

ROUTLEDGE STUDIES IN RHETORIC AND COMMUNICATION

Rhetoric and Discourse in Supreme Court Oral Arguments

Sensemaking in Judicial Decisions

Ryan A. Malphurs



Rhetoric and Discourse in Supreme Court Oral Arguments

Sensemaking in Judicial Decisions

Ryan A. Malphurs



First published 2013
by Routledge
711 Third Avenue, New York, NY 10017

Simultaneously published in the UK
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

*Routledge is an imprint of the Taylor & Francis Group,
an informa business*

© 2013 Taylor & Francis

The right of Ryan A. Malphurs to be identified as author of this work
has been asserted by him in accordance with sections 77 and 78 of the
Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or
utilised in any form or by any electronic, mechanical, or other means, now
known or hereafter invented, including photocopying and recording, or in
any information storage or retrieval system, without permission in writing
from the publishers.

Trademark Notice: Product or corporate names may be trademarks or
registered trademarks, and are used only for identification and explanation
without intent to infringe.

Library of Congress Cataloging-in-Publication Data

Malphurs, Ryan A., 1980–

Rhetoric and discourse in Supreme Court oral arguments : sensemaking
in judicial decisions / By Ryan A. Malphurs.

p. cm. — (Routledge studies in rhetoric and communication ; no. 13)

Includes bibliographical references and index.

1. United States. Supreme Court—Decision making. 2. Oral
pleading—United States. 3. Forensic orations—United
States. 4. Law—United States—Language. I. Title.

KF8748 M283 2012

347.73'2605—dc23

2012029759

ISBN13: 978-0-415-64004-6 (hbk)

ISBN13: 978-0-203-08294-2 (ebk)

Typeset in Sabon
by IBT Global.

Printed and bound in the United States of America on sustainably sourced
paper by IBT Global.

Rhetoric and Discourse in Supreme Court Oral Arguments

While legal scholars, psychologists, and political scientists commonly voice their skepticism over the influence oral arguments have on the Court's voting pattern, this book offers a contrarian position focused on close scrutiny of the justices' communication within oral arguments. Malphurs examines the rhetoric, discourse, and subsequent decision-making within the oral arguments for significant Supreme Court cases, visiting their potential power and danger and revealing the rich dynamic nature of the justices' interactions among themselves and the advocates. In addition to offering advancements in scholars' understanding of oral arguments, this study introduces Sensemaking as an alternative to rational decision-making in Supreme Court arguments, suggesting a new model of judicial decision-making to account for the communication within oral arguments that underscores a glaring irony surrounding the bulk of related research—the willingness of scholars to criticize oral arguments but their unwillingness to study this communication. With the growing accessibility of the Court's oral arguments and the inevitable introduction of television cameras in the courtroom, this book offers new theoretical and methodological perspectives at a time when scholars across the fields of communication, law, psychology, and political science will direct even greater attention and scrutiny toward the Supreme Court.

Ryan A. Malphurs earned a PhD in Communication from Texas A&M University, USA, and is a Litigation Consultant at Tara Trask & Associates.

