Making Sense of "Bong Hits 4 Jesus": A Study of Rhetorical Discursive Bias in *Morse v. Frederick*

Ryan Malphurs*

Introduction

Over three years have passed and more than 200 cases have been argued before the Supreme Court since Justice Clarence Thomas last uttered a word in oral arguments. According to Justice Thomas, he last spoke on February 22, 2006, during oral arguments for *Bowles v. South Carolina*.[1] Critics have harped that Justice Thomas's silence suggests a lack of involvement in cases, but Justice Thomas attributes his silence to the belief "that if someone is talking, somebody should be listening."[2] Since his book release,[3] Justice Thomas has been more critical about the other Justices' frequent questioning in oral argument, proffering that his "colleagues should shut up."[4]

There can be no doubt that the Justices' back and forth questioning in oral argument impacts how lawyers present their cases. Justices Stevens and Alito have lamented that some of their colleagues' active involvement

* © Ryan Malphurs 2010. Ryan Malphurs received his Ph. D. in Communication from Texas A&M University. He works as a litigation consultant for Tara Trask & Associates where he conducts general trial consulting and appellate research. Ryan would like to thank Dr. James Arnt Aune, Professor Linda Berger, and Professor Teresa Phelps for their insight and assistance in the development of this article. He would also like to thank David Frederick, Georgetown's Supreme Court Institute, Oyez.org, and the Glasscock Center for their contributions to his research.

1 Dahlia Lithwick, *Open Books: Why Supreme Court Justices' Speeches Are Less Important Than Oral Arguments*, Slate.com (Nov. 30, 2007) (available at http://www.slate.com/id/2178798/).

2Associated Press, *Thomas Silent as Supreme Court Talks On and On*, CNN.com (Feb. 25, 2008) (available at http://www.kenston.k12.oh.us/khs/academics/social-studies/ap-government/thomas-silent-as-supreme-court-talks-on-and-on.pdf).

3 Clarence Thomas, *My Grandfather's Son* (Harper 2007).

4 Lithwick, *supra* n. 1, at 1.

obstructs them from asking questions in a case and prevents lawyers from advancing arguments.[5] The more active Justices—Scalia, Breyer, now-retired Justice Souter, and Chief Justice Roberts—have established an active presence in oral arguments. Justice Scalia has developed a notorious reputation for his sometimes bombastic and overly pugnacious presence in oral arguments.[6] Likewise Chief Justice Roberts and Justices Breyer and Souter are all challenging participants in oral arguments. The Justices approach oral argument with different purposes in mind; whether that may be listening to a lawyer's arguments, asking a lawyer to clarify a question, or challenging a lawyer's argument, a Justice's involvement may vary case by case.

But does Justice Thomas's silence in oral argument lend itself to a more informed perspective? Is his silence ideal for considering and reflecting on issues? If a Justice focuses on listening and reflecting upon arguments rather than attempting to refute a lawyer's argument, then it seems the quiet Justice could have a real advantage in grasping the complexities of a case. Regardless of their silent or active involvement, judicial behavior plays an important role in oral argument. The information and arguments that lawyers present to Justices depend on the former's ability to answer a question or follow a line of reasoning without interruption. Similarly, Justices' ability to ask a question relies on an environment in which they are permitted the opportunity to inquire about a topic. More active Justices are most likely to control the flow of information through the direction of questioning, while less active Justices must either patiently wait for an opportunity to engage a lawyer, aggressively interrupt a previous line of questioning, or lose the opportunity to have their question answered.

In recent visits to Washington, D.C., in which I listened to nearly fifty oral arguments, I observed on numerous occasions a Justice's inquiry redirected by other Justices' questioning, active Justices preventing more reserved Justices from asking questions, and Justices obstructing a lawyer's argument with personal inquiries and long-winded hypotheticals. To a lay person, the process appeared disjointed, lopsided, and unfair. While lawyers and Supreme Court scholars have long recognized the turbulent nature of oral argument, few studies consider how judicial communication in oral arguments impacts the Justices' decision-making ability.

. . . . . .

5 *See* Associated Press, *supra* n. 2, at 1.

> "I really would like to hear what those reasons are without interruption from all of my colleagues," Justice John Paul Stevens said at an argument in the fall. The newest Justice, Samuel Alito, has said he initially found it hard to get a question in sometimes amid all the former law professors on the court.

Id.

6 *See* Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* 46 (Doubleday 2007).

At its core, this article questions the cognitive influence communicative interactions in oral arguments may have upon the Justices' decision-making ability. This article opens inquiry into judicial behavior in oral arguments, by examining, from a communication perspective, the Justices' rhetorical discursive interaction and then considering the scholarly and social repercussions of the Justices' interaction.[7] By offering a unique perspective through research and methodology, this article presents findings that are distinct from the common aggregate behavioral models and typical longitudinal studies conducted by political scientists and psychologists. In addition, analysis of a specific case enables research focused upon each Justice's individual rhetorical discursive interaction in oral argument. Mapping the Justices' individual behavior enables readers to determine the manner in which certain Justices may have controlled the discursive flow of information and arguments within the case's oral argument, and the mapping exposes a judicial discursive bias that may influence the Justices' decision-making ability.[8]

I. The Scholarly Landscape of Oral Arguments: Ignoring the Role of Communication

Traditional studies of the Supreme Court question the value of oral arguments, maintaining that "oral arguments [do not] play a significant role in the decision making of the U.S. Supreme Court."[9] Political scientists largely dominate this skeptical viewpoint, ignoring the discursive interactional dimension of oral argument.[10] Other researchers, dissenting from long-standing skepticism, emphasize the dynamic interactional nature of oral arguments and suggest that oral arguments play a crucial role in judicial decision making. These researchers disagree, however, about the significance of oral arguments, acknowledging that influence is difficult to

7 I have chosen to use the term "rhetorical discursive interaction" because oral arguments necessarily involve persuasion, the essence of rhetoric, and yet they deal with larger issues that reflect social discourse; the term reflects the occurrence of both concepts in oral argument.

8 My use of the term "bias" may prompt readers to believe that I am suggesting an overt preference for one counsel versus another. While the Justices may in fact hold a distinct bias when approaching oral arguments, my interest lies in studying how their rhetorical discursive interaction in oral arguments may influence the flow of information and arguments, as well as how discourse impacts a Justice's ability to evaluate a case.

9 Kevin T. McGuire, *Book Review*, 15 Law & Pol. 107, 107 (2005) (reviewing Timothy Johnson, *Oral Arguments and Decision Making on the United States Supreme Court* (SUNY Press 2004)).

10 *See e.g.* David W. Rhode & Harold J. Spaeth, *Supreme Court Decision Making* 211–12 (W.H. Freeman 1976); Jeffrey A. Segal & Albert D. Cover, *Ideological Values and Votes of U.S. Supreme Court Justices*, 83 Am. Political Sci. Rev. 557 (1989) (ignoring oral argument when looking at judicial influences); Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* 208–09 (Cambridge U. Press 1993); Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 280–81 (Cambridge U. Press 2002) [hereinafter Segal & Spaeth, *The Attitudinal Model Revisited*].

determine given other variables' potential influence on the Justices, such as the parties' briefs, amicus curiae briefs, intra-court negotiations, lawyers' experience, and the external political environment.[11]

Most previous scholarly research on Supreme Court oral arguments has been conducted by political scientists who ironically pay very little attention to the role of communication in oral arguments.[12] Until very recently, the only studies that considered the role of communication in oral arguments contributed little towards understanding the dynamic role of communication in oral arguments. Conducted by Milton Dickens and Ruth Schwartz, and by Stephen Wasby and his colleagues, both studies described the unique rhetorical challenges lawyers are presented with and noted the important role oral arguments play in providing lawyers and Justices with a final opportunity to distribute or clarify previous information.

Milton Dickens and Ruth Schwartz noted the unique nature of oral arguments in the Supreme Court, emphasizing that the Court's oral argumentation "differs from most other persuasive speaking situations."[13] Dickens and Schwartz identify the challenge with which lawyers must struggle by noting that the Court "impose[s] additional constraints rendering inappropriate or ineffectual many rhetorical techniques commonly used in public speaking," and yet the lawyer's "oral effectiveness will be largely determined by his . . . rhetorical strategy" within the constraining environment.[14] The preparation top advocates endure is testament to the challenging rhetorical situation oral argument presents.[15] To prepare for "a single hour of oral argument," advocates must "become familiar with thousands of pages of briefs, previous testimony and decisions," distill the delivery into "an extremely small portion of the

11 *See* Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. Pol. 187, 188–95 (1995); Paul M. Collins, *Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs*, 60 Political Research Q. 55, 55 (2007); *see generally* Donald R. Songer & Stefanie A Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 Am. J. Political Sci. 1049 (1996); Lee Epstein, Jeffrey A. Segal & Harold J. Spaeth, *The Norm of Consensus on the U.S. Supreme Court*, 45 Am. J. Political Sci. 362 (2001); Timothy R. Johnson, *Information, Oral Arguments, and Supreme Court Decision Making*, 29 Am. Pol. Research 331 (2001); Johnson, *supra n.* 9; Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 Am. Political Sci. Rev. 99 (2006); James N. Schubert, Steven A. Peterson, Glendon Schubert & Stephen Wasby, *Observing Supreme Court Oral Argument: A Biosocial Approach*, 11 Pol. & Life Sci. 35 (1992); Donald S. Cohen, *Judicial Predictability in the United States Supreme Court Advocacy: An Analysis of the Oral Argument*, 2 U. Puget Sound L. Rev. 89 (1978).

