' mahogany bench and stands in silence until the Chief Justice calls her by name.[222] Even for the most seasoned lawyer, this passage to the Supreme Court remains an awe-inspiring experience.[223] The Court's majesty underscores how everything about a case before the nation's highest Court remains elevated in the public imagination. This is why the sight of Justice Thomas' stubborn silence strikes such a dissonant chord.

Justice Thomas' silence damages the deliberative quality of the Court in the forum where the Justices should be acting most judiciously. His silence prevents counsel and colleagues from challenging his sweeping proposals to transform the constitutional order. His silence allows him to offer far-flung views in written opinions that are never vetted in oral argument or, in some cases, never raised in briefs. While Justice Thomas may find it more comfortable to keep quiet during oral argument, his silence undermines the development of the law. Law grows through argument, oral and written. If Justice Thomas spoke more often during oral argument, he might convince the Court to adopt his vision of the Constitution. Or his participation might cause the nation to reject his radical re-working of constitutional law. Either way, giving voice to an unheard viewpoint elevates the Court and honors the majesty of the judicial process. Justice Thomas' voice carries "in a rich baritone,"[224] which is deeper and more authentic than anyone's on the Court. For his sake and for the nation's, he should use it more often.

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219. Visitor's Guide, *supra* note 44, at 1. Supreme Court of the United States, The Court Building at 1, *available at* http://www.supremecourtus.gov/about/courtbuilding.pdf.

220. *Id.* at 2.

221. *Id.*

222. *Id.*

223. *See generally Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of nominee).

224. Greenhouse, *supra* note 185.