Routledge Studies in Rhetoric and Communication

- 1 Rhetorics, Literacies, and Narratives of Sustainability**
Edited by Peter Goggin
- 2 Queer Temporalities in Gay Male Representation**
Tragedy, Normativity, and Futurity
Dustin Bradley Goltz
- 3 The Rhetoric of Intellectual Property**
Copyright Law and the Regulation of Digital Culture
Jessica Reyman
- 4 Media Representations of Gender and Torture Post-9/11**
Marita Gronnvoll
- 5 Rhetoric, Remembrance, and Visual Form**
Sighting Memory
Edited by Anne Teresa Demo and Bradford Vivian
- 6 Reading, Writing, and the Rhetorics of Whiteness**
Wendy Ryden and Ian Marshall
- 7 Radical Pedagogies of Socrates and Freire**
Ancient Rhetoric/Radical Praxis
S.G. Brown
- 8 Ecology, Writing Theory, and New Media: Writing Ecology**
Edited by Sidney I. Dobrin
- 9 The Rhetoric of Food**
Discourse, Materiality, and Power
Edited by Joshua J. Frye and Michael S. Bruner
- 10 The Multimmediated Rhetoric of the Internet**
Digital Fusion
Carolyn Handa
- 11 Communicating Marginalized Masculinities**
Identity Politics in TV, Film, and New Media
Edited by Ronald L. Jackson II and Jamie E. Moshin
- 12 Perspectives on Human-Animal Communication**
Internatural Communication
Edited by Emily Plec
- 13 Rhetoric and Discourse in Supreme Court Oral Arguments**
Sensemaking in Judicial Decisions
Ryan A. Malphurs



Elevated view of the Courtroom showing the Supreme Court Bar area. The Brass chancel railing separates the public from Supreme Court bar members. Pews to the justices' right provide seating for the media, while pews to the justices' left provide seating for the justices' guests.

To all those who have brought me to this point, most importantly my wife, Nicole, who is more responsible than any other for this accomplishment, because without her love, support, and wisdom, I never would have embarked on this path and this project would never have reached fruition.

To the Justices of the Supreme Court of the United States, may you always have the keen insight to ask the right questions, the patience to listen carefully, and the wisdom to carefully consider the advocate's response.

Preface

Before diving into any research related text, readers have a right to know the motivations surrounding it and the context for it within scholarly literature. Much like many topics that turn into a life's work, I read the transcripts of oral arguments in *Morse v. Frederick* as a first year doctoral student in the Communication department at Texas A&M University. I fell in love with the Court's tradition immediately—it was law, politics, and life intertwined and laid bare in its rich complexity.

As a student of rhetoric, I was not wholly unfamiliar with the Court's approach to oral arguments, but like any curious graduate student, when I sought out scholarly articles on Supreme Court oral argument, I was shocked to find nothing. When querying the professor, and later chair of my committee, about possible scholarly articles related to the Court's oral argument, he smiled wryly and announced that there was very little. The seed had been planted, resulting in a final term paper that roughly analyzed the oral arguments in *Morse v. Frederick*, and served as the precursor to Chapter 7. Through subsequent years the topic of oral argument matured as I considered how other classes on discourse and organizational communication could refine my initial rhetorical approach. The imprints of various classes will be clear to Communication scholars through the mixed methods and development of this book's arguments.

I received tremendous support from the Glasscock Center at Texas A&M and the College of Liberal Arts which enabled me to travel to Washington, D.C. and observe nearly fifty oral arguments before defending my dissertation. The experience of observing the Court's oral arguments is thrilling, and I encourage all readers, if you have not been before, go and observe what I consider to be one of our country's finest egalitarian traditions. The Court always makes room for the public, even in high profile cases, and rarely can Americans sit so near and watch so closely our nation's most esteemed figures at work.

As a branch of our federal government, law scholars, political scientists, psychologists, and humanists have written extensively on the Supreme Court, as readers will see in the literature review. However, few scholars focus on oral arguments, and those that do focus less on the communication

within oral arguments and more upon predictions of voting positions. Communication scholars would find these studies fraught with problems, namely the analysis of communication without studying the act or process of communication. Generally, Supreme Court scholars have argued that oral arguments make very little difference to the likely outcome of a case and rarely change a justices' voting position. However, there is more at stake than simply the influence of voting positions, and to reduce oral arguments to an empty ritual misses the complexity and dynamism of the nine seated justices, multiple advocates, and an always watchful audience.