12 *See e.g.* Johnson, *supra* n. 9 (publishing 140-page book on the effects of oral argument on decision making without discussing communication).

13 Milton Dickens & Ruth E. Schwartz, *Oral Argument before the Supreme Court:* Marshall v. Davis *in the School Segregation Cases*, 57 Q. J. Speech 32, 41 (1971).

14 *Id.* at 41–42.

15 Nearly every top advocate I spoke with mentioned that on average they spend about 100 hours per case preparing for oral arguments, and argue between two and five moot courts before appearing before the Court.

voluminous relevant materials," "speak within the confines of a formal set of rules," and "respond to questions or comments or commands from a highly trained intelligent and articulate group," all while standing "intellectually alone" before the Justices.[16] Dickens and Schwartz's descriptive article simply calls scholars' attention to the unique rhetorical environment oral argument presents by distinguishing how it differs from traditional political communication.

While oral argument requires unusual rhetorical skills, Stephen Wasby and his colleagues suggest that the importance of oral argumentation lies in an advocate's ability to foreground essential information.[17] At the heart of oral argumentation are the questions put forth by Justices, which provide lawyers with the opportunity to persuade the Justices. The Wasby article calls attention to the many purposes of oral argumentation through which Justices test policy, challenge logic with analogies, persuade other Justices of their reasonable positions, gather more information, clarify positions, and reduce cases to their essential arguments. They note that "for the lawyer, there is the reassurance that a case has been heard" as well as the ability "to concentrate on the points from his overall case he considers most important."[18] For Justices, oral arguments emphasize "the most important elements in the case," but they also serve as a ritual which "legitimizes [their] function, provides a new opportunity to communicate with [their] colleagues, to obtain information about a case and [to clarify] points which may have been raised."[19] However, of utmost importance to Wasby and his co-authors is the ability of oral arguments to assist Justices "in shaping the strategy he [or she] and his [or her] colleagues should follow" in resolving the case.[20] Dickens and Schwartz, and Wasby and his colleagues urged others to learn more about the Court's unique communicative interactions, but their calls went unnoticed, and these two works, both published in the *Quarterly Journal of Speech*, were the first of their kind to attempt a communication style study of oral argumentation.[21]

The influence of the Justices' communication in oral arguments has been partially considered, most recently by Timothy Johnson, a prominent political scientist in Supreme Court studies. Johnson has conducted research on the Supreme Court which has led him to conclude that oral arguments do influence judicial decision making and lead Justices to test

16 Dickens & Schwartz, *supra* n. 13, at 41–42.

17 Stephen Wasby, Anthony D'Amato & Rosemary Metrailer, *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q. J. Speech 410, 413 (1976).

18 *Id.* at 422.

19 *Id.*

20 *Id.*

21 Ironically Stephen Wasby is a political scientist who published his findings in a Communication journal.

policy options within the political environment.[22] In order to determine the importance of oral arguments, Johnson evaluated "litigant and *amicus curiae* briefs, oral argument transcripts, notes and memoranda from the private papers of Supreme Court Justices, and the final decision handed down" for cases handled between 1972 and 1986.[23] Johnson's comprehensive study is the first of its kind to conduct long-term research on communication to expose the connection between the information Justices gather in oral arguments and the development of those ideas in their final opinions.

Johnson adopts the strategic actor model as a means of understanding the Justices' communication.[24] As strategic actors, Justices should gather as much information as possible in order to find the best possible solution in accordance with their preferences. Johnson describes his position more fully, proposing:

> The first tenet of the strategic account is that [J]ustices strive to achieve their most preferred policy objectives. To do so they need information about all the policy choices available to them. I posit that oral arguments provide a time for [J]ustices to gather this information by raising questions concerning legal principles the Court should adopt, courses of action the Court should take, or a [J]ustice's beliefs about the content of a policy.[25]

For Johnson, oral arguments are critical because they inform Justices of policy implications by allowing them to explore the consequences of various alternatives.[26] His study determines that Justices' questions in oral argument will focus on policy issues 40% of the time and 31% of questions will be related to the constitutionality of counsel's position; over 70% of Justices' questions will focus on either policy or constitutional matters.[27] Johnson's conclusions are influential because they point to the importance of oral argument before the Supreme Court as a valuable tool for

22 For commentary on the influence of Johnson's study, see book reviews by Kevin McGuire, *supra* n. 9, and Brian Palmer, *Book Review*, 26 Just. Sys. J. 245 (2005) (reviewing Johnson, *supra* n. 9).

23 Johnson, *supra* n. 9, at 17.

24 *See id.* at 6–7 (contrasting the strategic actor model with the attitudinal model). The strategic actor model varies with each scientist who employs it. For other uses of the strategic actor model in judicial inquiry, see e.g. Rafel Gely & Pablo Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. Econ. & Org. 263 (1990); William Eskridge, *Reneging on History: Playing the Court/Congress/President Civil Rights Game*, 79 Cal. L. Rev. 613 (1991); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 Geo. L. Rev. 565 (1992); Lee Epstein & Jack Knight, *The Choices Justices Make* (Cong. Q. Press 1998); Forrest Maltzman, James Sprigs & Paul Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge U. Press 2000).

25 Johnson, *supra n.* 9, at 23–24.

26 *Id.*

27 For a more extensive discussion, see *id.* at 21–56.

information gathering. His study is really the first of its kind in political science to establish the importance of oral argument, and to do so through a rigorous examination. As a consequence of his study, the strategic actor model has gained prominence as a primary model for understanding Supreme Court decision making.

Although Johnson's study involves a comprehensive survey of Supreme Court opinions and oral arguments, his study leaves a number of questions as a consequence of both his theoretical model and method. First, Johnson's aggregate findings fail to account for individual differences in Justices' decision making or approaches to oral argument. For example, Justice Scalia argues with counselors incessantly while Justice Thomas rarely engages in open debate, and it seems unlikely that both Justices share a similar decision-making process or a similar approach to information gathering. Second, Johnson ignores whether Justices treat counselors equally or seek balanced information, seemingly an important underlying indicator of the strategic actor model. Third, he overlooks the combination of multiple voices within a case (litigant and amicus briefs, Justice conferences, and senior Justice voting patterns) that could influence a Justice's decision. For instance, a Justice could be persuaded by a brief to rule in favor of a litigant and use a frame provided by a counselor in oral argument to explain his ruling.

Fourth, the a priori adoption of the strategic actor prevents emerging patterns from guiding Johnson's theorizing, influencing how Johnson makes sense of or interprets the oral arguments. Imposing an external theory limits and frames his conclusions prior to analysis. Instead of discerning what patterns may develop from oral arguments, Johnson proposes a pattern of behavior and then discovers the behavior, much like finding a solution before understanding the problem. Johnson's use of the strategic actor model eschews substantial scholarly research that suggests humans do not often conform to the strategic actor model, but more often invoke a process of sensemaking to process information and make decisions.[28]

Where the strategic actor model suggests that humans approach solutions to problems in relatively systematic ways, sensemaking suggests that humans employ cognitive commitments to reduce the ambiguity of

28 On the influence and widespread use of the theory of sensemaking, see e.g. Dennis A. Gioia & Kumar Chittipeddi, *Sensemaking and Sensegiving in Strategic Change Initiation*, 12 Strategic Mgt. J. 433 (1991); Meryl Reis Louis, *Surprise and Sense Making: What Newcomers Experience in Entering Unfamiliar Organizational Settings*, 25 Admin. Sci. Q. 226 (1980); Meryl Reis Louis & Robert L. Sutton, *Switching Cognitive Gears: From Habits of Mind to Active Thinking*, 44 Human Relations 55 (1991); William H. Starbuck & Frances J. Milliken, *Executives' Perceptual Filters: What They Notice and How They Make Sense*, in *The Executive Effect* 51–58 (Donald Hambrick ed., JAI Press 1988) (discussing sensemaking and its effect on filtering); Karl E. Weick, *Making Sense of the Organization* (Blackwell 2001) [hereinafter Weick, *Making Sense of the Organization*]; Karl E. Weick, *Sensemaking in Organizations* (Sage 1995) [hereinafter Weick, *Sensemaking in Organizations*].

an environment due to conflicting, excessive, uncertain, or undesirable information.[29] Where the strategic actor may articulate universal human behavior, sensemaking captures a wide range of human behavior within specific circumstances and proposes that in order to understand how humans make sense of the world, we should focus on how people selectively see and construct the world.[30] Sensemaking can be both deliberate and unintentional, but at its core, it emphasizes the way in which communication enables people to frame problems and reach solutions.[31] Because sensemaking emphasizes the role communication plays in human decisions, and the manner by which communication shapes people's understanding of the world, it seems a practical model that can help further explain the importance of oral argument.[32] While Johnson may not have chosen a practical model of decision making, his reliance on only one model of human decision making leaves his scholarship vulnerable to inquiries of more accepted and verifiable forms of decision making.

Fifth, the ambiguous nature of the strategic actor model prevents a clear articulation of behavioral expectations in humans, potentially subsuming all human behavior and therefore capable of explaining none.[33] Sixth, and ironically but perhaps most importantly, Johnson's study on oral argument does not consider the dynamic role communication plays in the environment of oral arguments. His understanding of communication depends upon the eclipsed transmission model of communication in which interaction occurs between two actors who use speech solely to transmit information to one another. Johnson fails to consider the rhetorical nature of a Justice asking questions or making statements to influence his or her colleagues. He ignores the tone of Justices' statements and questions, which may reveal more about a statement's purpose than any other quality. Finally, Johnson's study also fails to consider that each case presents unique situations and scenarios. Indeed the Supreme Court rarely grants certiorari on clear issues on which the Court has already ruled, and while cases may fall into similar legal categories (death penalty, abortion, freedom of speech, habeas corpus, and so on), each case often presents unique circumstances and contains issues that may evoke different communicative interactional responses among Justices.[34]

29 *See* Weick, *Sensemaking in Organizations*, *supra* n. 28, at 83–105 (discussing occasions for sensemaking).

30 *Id*. at 4 (discussing the concept of sensemaking).

31 *Id*.

32 *See supra* n. 28 and accompanying text.

33 For a discussion of limitations of the strategic actor model, see Segal & Spaeth, *The Attitudinal Model Revisited*, *supra* n. 10, at 97–110.

34 While my criticisms of Johnson's research are numerous, the criticisms derive largely from differences between fields of study. Science values generalizable findings that contribute to universal knowledge. Areas of the humanities,

Johnson's research suggests that the importance of oral arguments lies in the opportunity for Justices to gather information that better informs their decisions, but he overlooks evaluating how Justices could be influenced by their approach to gathering information. Johnson's strategic actor model suggests that we should observe relatively balanced behavior in the manner in which a Justice approaches oral argument to gather information. In order for a Justice to make the best possible decision, he or she must be equally well informed and must gather information from both sides in a balanced approach. If Justices were seeking to make the best possible decision, as Johnson claims, then it seems likely that they would question counselors equally. However, Johnson's study ignores micro individual interactions between lawyers and Justices and emphasizes strategic decision making on the larger macro level in which oral arguments are only one key component. Johnson's study fails to consider how communicative interaction within oral argument could impact how Justices gather information and hence behave in contrast to the strategic actor model. This study attempts to improve upon Johnson's research on oral arguments by accounting for Justices' communicative interaction through an examination of the oral argument in *Morse v. Frederick*[35] in order to understand the Justices' behavior on the micro individual level.

II. Studying the Case of "Bong Hits 4 Jesus" with a Mixture of Unusual Methods

Morse v. *Frederick* was a highly publicized 2007 case in which a student, Joseph Frederick, claimed First Amendment protection for his sign that read "Bong Hits 4 Jesus."[36] The student unfurled his banner across the street from where his fellow high school students were gathering to watch the passing of the Olympic torch.[37] Principal Deborah Morse believed the sign promoted the use of illegal drugs and directed Frederick to take down the sign. When Frederick refused to take the sign down, Morse confiscated the sign and later suspended him.[38] Frederick appealed the suspension to the school's superintendent, who upheld his suspension.[39] In 2007 the Supreme Court handed down a 5-4 ruling in favor of Morse, determining that schools have an interest in safeguarding students from

such as communication, may foreground the importance of limited uniquely situated knowledge. Johnson's research broadly sheds new understandings upon a disregarded area of inquiry. I hope to expand upon his findings, rather than dismiss them, by narrowly focusing upon individual interaction.

35 551 U.S. 393 (2007).

36 *Id*. at 396.

37 *Id*. at 397.

38 *Id*. at 398–99.

39 *Id*. at 399.

speech that can be reasonably interpreted to encourage illegal drug use.[40] Kenneth Starr and Edwin Kneedler (Deputy Solicitor General) represented Deborah Morse, and Douglas Mertz represented Joseph Frederick.[41] Topically, the case provides an interesting and controversial issue of First Amendment rights from which to gauge Justices' behavior. Oral argument in the case was vigorous and nearly all the Justices were involved in questioning at some stage.

The following study examines oral argument at the micro or rhetorical discursive level by studying the communicative interaction between Justices and lawyers to better understand how judicial interaction influences information gathering and argument development. In order to evaluate judicial interaction within oral arguments, I analyzed the oral arguments in *Morse v. Frederick* by posing the following questions to consider judicial communication in a variety of areas:

> Do Justices demonstrate a substantial preference for one counsel over another in their
> 1. challenging of counsel,
> 2. permitting counsel an equal opportunity to respond,
> 3. frequency at which they interrupt counsel,
> 4. assistance of counsel's arguments, and
> 5. treatment of counsel?

To evaluate the case, I obtained transcripts of oral argument from the Supreme Court website and listened to oral arguments on Oyez.org.[42] In analyzing arguments, I tallied the number of instances in which Justices interrupted lawyers based upon the actual transcript as well as listening to the argument. Argument transcripts only record mid-sentence interruptions, but audio files enabled me to discern interruptions not captured in the transcript. While interruptions can reveal a more challenging rhetorical environment, understanding how frequently Justices challenged, assisted, or neutrally questioned counsel is also important in understanding rhetorical discursive interaction. To determine whether Justices equally challenged counsel, I divided Justices' statements or questions between those they made during the petitioner's and respondent's oral arguments, and then categorized statements or questions based upon whether they challenged or assisted the lawyer's argument. I also listened to the tone of their voice for any sense of hostility

40 *Id*. at 408.

41 *Id*. at 395.

42 *Morse v. Frederick*, U.S. Supreme Court Case Summary & Oral Argument, http://www. http://www.oyez.org/cases/2000–2009/2006/2006_06_278 (accessed Apr. 18, 2010).

or sarcasm. This tally enabled me to determine how commonly Justices supported or challenged counsel.[43] By achieving a more nuanced understanding of Justices' statements, we can better understand Justices' rhetorical discursive interaction. Finally, in order to determine equal speaking time, I timed speaking moments for all participants in oral argument. I did not include moments in which a Justice or lawyer was forced to repeat a statement or question. Quantitative recordings provide an efficient means of capturing iterations without providing readers with a list of assisting or challenging statements made by the Justices. Qualitative analysis complements quantitative findings by providing a more transparent examination of the Justices' treatment of counsel.

Using a qualitative approach to understand whether Justices showed preference for one counsel over another, I compared whether or not Justices assisted counselors equally, by providing them with frames or arguments that strengthened their position. I also compared whether Justices equally ridiculed or denigrated counselors to determine if Justices treated counselors preferentially.

Lastly, my analysis has been informed by my firsthand observations of nearly fifty oral arguments before the Supreme Court, interviews with top advocates who regularly argue before the Court, and a discussion about oral argument with Associate Justice Stephen Breyer. Witnessing oral argument and learning about the physical behavior and rhetorical discursive interaction of Justices provided a level of understanding which more fully informed my reading of the transcript from *Morse v. Frederick*. My experience at the Court forced me to consider quantitative and qualitative approaches that could capture the dynamic interactions occurring within oral argument. Observation of physical behavior and rhetorical interaction at the Court revealed the displeasure Justices feel when their line of questioning has been interrupted. At times, Justices would lean forward to ask a question and, before uttering a remark, another Justice would speak first and shift the course of inquiry. Justices appeared to be irritated by the rhetorical interaction of other Justices, and I could not help but wonder how many Justices still held questions they wanted to ask, or how many questions were never answered because of another Justice's interruption.

43 I deemed challenging statements/questions to be those that questioned the argument or proposed a hypothetical that tested the counsel's argument (e.g. "That doesn't make any sense to me. Does it depend on his intent, whether or not he intended to be truant that afternoon?"). *See* Official Transcript of Oral Argument, *Morse v. Frederick* 55 (Mar. 19, 2007) (available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html). I considered assisting statements/questions to be helpful to the lawyer in framing or emphasizing aspects of the argument (e.g. Scalia: "This banner was interpreted as meaning smoke pot, no?" Starr: "It was interpreted—exactly, yes."). *See id.* at 8. I recorded neutral statements/questions as those statements by Justices asking for small matters of fact, or references in the brief (e.g. "Can I ask you another record point, just so I know where to look?"). *See id*. at 46.