As a singular purpose, this book responds to previous research in political science and psychology by arguing for the importance of oral arguments from a Communication perspective, by examining the justices' rhetorical discursive interaction, by introducing Sensemaking as a new model of judicial decision-making, and by discussing the legal and cultural impact of the justices' rhetorical discursive interaction in *Morse v. Frederick*, *Kennedy v. Louisiana*, and *District of Columbia v. Heller*. While bringing together an assortment of theories and goals, readers should bear in mind that this research is the first of its kind in Communication and does not seek to be the final or singular voice on the study of oral arguments, but rather an introduction for a vast dialogue to begin.

In addition to new theories, this book also seeks to break down the distance and subsequent generalizations from which other scholars approach "the Court"—we are, after all, dealing with nine individuals, not just "the Court" as an entity. The majority of political scientists and psychologists collapse the justices' distinct behavioral differences into aggregate behavioral models to describe "the Court," and rely upon longitudinal studies that ignore the unique qualities of each case. Instead of studying the court from a distance or considering a large number of cases, this book examines the three specific cases, mentioned above, to gauge each justice's individual interaction in oral argument and to determine how certain justices may have controlled the flow of information, which in turn may have influenced the justices' and the Court's decision-making ability.

The book's first chapter is an open letter to the Chief Justice of the Supreme Court of the United States. I wrote this letter in the hope that Chief Justice Roberts, or any Chief following Roberts, would take seriously my suggestions. It would not be an understatement to say I wrote this book with one person in mind—the Chief. Nor would it be an overstatement to say that it can prove insightful to many more than just the Chief; however, the effectiveness of this work may be judged by the Court's willingness to recognize and improve its deficiencies within oral argument. The Court's recent rancorous and rambunctious approach to President Obama's health care bill may underscore many of the problems identified within this study. The Chief Justice, more than any other justice, may assert control to reign in the fragmented questioning within oral argument that has continued for so long, but only if he or she chooses to do so. For those that believe the

Court and its justices will ignore this study as it has with many others, you may be correct, but it does no harm to aim for the heart of the problem. At the very least, the work will offer a creative approach and unique insights into understanding the importance of Supreme Court oral arguments.

I begin the book with an overview of the development and study of legal rhetoric and a historical snapshot of shifts in the Court's approach to oral argument. Readers will find Chapter 2 beneficial as a historical summary that provides a workable context upon which the study may move forward, but I also address the need for rhetorical improvements from advocates arguing before the Court, and set forward the study's driving research questions. Those wishing to skip Chapter 2 may risk wandering aimlessly through the book without understanding the study's guiding questions and concerns. Chapter 3 provides views of oral argument from law, political science, and psychology to emphasize the nuances within which each field evaluates the Court's oral arguments, in turn revealing where Communication may provide valuable contributions to the study of Supreme Court oral arguments. After establishing the benefits of a Communication study, Chapters 4 and 5 consider theoretical and methodological approaches adopted for the study; here I discuss rhetoric, discourse analysis, ethnography, and Sensemaking as useful tools that can help uncover the complexity and dynamic interplay found within oral arguments.

The study's analysis begins in Chapter 6 with a thick description of the inherent complexity found within oral arguments and applies the previously discussed theoretical and methodological approaches to the case of *Morse v. Frederick* as a means of determining theoretical and methodological validity. Essentially, the analysis of *Morse v. Frederick* in Chapter 7 serves as a test case and offers to readers proof of the usefulness of the approaches I adopted. Following analysis of *Morse v. Frederick*, I consider a second case in Chapter 8, *Kennedy v. Louisiana*, to determine how first-hand observation of a case might further inform my analysis. I analyze a third case in Chapter 9, *District of Columbia v. Heller*, to understand whether justices' behavior may deviate in more socially and politically sensitive cases. The book's penultimate chapter offers suggestions for lawyers and judges based upon this study's findings and makes recommendations to scholars for further areas of research. The book concludes with a discussion of how the Court's current approach to oral argument compromises its rhetorical authority.

Acknowledgments

Thanks goes to the ultimate arbiter of Justice in all his and her manifestations. An omnipresent guiding hand has maintained a persistent path forward during the writing of this manuscript, particularly through the character building obstacles that surround any book.