III. Expectations and Findings: Rhetorical Discursive Interaction in Morse v. Frederick

In considering the rhetorical discursive interactions of Justices, readers should keep in mind that the strategic actor model suggests that we should witness a balanced approach by Justices in their gathering of information. Realistically we should not expect Justices to have an identical number of questions or statements for each advocate, but we should expect to see a relatively balanced approach. My articulation of findings begins with considering quantitative data: frequency of interruptions, tally of the types of statements and questions uttered by Justices, and the speaking time frames for both Justices and lawyers. Quantitative data capture the phenomenon of rhetorical discursive interaction in ways that qualitative methods cannot, such as providing information on frequency rates and speaking times. [44] Following the quantitative data, qualitative data present a picture of the Justices' treatment of counsel. Both quantitative and qualitative findings present a comprehensive understanding of the Justices' rhetorical discursive interaction and its impact upon information gathering and argument development. As the term rhetorical discursive interaction suggests, readers should consider how the Justices' interactions influence persuasiveness and understanding. Justices' lopsided or unbalanced interactions will be referred to as "rhetorical discursive bias," but this communicative "bias" should not necessarily be equated directly with judicial bias. In the discussion section, more will be said about how unbalanced communication may reflect or even generate judicial bias.

The findings section begins with an evaluation of interruptions. Interruptions provide a basic means of understanding how Justices controlled oral arguments for both parties. If one lawyer suffered significantly fewer interruptions than the competing lawyer, then it seems likely that some Justices may be reflecting a communicative bias in their questioning and gathering of information.

Interruptions

Table 1 lists the number of interruptions generated from both transcript and audio file.

---

44 Traditional quantitative analysis cannot be applied reliably to the communicative interaction captured by quantitative frames. T-tests and Chi squares cannot be used to reveal much because each oral argument is different and we cannot assume that each case should, or will, elicit the same, or "average," level of interaction by the Justices. In addition T-tests and Chi squares prove unreliable because questioning by Justices can be lopsided with different Justices taking similar amounts of time when speaking to different counsel, thus negating any "statistical significance."

Table 1: Interruptions

Justice	Scalia	Roberts	Kennedy	Alito	Breyer	Thomas	Souter	Ginsburg	Stevens	Total
Petitioner	8	3	6	3	4	0	11	4	6	45
Respondent	19	13	9	0	11	0	3	8	0	63

Justices Scalia, Kennedy, Alito, Thomas, and Chief Justice Roberts voted in favor of the petitioner, while Justices Souter, Breyer, Ginsburg, and Stevens voted for the respondent.[45] Interestingly, some Justices questioned the counsel against whom they voted more vigorously than the counsel they ended up supporting. Justice Scalia and Chief Justice Roberts interrupted respondent's counsel significantly more than they interrupted petitioner's counsel. Justice Scalia interrupted more than twice as often in respondent's argument as he did in petitioner's argument. Likewise Chief Justice Roberts interrupted more than four times as often in respondent's argument as in petitioner's. Justice Breyer also interrupted nearly four times as often in the respondent's time as in the petitioner's. Although Justice Breyer did not join the majority, he concurred and dissented in part. At the time, Justice Breyer believed the Court "need not and should not decide this difficult First Amendment issue on the merits. Rather [he] believ[ed] that it should simply hold that qualified immunity bars the student's claim for monetary damages and say no more."[46] In effect, Justice Breyer joined the majority in ruling against Joseph Frederick's right to collect monetary damages. Chief Justice Roberts and Justices Scalia and Breyer's rhetorical discursive interaction reflects a clear communicative bias and potential judicial bias in their approach to questioning, given their taxing interruptions of respondent's counsel versus their minor involvement in petitioner's argument. In contrast with the majority's opinion but reflective of biased communicative interaction, Justices Souter and Stevens were much more active in petitioner's argument than they were in respondent's. Justices Kennedy, Alito, and Ginsburg's interaction reflect less of a rhetorical discursive bias.

The number of interruptions only provides a partial sense of understanding Justices' rhetorical discursive interaction and fails to provide a more nuanced understanding of why Justices interrupted. Yet this table does reveal the disparity with which Justices can treat opposing counsel. Based on interruptions in oral argument, the Justices do not seem to be interacting equally with counsel, indicating a potential for rhetorical

45 *Morse v. Frederick*, 551 U.S. at 395.

46 *Id*. at 425.

discursive bias. This table coupled with the next provides a better understanding of how and why Justices may have interrupted lawyers.

Statements

The statements Justices make allows us to better understand the purpose of their interruptions, but it also provides a means of learning how Justices may have challenged or supported each counsel.

Table 2 lists the number of challenging (C/), assisting (A/), or neutral (N/) statements or questions posed to each counsel by the Justices.

Table 2: Statements

Petitioner's Argument

Justice	Scalia	Roberts	Kennedy	Alito	Breyer	Thomas	Souter	Ginsburg	Stevens
C/Pet.	1	2	7	2	5	0	9	6	5
A/Pet.	7	1	0	0	0	0	0	0	0
N/Pet.	0	0	3	1	0	0	3	0	2
Total	8	3	10	3	5	0	12	6	7

Respondent's Argument

Justice	Scalia	Roberts	Kennedy	Alito	Breyer	Thomas	Souter	Ginsburg	Stevens
C/Resp.	28	14	10	0	9	0	4	5	0
A/Resp.	0	0	0	0	0	0	0	2	0
N/Resp.	0	1	0	0	10	0	0	2	0
Total	28	15	10	0	19	0	4	9	0

Table 2 provides a better understanding of the Justices' rhetorical discursive interaction because it breaks down how Justices challenged, assisted, or neutrally posited questions for counsel. In conjunction with Table 1, the data reveal that Justice Scalia kindly assisted the petitioner's counsel seven times, while heavily challenging the respondent. Chief Justice Roberts appeared to minimally assist the petitioner's counsel, but also strongly challenged the respondent's counsel. Although in Table 1, Justice Breyer appears to overly interrupt the respondent's counsel, this table clarifies that his interruptions were most likely due to neutral brief-oriented questions or statements in which he inquired about where to read various affidavits in the brief. Justices Souter and Stevens both questioned the petitioner's counsel more stringently than the respondent's counsel. Table 2 further indicates a presence of rhetorical discursive bias in the Justices' interactions.

Speaking Time

Speaking time is an important component because lawyers only receive thirty minutes for their oral arguments, and if a Justice dominates the speaking time of a lawyer, then it can substantially limit what a lawyer can communicate about his or her case.

Petitioner

Table 3 displays petitioner's oral argument including rebuttal time. Total speaking time allotted was 30 minutes 46 seconds.[47]

TABLE 3: Petitioner's Argument

Speaker	Starr	Kneedler	Scalia	Roberts	Kennedy	Alito	Breyer	Thomas	Souter	Ginsburg	Stevens
Seconds	572	321	82	79	88	43	96	0	284	145	51

Total Petitioner = 893 (14 minutes 53 seconds) Justices = 868 (14 minutes 28 seconds)

Respondent

Table 4 displays respondent's oral argument. Total speaking time allotted was 30 minutes 16 seconds.

TABLE 4: Respondent's Argument

Speaker	Mertz	Scalia	Roberts	Kennedy	Alito	Breyer	Thomas	Souter	Ginsburg	Stevens
Seconds	674	289	197	58	0	308	0	101	84	0

Total Respondent = 674 (11 minutes 14 seconds) Justices = 1037 (17minutes 17 seconds)

A comparison between Tables 3 and 4 reveals a substantial difference in the amount of speaking time afforded to each counsel. Oddly, during respondent's argument, Justices controlled more speaking time than the actual lawyer, and they presented an obvious rhetorical advantage to the petitioner's counsel by allowing extra time for petitioner's counsel to clarify and advance arguments. Petitioner's counsel presented for three minutes and thirty-nine seconds longer than the respondent, over a 10% time advantage. Justices largely controlled the three-minute time difference in their questioning. Justice Scalia and Chief Justice Roberts engaged in questioning over five minutes longer in respondent's argument

47 "Allotted" speaking time varies from "actual" because of time elapsed resulting from pauses in statements, or time spent in referencing information for the Justices.

than in petitioner's. Among Justices Breyer, Scalia, and Chief Justice Roberts, the three controlled over thirteen minutes and accounted for nearly 77% of Justices' speaking time during respondent's oral argument. During both petitioner's and respondent's oral arguments, these three Justices accounted for over 55% of Justices' entire speaking time; this third of the Justices clearly dominated the time accorded to the other two-thirds.

For those Justices who both participated in oral arguments and voted against the respondent (Scalia, Roberts, Kennedy, Breyer), these Justices controlled 82% of the Justices' speaking time during respondent's oral argument. Likewise those Justices who voted against the petitioner (Souter, Ginsburg, Stevens, and Breyer (since he concurred and dissented in part)) controlled over 66% of Justices' speaking time during petitioner's oral argument; without Justice Breyer the trio still controlled over 55% of Justices' speaking time. Why do Justices who end up voting against a counsel spend the most time arguing with that counsel?