Writing a book, much like raising a child, takes a village. Yet while the author has put words down on paper, it is the village that has supported him in this process. I have been blessed by a village of family and friends who, throughout the writing of this book, have witnessed its birth and encouraged its development toward fruition. Thank you to Routledge, my editor Elizabeth Levine, and Eleanor Chan for making this book possible.

I have been fortunate to receive opportunities granted to very few scholars by the Supreme Court. Through the assistance of Marshal Pamela Talkin and Marion Zaczkiewicz in the Marshal's Office, the Supreme Court has been gracious in accommodating my research by offering me seating when available. Thanks goes out to the Supreme Court Police who after seeing me for weeks in a row waiting outside for oral arguments finally inquired about my frequent visits to the Court. I have come to look forward to seeing these same officers year after year. And I extend a special thank you to those justices who have taken the time to speak with an inquisitive young scholar, even when cornered in the Court's cafeteria.

The Supreme Court Advocacy, Scholarly, and Media community also welcomed me to observe moot courts, and they all patiently endured my interview questions. My thanks goes out in particular to Supreme Court advocate David Frederick, the Georgetown Supreme Court Institute, The National Association of Attorney Generals, Oyez.org, Robert Barnes, Michael Sacks, and Jan Crawford.

While comprehensive research requires access and background details, it also requires an extensive level of support from other scholars, funding centers, and flexible employers. I would like to thank Professors James Arnt Aune, C. Jan Swearingen, Leroy G. Dorsey, Jennifer R. Mercieca, Charles R. Conrad, and Mark J. Bruhn. Some of these educators have seen me fight passionately for my causes, and many of them provided me with the necessary tools and encouragement along the way. In particular, Michael C. Gottlieb is like another father to me and he has spent countless hours

debating with me and polishing my manuscript. In addition, Kathleen Burk has seen and provided feedback on more versions of this manuscript than she cared to before being circulated to publishers. Her guidance has proved invaluable to my career. Thanks also goes out to Rachel Renz who edited early versions of the manuscript.

I also would to extend my gratitude to Texas A&M University, its College of Liberal Arts, and the Melbern G. Glasscock Center for their generous support. Of particular significance, I would like to thank the Department of Communication at Texas A&M for taking a chance on a misfit scholar and helping me succeed. Without a first-rate research institution, supportive faculty, and accompanying levels of financial support, my research would not have been possible. In addition, without a supportive work environment this book would have remained in dissertation form and my trips to the Court would have come to an end. It certainly would have been within my employer's rights to explain that my research on the Court did not exactly align with jury consulting, but with support from Tara Trask, Brian Bunch, and everyone at Tara Trask & Associates, they encouraged my research and have contributed a great deal to its success, and for that I thank you all.

Friends and family have been the bedrock of this book; they, more than anyone, have encouraged me since my first breath. Looking back, it's clear now that all their efforts have resulted in this text: my grandmothers who encouraged me to write and write often, my grandfathers, uncles, and father whose tireless work ethic and successes truly proved inspirational, my sister who has always kept me humble while still believing in her big brother, and my mother who has shown more strength, wisdom, courage, and compassion in her lifetime than any single individual should possess, for it was she who taught me how to stand unflinchingly in the face of opposition.

To a large extended family that has welcomed me with open arms, thanks goes out to the Friedmans, Silbermans, and Luries. Your love and support means a great deal.