One would expect to see a clear rhetorical discursive bias in judicial interaction towards a counsel whom Justices support rather than with whom they disagree. Justices seem to actively refute and undermine the argument that threatens the position with which they most identify, as if they have a "champion" whom they want to win the case. Justice Scalia assisted the petitioner's lawyers seven times in making their argument, and attacked the respondent's lawyer twenty-eight times. Chief Justice Roberts followed a similar pattern of interaction. Although he did not assist the petitioner's lawyers, except in one instance, he only challenged the petitioner's lawyers twice, and he heavily attacked the respondent's lawyer fourteen times, taking up over three minutes of speaking time.

The amount of time that Justices afford an advocate to articulate a complex argument is a significant advantage. The more time speakers have to put forth an argument, then the clearer and more persuasive their messages may become. Thirty minutes is already an exceedingly difficult timeframe in which a lawyer must present arguments and answer questions, but if each response is limited by Justices' interruptions, then the task grows even more Sisyphean.

Lawyer's Speaking Timeframes

Table 5 displays the number of speaking instances in which lawyers were able to speak for a certain timeframe.

Table 5: Speaking Timeframes

Seconds	Petitioner	Respondent
1–10	27	57
11–20	18	15
21–30	7	3
31–40	6	3
41–50	3	0
50+	1	0

Given the difference in speaking times Justices provided each counsel, we should not expect similar numbers, yet the disparities in speaking timeframes are substantial. If Justices' interruptions limit the timeframe of a response, then lawyers lack the time to appropriately respond to questions, or lack the time to articulate the intricacies of an idea. While it is true that lawyers can ramble in their explanations and Justices should step in to redirect lawyers if necessary, in this case, the respondent's counsel was forced to make fifty-seven statements in ten seconds or less, meaning 73% of the lawyer's statements were limited to responses in ten seconds or less. In contrast, the petitioner's lawyers made twenty-seven or 44% of their statements in ten seconds or less, and they were provided with other opportunities to present complex responses to Justices, opportunities which were withheld from the respondent.

Quantitative Summary

A summary of quantitative findings suggests that Justices' rhetorical discursive interactions may reveal preferential treatment for counsel. In general, the respondent's counsel faced significantly more questions and a much more aggressive style of questioning than did the opposing counsel. The respondent's counsel was also interrupted more frequently and his response time was significantly more limited than the petitioner's. The petitioner's attorneys faced more stringent questioning by those Justices who voted against them as well, but not to the degree in which the respondent's counsel was questioned. Furthermore, Justices Kennedy, Alito, and Ginsburg all maintained relatively balanced questioning and did not reflect a significant bias in their rhetorical discourse. Lastly, Justices did assist one counsel more than the other, but Justice Scalia was the only Justice who significantly and disproportionately assisted one counsel more than another. It is important to remember, however, that any assistance from a Supreme Court Justice can be a substantial advantage for one's case because a lawyer then has an advocate who carries legal and social authority that can defend and advance an argument for him or her.

Qualitative Findings

While the quantitative data enable us to answer the research areas abstractly, qualitative analysis provides the opportunity to reveal the level of respect or disrespect Justices show towards counsel. In this case, qualitative data confirm that Justices were less concerned with gathering information and exploring all possible arguments through fair interactions with counsel. This section provides further evidence of rhetorical discursive bias in Justices' interactions by examining how Justices assist counselors in both constructing arguments and denigrating a counselor's position within oral argument.

It seems unusual for Justices to help lawyers frame an argument or rescue them from another Justice's hypothetical situation. However, because Justices have read the case's briefs and have some intimate knowledge of their fellow Justices' inclinations, "judges may use oral argument as a form of internal advocacy. They may stake out tentative positions in advance of the decision conference" to persuade their colleagues of certain positions.[48] In order to generate favor for their own positions, Justices may help the lawyer whom they prefer to construct an argument favorable to the Justice's position. In *Morse* v. *Frederick*, Justices assisted both counsel but to disproportionate degrees. For example, Justice Scalia helped Mr. Starr avoid an unfavorable hypothetical advanced by Justice Breyer:

> **Justice Scalia:** So you want to get away from a hypothetical then. I don't know why you try to defend a hypothetical that involves a banner that says amend the marijuana laws. That's not this case as you see it, is it?
>
> **Mr. Starr:** Well it's certainly not this case, but—
>
> **Justice Scalia:** This banner was interpreted as meaning smoke pot, no?
>
> **Mr. Starr:** It was interpreted—exactly, yes . . . .[49]

Justice Scalia not only presents Mr. Starr with an escape from Justice Breyer's unfavorable hypothetical, but he also assists Mr. Starr in framing his argument around "a banner that was interpreted as meaning smoke pot." Justice Scalia narrows the realm of judicial inquiry by establishing early on in Mr. Starr's argument that Frederick's banner advocated drug use. Justice Scalia assists Mr. Starr with his argument again when he redirects Justice Kennedy's inquiry:

48 Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 32 (2d ed., NITA 2003).

49 Official Transcript of Oral Argument, *supra* n. 43, at 8.

> **Justice Scalia:** Why do we have to get into the question of what the school board's policy is and what things they can make its policy? Surely it can be the—it must be the policy of any school to discourage the breaking of the law. I mean suppose this banner had said kill somebody, and there was no explicit regulation of the school that said you should not, you should not foster murder. Wouldn't that be suppressible?
>
> **Mr. Starr:** Of course. That is not—
>
> **Justice Scalia:** Of course it would, so—
>
> **Mr. Starr:** The answer is yes.
>
> **Justice Scalia:** Why can't we decide this case on that narrow enough ground, that any school whether it has expressed the policy or not, can suppress speech that advocates violation of the law?
>
> **Mr. Starr:** I think it can . . . .[50]

Justice Scalia again provides a favorable situation with which Mr. Starr can simply agree. Justice Scalia's distillation and clarification of the case provides a compelling argument for Mr. Starr, and Justice Scalia's comments could easily have presented the case in such a way as to agree with or influence the commitments of other Justices. These two examples represent four out of the eight speaking turns taken by Justice Scalia in the petitioner's portion of oral argument, and they clearly benefitted Mr. Starr's argument and the standing of the petitioner's position. As we shall see later, Justice Scalia provided no similar assistance to Mr. Mertz and even ridiculed his position.

As Justice Scalia provided significant assistance to Mr. Starr, so too did Justice Ginsburg aid Mr. Mertz in the framing of his argument, though not to the same degree as Justice Scalia. Justice Ginsburg interrupts one of Justice Scalia's many questions, but instead of redirecting her inquiry as Justice Scalia had done in the previous two examples, she clarifies Justice Scalia's line of questioning:

> **Justice Ginsburg:** But couldn't the school, couldn't the school board have a time, place, or manner regulation that says you're not going to use the halls to proselytize your cause, whatever it may be?
>
> **Mr. Mertz:** I believe that's correct.
>
> **Justice Ginsburg:** You could have reasonable rules of decorum for what goes on inside the school building.
>
> **Mr. Mertz:** Right.[51]

50 *Id.* at 12.

51 *Id.* at 40–41.

Justice Ginsburg's questioning assists Mr. Mertz in making his case, but her assistance should not be considered a sign of favoring his position, because she later ridicules one of his arguments, stating "I couldn't understand that somehow you got mileage out of his being truant that morning?"[52] Although Justice Ginsburg assists Mr. Mertz in framing his argument, her action should probably be understood as an act of clarification rather than preferential treatment.

Thus far Justices have helped both counsel, although to varying degrees, but when coupled with the treatment of both counsel a new picture begins to develop. Justices disparage the arguments of petitioner's counselors only once when Justice Alito tells Mr. Kneedler, "I find that a very, a very disturbing argument . . . ."[53] Justice Alito's response to Mr. Kneedler's argument suggests that he disagrees with Mr. Kneedler's position, but this is the only instance in which the Justices critique the petitioner's argument.

Conversely related to the experience of the petitioner's counsel, Justices heavily ridicule and denigrate Mr. Mertz's arguments, at times even laughing at his position. Following Mr. Mertz's opening statements, in which Mr. Mertz claims "this case is about free speech. This is not a case about drugs," Chief Justice Roberts sets the tone for Mr. Mertz's oral arguments stating: "It's a case about money. Your client wants money from the principal personally for her actions in this case."[54] Chief Justice Roberts aggressively reframes Mr. Mertz's argument in an adversarial manner suggesting Frederick's true motivation is greed. Of further consequence to Chief Justice Roberts is a personal concern that "principals and teachers around the country have to fear that they're going to have to pay out of their personal pocket whenever they take actions pursuant to established board policies."[55] Chief Justice Robert's comments immediately frame Mr. Mertz's argument in an unfavorable light, by which Mr. Mertz must now defend his client's position from the greedy and socially dangerous argument Chief Justice Roberts advanced. Chief Justice Roberts forces respondent's counsel into a defensive position before he can even begin to articulate his opening arguments. Chief Justice Roberts clearly takes exception to Mr. Mertz's case and appears to approach the case with a clear interactional bias against respondent's counsel. While Chief Justice Roberts's questioning is obviously value laden, his approach seems tame compared to Justice Scalia's approach. Justice Scalia aggressively questions Mr. Mertz, at times preventing him from responding:

52 *Id.* at 51.

53 *Id.* at 20.