And to an equally supportive family, my friends, I thank you for enduring my tirades and fits of passion. To you all it is no surprise that I chose to argue with the nation's highest Court. Paul and Jeff, like brothers, you have been there since the beginning, and I take great pride in having you both in my life and knowing where you have led me. I also would like to thank two key individuals who welcomed me as a stranger into their homes. Spencer Gerrol and Kirit Radia, who both provided me not only with the essential element of housing during my stays in D.C., but also with friendship and valuable insight. I cannot thank both of you enough for your hospitality, friendship, and support. My thanks go out to my confidants, sounding boards, intellectual combatants, and emotional bulwarks who have assisted along the way in my intellectual journey: Justin Nicolace, Colin Patrick, Robert Henderson, Kate Hatch, Kris Roebuck, Peter Spiessbach, Collins Illich, Kevin-Khristian Cosgriff-Hernandez, Zach Schaefer,

Brocka Nolen, Michael Mattair, Brad Friedman, Jaime Bochantin, Reuben Pacheco, Thomas Hill, Dan Hattrup, Graham Blackman-Harris, and all my friends and colleagues in the Department of Communication at Texas A&M.

Finally, and most importantly, thank you to my wife, Nicole, for her love, patience, understanding, and support during this journey. It was she who encouraged me to transition from English to Communication, she who persuaded me to consider a career in trial consulting, she who consoled me during times of fragility, and she who believed in me from the beginning. Without her I would be a lesser man. And it is because of her that we welcome our daughter, Arianna. Ari, your mother and I hope that all your dreams come true, and may you add a bit of justice to this complex world.

Contents

<i>List of Figures</i>	xi
<i>List of Tables</i>	xiii
<i>Preface</i>	xv
<i>Acknowledgments</i>	xix
1 A Letter to the Chief Justice of the United States	1
2 Historical Development of Legal Rhetoric and Supreme Court Oral Arguments	4
3 Do Oral Arguments before the Supreme Court Matter? A Simple Explanation	18
4 New Question: Oral Arguments “Matter,” But How Do We Make Sense of Them? A Modest Proposal	47
5 Critical Theories and Research Questions: Proposing a Method to Capture the Madness of Oral Arguments	60
6 The Many Faces of Oral Argument: Oral Argument’s Purposes and the Justices’ Styles	81
7 Arguing about “Bong Hits 4 Jesus”: Testing Theory and Method in <i>Morse v. Frederick</i>	102
8 Making Sense of Child Rapists in <i>Kennedy v. Louisiana</i> : A Firsthand Observation	117
9 Historical Repercussions of Judicial Sensemaking: <i>District of Columbia v. Dick Anthony Heller</i>	140

10	The Ground Covered and New Ground to Uncover: Responding to Critics, Offering Recommendations, and a Final Letter to the Chief Justice	161
11	Biased Sensemaking: Compromising the Court's Rhetorical Authority	183
	<i>Notes</i>	191
	<i>References</i>	211
	<i>Index</i>	221

Figures

	Frontispiece: Elevated view of the Courtroom showing the Supreme Court Bar area.	iii
1	West Portico of the Supreme Court Building.	75
2	Courtroom of the Supreme Court of the United States.	76
3	Angle view of the entire Courtroom Bench and attorneys' tables.	76
4	Close-up of Courtroom lectern looking toward the Bench and five of the nine Justices' chairs.	77
5	Elevated view of the Courtroom showing the Supreme Court Bar area.	78
6	The Justices' Conference Room—where the justices debate the cases and cast their votes each Friday following oral arguments.	78
7	“Contemplation of Justice”—Notice the Court’s defining words above its entrance “Equal Justice Under Law.”	79
8	The east frieze in the Courtroom above the justices’ bench. Visitors often stare at these images during oral arguments.	79
9	West frieze—this frieze faces the Justices and they often stare at the figures during oral argument.	79
10	A detail of the statuette held by Contemplation of Justice.	80

Tables

7.1	Interruptions	104
7.2	Statements	105
7.3	Speaking Time	106
7.4	Lawyer’s Consecutive Speaking Time Frames	107
8.1	Interruptions	120
8.2	Statements	121
8.3	Speaking Time	122
8.4	Advocates’ Speaking Time Frames	123
9.1	Interruptions	144
9.2	Statements	145
9.3	Speaking Time	147
9.4	Lawyer’s Speaking Time Frames	148