54 *Id.* at 29.

55 *Id.* at 30.

> **Justice Scalia:** Nonviolent crimes are okay, it's only violent crimes that you can't, you cannot promote, right? Right?
>
> **Mr. Mertz:** I think there is a—
>
> **Justice Scalia:** "Extortion is Profitable," that's okay?
>
> **Mr. Mertz:** Well—
>
> **Justice Scalia:** This is a very, very, with all due respect, ridiculous line. . . .[56]

To claim "with all due respect" and then state Mr. Mertz is advancing a "ridiculous line" is to use sarcasm to demean Mr. Mertz. Justice Scalia not only aggressively challenges Mr. Mertz to relent to his position by repeating "right? Right?," but he prevents Mr. Mertz from clarifying or defending his position by not allowing him to respond and dismissing his argument as a "ridiculous line."

Later Justice Scalia joins in laughter prompted by a sarcastic statement made by Justice Kennedy, and then perpetuates the laughter by stating "because you're both a truant and a disrupter, you get off. (laughter)./ Had you just been a disrupter, tough luck. (laughter)."[57] Justice Scalia's sarcastic comments denigrate and ridicule Mr. Mertz's position, and Justice Scalia's comments, more than twenty-eight of them, seem to substantially undermine Mr. Mertz's ability to generate a successful argument, or even advance a reasonable position. Justice Scalia's rhetorical discursive interaction heavily reflects a clear communicative and likely judicial bias against respondent's counsel. His comments account for almost a third of the Justices' comments, and he appears as an advocate of the petitioner, attacking and attempting to overturn Mr. Mertz's position.

Chief Justice Roberts and Justice Scalia are not the only Justices who engage in ridiculing Mr. Mertz's position. The Justices appear to encourage and play off of each other's behavior. In one instance, Chief Justice Roberts asks a question in response to Mr. Mertz's assertion that Principal Morse had working knowledge of free speech cases related to schools:

> **Chief Justice Roberts:** And so it should be perfectly clear to her exactly what she could and couldn't do.
>
> **Mr. Mertz:** Yes.
>
> **Justice Scalia:** As it is to us right? (laughter)

56 *Id.* at 35.

57 *Id.* at 53.

> **Justice Souter:** I mean, we have had a debate here for going on 50 minutes about what Tinker means, about the proper characterization of the behavior, the non-speech behavior . . . . We've been debating this in this courtroom for going on an hour, and it seems to me however . . . you come out, there is reasonable debate.[58]

Missing from oral argument transcripts is the tone of each Justice. In audio files, all three Justices adopt a sarcastic tone when questioning Mr. Mertz, which again undermines any reasonable response he could provide. Justice Scalia's laughter would only be appropriate in an environment of sarcastic questioning, and his laughter only further denigrates Mr. Mertz's position, rendering a compelling retort impossible. Justice Kennedy joins the other Justices in belittling Mr. Mertz's argument by framing his position in a ridiculous light:

> **Justice Kennedy:** So under your view, if the principal sees something wrong in the crowd across the street, had to come up and say now, how many of you here are truants . . . I can't discipline you because you're a truant, you can go ahead and throw the bottle (laughter).[59]

Justice Kennedy's hypothetical ridicules Mr. Mertz's line of questioning by arguing *ad absurdum*. This absurd argument would clearly not be a position a litigant would adhere to, nor does it apply to a free speech case. Justice Kennedy's hypothetical seems to be designed to provoke laughter that would undermine Mr. Mertz's argument and eliminate his ability to provide a persuasive response.[60] In general the Justices appear more engaged in attacking Mr. Mertz than listening to his arguments.

IV. Discussing the Strategic Actors and Sensemakers

This article sought to open inquiry into Justices' rhetorical discursive interaction at oral argument and to consider the scholarly and social repercussions of this interaction. In answer to this article's driving research questions, quantitative and qualitative information has revealed that some Justices reflect a rhetorical discursive bias through communicative interactions in their (1) challenge of counsel, (2) permitting

58 *Id.* at 49–50.

59 *Id.* at 52–53.

60 Justice Kennedy's participation in the ridicule of Mr. Mertz is also significant because of his swing vote position. The disparagement of Mr. Mertz by Chief Justice Roberts and Justice Scalia may have also encouraged Justice Kennedy to join in the game, potentially influencing his consideration of the case. At the very least, Justice Kennedy fails to fairly consider the case, and has likely impacted his own judgment by joining in the ridicule of a counselor.

counsel an equal opportunity to respond, (3) the frequency at which they interrupt counsel, (4) their assistance of counsel's arguments, and (5) their treatment of counsel. But we have yet to consider the scholarly and social repercussions of a Justice's biased rhetorical discourse.

In the scholarly realm of political scientists and communication scholars, biased rhetorical discursive interaction dramatically alters how prior models have explained the ways in which Justices should act. The strategic actor is the primary model for considering Supreme Court interaction both in oral argument and outside of it.[61] Closely related to the rational actor, under the strategic actor model, Justices should gather as much information as possible in order to find the best possible solution in accordance with their preferences. The strategic actor model suggests a relatively even process of information gathering to reach the best possible decision; biased rhetorical discursive interaction, on the other hand, offers an alternative understanding that opposes the strategic actor model, informing a new dimension of Justices' communication that aligns more closely with sensemaking.[62]

Traditionally, we understand a Justice to determine the law, "not according to his own private judgment, but according to the known laws and customs of the land"; "the judge's techniques were socially neutral, his private views irrelevant; judging was more like finding than making."[63] However, instead of approaching a case with objective and socially neutral views, it seems more reasonable that Justices already have a personal position regarding legal and social issues. Their ages and experiences have exposed the Justices to a diversity of arguments from which they have been able to shape and temper their views of the world. In specific cases, Justices have already become familiar with the case and its arguments through the lawyers' briefs and amicus curiae, fostering a bias primed by arguments and information in the briefs. Justices likely approach oral argument with both their historical bias in tow as well as their bias regarding the case at hand.[64]

Previous Justices have given evidence of their biased perspectives when approaching oral argument. Justice Ginsburg notes that "I have seen few victories snatched at oral argument from a total defeat the judges had

61 *See* Johnson, *supra* n. 9, at 4–5.

62 As stated above, not all Justices demonstrate a communicative bias in their rhetorical discourse, and for those Justices who do not demonstrate a communicative bias, perhaps the strategic actor is a reasonable explanation for these moderate Justices. But those Justices who act strategically may still be hindered in their ability to gather information by communicatively biased Justices.

63 *See* Segal & Spaeth, *The Attitudinal Model Revisited*, *supra* n. 10, at 87.

64 In using the term "bias," I am referring to a hunch or leaning, as well as a solid conclusion. Justices will likely have a position they are leaning towards, and they may also have a primary party in mind who should win the case.

anticipated on the basis of briefs."[65] Justice Ginsburg's statement emphasizes the nature by which Justices approach questioning. Their readings of the brief have already influenced a particular decision, by which they are unlikely to change their minds. Chief Justice Rehnquist has also commented that "in a significant minority of cases in which I have heard oral argument, I have left the bench feeling differently than I did when I came on the bench . . . . [T]he change is seldom a full one-hundred and eighty degree swing."[66] Chief Justice Rehnquist's statement accords with Justice Ginsburg's as he suggests that oral arguments do not typically serve to change minds, and he calls attention to the existence of Justices' entrenched views as they sit for oral arguments. Even in the 19th Century, Chief Justice Marshall held a cynical view of oral argument when he said that it requires "the ability to look a lawyer straight in the eyes for two hours and not hear a damned word."[67] Chief Justice Marshall's frightening view of oral argument highlights the potential irrelevancy it may have if Justices do not desire to gather further information. The previous statements from the Justices do not reflect those of strategic actors, but rather biased Justices. Perhaps a new model of behavioral decision making could be applied to our current rhetorical discursive bias to help scholars understand how and why Justices respond prejudicially.

Communication theorist Karl Weick has spent a significant amount of time examining and articulating how humans make decisions through a process he calls "sensemaking."[68] His theory of sensemaking stands in opposition to the rational view of the strategic actor. Weick argues that humans more frequently rely on non-rational approaches to decision making than they implement the traditional rational actor methods. Most human behaviorists now focus on how humans primarily rely upon non-rational approaches to decision making, such as sensemaking, to make their everyday life decisions.[69] The process of decision making is complex and may contain elements of both the strategic actor model and sense-making. A Justice may consider possible actions, but the consideration of potential actions may be limited by the Justice's values, and even the Justice's final decision may be directly related to personal values. Weick's

65 David Frederick, *Supreme Court and Oral Appellate Advocacy* 4 (West 2003).

66 William H. Rehnquist, *The Supreme Court* 243–44 (Alfred A. Knopf 2001).

67 Frederick, *supra* n. 65, at 3.

68 *See generally* Weick, *Sensemaking in Organizations*, *supra* n. 28; Weick, *Making Sense of the Organization*, *supra* n. 28 (both explaining and applying sensemaking).

69 *See e.g.* Jeffrey Salanick & Gerald Pfeffer, *A Social Information Processing Approach to Job Attitudes and Task Design*, 23 Admin. Sci. Q. 224 (1978); Gareth Morgan, Peter J. Frost & Louis R. Pondy, *Organizational Symbolism*, in *Organizational Symbolism* 3–35 (Louis R. Pondy, Peter J. Frost, Gareth Morgan & Thomas C. Dandridge eds., JAI Press 1983); Dmitri Shalin, *Pragmatism and Social Interaction*, 51 Am. Sociological Rev. 9 (1986); and sources cited in *supra* n. 28.

sensemaking suggests that humans use cognitive maps or basic assumptions to "make sense of things by seeing a world on which they have already imposed what they believe," which in turn reassures and protects a human's understanding of the world.[70]

Under the theory of sensemaking, commitments guide and shape how an actor interprets events and "constrain the meanings that people impose on streams of experience."[71] Individuals using sensemaking will not weigh all possible options to gain a better understanding but will rely on preexisting commitments to guide their options.[72] It is important to emphasize that human actors employ sensemaking to constrain possible solutions, and impose their own perspectives to make sense of a situation.[73] At the Supreme Court this type of behavior could have dramatic consequences on the manner in which Justices understand a case and make their decisions.

A sensemaking Justice will not listen to or weigh all potential arguments, not only because time limits a Justice's ability to explore issues in oral argument, but also because the Justices already hold positions formed by decades of legal practice. Through sensemaking, personal commitments and prior experience also lead them to a preconceived solution, a hunch, which may constrain an exploration of other possible options; thus sensemaking serves as a more timely and efficient process, but a flawed process of decision making. Cognitively relying on commitments simplifies numerous possibilities and reduces choices to those which best align with a Justice's commitments, thereby minimizing an argument's complexity and limiting the confusion caused by multiple possibilities; however, commitments also cause the Justices to ignore other potentially viable options, a dangerous problem for any decision-making entity. Commitments can be a valuable source for Justices' decision making, because by relying on commitments, Justices are able to reduce the complexity of an argument, the time spent on determining a solution, and the confusion of multiple possibilities, but as a cognitive shortcut, commitments reduce the consideration Justices give to a case.

Reducing the number of possible solutions to a problem, or what Weick calls "equivocality," allows actors to "introduce stability into an equivocal flow of events."[74] Limiting the complexity and equivocality of potential arguments allows Justices to simplify their decision-making process; Justices' commitments "marshal forces that destroy the plausibility of alternatives and remove their ability to inhibit action," elevating

70 Weick, *Sensemaking in Organizations*, *supra* n. 28, at 15.

71 Weick, *Making Sense of the Organization*, *supra* n. 28, at 28.

72 *See id.*

73 *Id.*

74 *Id.* at 15.

preferences and eliminating obstacles.[75] As a site of significant debate, oral argument provides Justices with the opportunity to reinforce or confirm their commitments. Weick's sensemaking suggests that Justices use commitments to limit their exploration, paying "more attention to the alternatives they eventually reject," much like an attack on a counsel who opposes a Justice's preferred position.[76]

As this article has revealed, some Justices did attack counselors who opposed their commitments, and they also supported the counselor with whom their commitments most nearly aligned. This bias may have developed through the parties' briefs, amicus curiae briefs, or previous historically shaped views concerning the issues. Already familiar with the case's arguments, Justices likely enter oral argument with preconceptions and prejudgments of how they will rule in the case. A Justice serving as a strategic actor would either attempt to set aside personal convictions to weigh all arguments and enter oral argument with the desire to test all possibilities, or the strategic Justice may have a tentative judgment in mind and then test his or her suspicions on both counsel.

In contrast, the sensemaking Justice would have a judgment in mind that he or she would seek support for through the correlating counselor. The sensemaking Justice would attack the counsel who presented an argument that opposed the Justice's commitments in order to limit equivocality or even publicly expose the flaws of the lawyer's argument. Sensemaking Justices should champion counselors who support their commitments and attack those who oppose their position. Weick notes "that once a justification begins to form, it exerts effects on subsequent action."[77] Instead of using oral argument as a place to test arguments for the best possible choice that agrees with their personal values, Justices may use oral argument to reinforce their commitments and convince themselves of the validity of their position. The action of oral argument tempers and strengthens Justices' convictions; their commitments have "created a self-fulfilling prophecy that builds confidence in the prophecy."[78] "Both the justification and the action mutually strengthen one another" so that Justices reaffirm their principles as well as the judgment they were already considering, simply by participating in oral argument.[79] Sensemaking then offers a radical new view of the influence of oral argument in which the Justices are not simply reflecting their thoughts, but are generating and reinforcing them through oral arguments. Communication does not just follow cognition, but also shapes and

75 *Id.* at 25.

76 *Id.* at 24.

77 *Id.* at 23.

78 *Id.* at 28.

79 *Id.*

influences it. In oral argument, the physical, social, and intellectual process of argument cognitively impacts a Justice's decision-making ability and thus the quality and balance of communicative interactions in oral arguments should be a primary concern to prevent a flawed process of decision making.

Justices' rhetorical discursive interactions play a significant role in the development of their opinions. After oral argument in *Morse v. Frederick,* Justices Scalia and Breyer and Chief Justice Roberts most likely left the courtroom with a firm conviction about which side should prevail. It is probable that they entered the courtroom with a view of how they would vote, but their rhetorical discursive interaction likely further entrenched and probably solidified the arguments for which they would vote. The Justices' rhetorical discursive interaction exhausted a substantial amount of time, likely preventing less active Justices from asking questions which may have helped resolve questions or issues. Regardless of the reason for their behavior, the active Justices in this case clearly impacted how other Justices were able to gather information and weigh arguments.

V. Recommendations

In assessing the behavior of biased sensemaking Justices, we should expect to see Justices heavily attacking positions they will vote against, and actively supporting, or remaining silent, on positions they support. Justices will display sensemaking behavior through communicative interactions with their colleagues and the arguing advocates. While seemingly simple in premise, a sensemaking Justice's support or challenge for a position may take the form of (1) disparities between the persistent interruptions counsel endure, (2) a large quantity of challenging or assisting statements, (3) a disparity in the time during which Justices challenge or assist advocates or the time in which Justices allow advocates an opportunity to advance arguments or address questions, (4) the respect Justices show toward arguments from both sides, and (5) the Justices' general treatment of both counsel. Lopsided communicative behavior in oral arguments (i.e., speech favorable toward one counsel and not another) may indicate the potential existence of biased sensemaking within a Justice's decision-making process. But regardless of the reason for lopsided communication, of greatest importance is the way in which a Justice's physical act of speech may influence his or her cognition, which makes the environment of oral argument a significant site where the Justices' consideration of a case may be formed and finalized.

The articulation of lopsided communicative behavior by sensemaking Justices may seem obvious to legal practitioners, but the consequence of

the Justices' behavior is of great importance. Within the scholarly realm, biased communicative behavior by sensemaking Justices overturns current models of decision making that ignore communicative interactions in oral argument. Strange as it may seem, previous scholars of oral arguments have relied on decision-making models that fail to consider the role of communication. As a theory, sensemaking foregrounds the importance of communicative interactions within oral arguments and provides scholars with an alternative model for understanding oral arguments. In addition to a scholarly contribution, sensemaking also helps highlight the potential dangers and pitfalls associated with the process of sensemaking.

Dangers of Judicial Sensemaking

Because sensemaking emphasizes the guiding role of a priori commitments, values, and emotions, it is a less than ideal form of decision making for Justices. Judges and Justices unaware of the process of sensemaking may fail to consider how preconceptions and communication about a case may influence their decision-making ability. Sensemaking Justices, through their communicative interactions, may limit the consideration of alternatives, or may negatively influence how their colleagues understand the case. Justices relying on sensemaking present a real danger to the decision-making process at the individual and group level because their communicative interactions can negatively influence both their colleagues' consideration of the case as well as the sensemaking Justice's understanding of the case.

There are a number of obvious potential problems sensemaking may create in a Justice's decision-making process: (1) before reaching a final decision, a Justice may explore both sides of an issue but his or her commitments may lead towards a decision which accords with the Justice personally rather than in strict legal terms; (2) a Justice may heavily explore and challenge a disfavored position, only to reject it later, having wasted a counsel's, and the other Justices' precious time; (3) an active sensemaking Justice may prevent counsel from effectively presenting their arguments, hampering other Justices' consideration of the case; or (4) if a Justice has already reached a final decision, he or she may seek to prove an advocate wrong who challenges the decision, and conversely he or she may champion an advocate who aligns with the position. Justices employing sensemaking in the decision-making process fail to systematically and impartially evaluate the case, allowing emotions and prior commitments to primarily shape their consideration of a case. The tentative findings in this article offer scholars, lawyers, and judges potentially valuable insight into the judicial decision-making process.

Scholars

This scholarly contribution of rhetorical discursive interaction and the possibility of sensemaking as a new model for judicial decision making offers a number of future studies that could help scholars better understand the Court. Understanding how frequently Justices invoke sensemaking, through a rhetorical discursive bias, versus approaching the case as a strategic actor would be helpful in understanding how Justices make decisions long term. Mapping Justices' rhetorical discourse may also help scholars predict how cases will turn out. Tracing Justices' rhetorical discourse would also prove intriguing as a means of determining how arguments or a line of reasoning put forth by a lawyer or Justice was either further developed or eliminated by other Justices. While this article opens a new area of inquiry in the scholarly realm, it provides new insight for lawyers and opportunities to use rhetorical discursive interaction to their advantage.

Lawyers

Recommendations for advocates are limited due to the inability to alter the perspective of a sensemaking Justice or judge. Advocates should consider that Justices are capable of acting as both sensemakers and strategic actors, and that Justices' rhetorical discourse may reveal a communicative bias and potential judicial bias either in the lawyer's favor or in the opposition's favor. In this case, Justices supported the petitioner's arguments more than they supported the respondent's, but any occasion on which an advocate receives assistance from a Justice should obviously be welcomed. However, advocates must be careful to gauge whether the Justice is actually assisting them or setting them up for failure. Identifying sensemaking behavior may inform advocates about those Justices from whom they will experience significant resistance or who are unlikely to change their minds. Advocates can avoid spending time attempting to persuade those sensemaking Justices.

Most advocates are already aware of the futility surrounding the persuasion of an antagonistic Justice, but it was common to witness advocates potentially wasting valuable time by engaging the oppositional Justice. Instead, advocates should attempt to bypass arguments from antagonistic Justices by turning to those Justices who may support their position, or referencing earlier positions Justices may have held in opinions or earlier in the argument. If an advocate faces an inaccurate hypothetical, referencing a point made by a supporting Justice may allow the lawyer to redirect focus away from the antagonizing Justice and gain standing with the supporting Justice. If the advocate can bypass the

argument or hypothetical and speak on a separate point for a handful of seconds, then it is likely that another Justice will jump in and redirect the questioning before the advocate can even properly address the Justice's hypothetical. If a Justice insists that the advocate respond to the argument or hypothetical, then the lawyer should do his or her best in addressing the issue. However, stalling or drawing out a lengthy response may cause an impatient Justice to ask a separate question, in turn redirecting the lawyer away from the challenging hypothetical or argument, proving a valuable tactic.

Managing Justices and their questioning onslaught will prove more helpful than trying to persuade the Justices of a particular position. On the other hand, if a Justice appears to require specific information, it is important to frame that information in a persuasive manner, demonstrating how that information supports the advocate's position. If the lawyer has been unable to articulate certain crucial arguments, then it is helpful to tie those arguments into a response to a specific Justice. Justices appear reluctant to interrupt another Justice's line of questioning, and connecting an argument to a particular Justice may both curry favor with that Justice and buy the advocate precious seconds to articulate a point.

Justices' frenetic questioning may also be kept at bay if an advocate uses a mapping statement to state the number of points he plans to make. Often Justices will allow lawyers to briefly state their points and allow them to finish their progression as long as it is not too lengthy; in the *Morse* case, Justices kept most responses by both counsel to within the ten-second range. Long uninterrupted statements are rare within oral argument; if allowed time to articulate lengthy positions, it could be a favorable sign for a counsel's position. Conversely, given the unusual instance of lengthy responses, it is important for advocates to reduce their arguments to terse statements they can present when appropriate. Justices often indulge lawyers who ask for a certain number of seconds to articulate their arguments or responses, and this too can be a valuable tactic to gain crucial time for a response.

Advocates should also consider the difference between how Justices and lawyers use legal language. When examining transcripts, I found that Justices often use language at the colloquial level, and use legal language only when necessary. Advocates on the other hand cannot seem to depart from legal technical language and may often get frustrated with a Justice for seemingly not understanding the technical terms they are using. Confusion by both lawyer and Justice can result from technical language. Lawyers should look to reduce their use of "legalese" and rely on technical language only when necessary or when referenced by Justices. How Justices understand and apply technical terms is crucial for them to

understand a case, and obfuscating language can force Justices to rely on their sensemaking or prefigured understanding of a case.

Finally, advocates traditionally have considered that the most important Justice is the "swing" Justice, that Justice whose ideology falls within a moderate position in the case and is not decidedly against or in support of a position.[80] Theoretically, a lawyer's argument could then swing or influence a swing Justice to vote in his or her favor, giving the winning vote on a split Court. Given the findings in this article, however, the Justice controlling the Court's rhetorical discursive interaction could be the most powerful and influential Justice in the case, because he or she controls how information and arguments develop. In *Morse*, Justices Souter, Ginsburg, Stevens and Breyer claimed the majority of time in the petitioner's oral argument. If petitioner's counsel had redirected their answers to points made earlier by Justice Scalia and Chief Justice Roberts, they may have drawn those two Justices into the argument to defend their positions later on, thus further entrenching the Justices' support and perhaps persuading other Justices.

Judges and Justices

Although making suggestions for judges and Justices may be both fruitless and dangerously presumptuous, it does seem necessary that judges and Justices recognize their preconceptions and understand how their rhetorical discursive interaction could impact a case. After all, judges and Justices largely control the rhetorical discursive interactions in the courtroom. This article's rhetorical analysis makes apparent language's constitutive nature, and correspondingly, the manner in which communication can influence a judge's or Justice's impartiality. Language's constitutive nature has long been recognized by philosophers and scholars as a means of constructing the social world around us and how we understand the world.[81] Karl Weick notes that the importance of sensemaking lies in its constitutive nature which "address[es] how the text is constructed as well as how it is read."[82] In oral argument, Justices create the text through their rhetorical discourse and their statements in turn

80 *See e.g.* Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* 262 (Random House 1998) (describing the role of the swing Justice in the 1988 Supreme Court).

81 *See* Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973); William Labov, *Language in the Inner City: Studies in the Black English Vernacular* (U. Pa. Press 1972); Dell Hymes, *"In Vain I Tried to Tell You": Essays in Native American Ethnopoetics* (U. Pa. Press 1981); Catherine Kohler Riessman, *Narrative Analysis* (Sage 1993); Dennis Mumby, *Modernism, Postmodernism, and Communication Studies: A Rereading of an Ongoing Debate*, 7 Commun. Theory 1 (1997); Nelson Phillips & Cynthia Hardy, *Discourse Analysis: Investigating Processes of Social Construction* (Sage 2002); Daniele M. Klapproth, *Narrative as Social Practice: Anglo-Western and Australian Aboriginal Oral Traditions* (Mouton de Gruyter 2004).

82 Weick, *Sensemaking in Organizations*, *supra* n. 28, at 7.

influence how other Justices experience and understand the arguments. The more Justices challenge a counselor, particularly in a lopsided oral argument such as *Morse v. Frederick*, the more they are reaffirming their own position, and the more they are influencing the opinions of other Justices.

Language "produce[s] a social reality that we experience as . . . real."[83] If a certain Justice controls the path of language through dominant questioning and aggressive interruptions, then that Justice has played a significant role in limiting and framing how other Justices understand a case. In *Morse*, Justices Scalia and Breyer and Chief Justice Roberts controlled over 75% of the oral argument. These three Justices played a profound role in how the other two-thirds of the Justices understood the case. By limiting Mr. Mertz's response, asking particular questions, challenging certain portions of an argument, and laughing at his responses, these Justices dramatically shaped not only how the other Justices understood the case, but also how the American people viewed the case. Thus it is crucial for Justices and judges to consider how their engagement in oral argument may shape the case at hand, and if a single Justice cannot control his or her dominance, then the Chief Justice should step in to limit that Justice's presence in the case.

Pragmatic Idealism?

Justices also need to be aware of their presence in oral argument, not only in consideration for how language may shape a case, but also in the purpose of their engagement and where they stand in the case. The Justices on the bench right now have all been lawyers and spent a significant portion of their lives arguing cases, but argument is a task separate from judgment. Argument entails attempting to persuade a person of a position, oftentimes by refuting certain areas of their argument. Justice Scalia and Chief Justice Roberts spend a significant amount of time refuting Mr. Mertz's arguments, but for what purpose? It seems likely that these Justices already had a decision in mind, particularly in Chief Justice Roberts' early statements framing the case as a case about money. So why would these Justices so eagerly pursue Mr. Mertz? It seems reasonable that these Justices may have been attacking Mr. Mertz's arguments to persuade other Justices to vote against the respondent, but this behavior is less in accordance with that of a judge, and more in accordance with that of an advocate or lawyer. It is certainly reasonable for the Justices to use oral argument as a time to persuade each other, or

83 Phillips & Hardy, *supra* n. 81, at 1–2.

address arguments that may not have been discussed by either party; nonetheless, Justices must interact in a measured fashion. It appears unfair and unjust for a Justice to engage in biased interaction rather than weighing and considering arguments from both parties. To prevent biased rhetorical discourse, Justices should be mindful of where they stand when entering cases, and, while participating in oral argument, Justices should consider how their views may be influencing colleagues.

Oddly, in the scholarly and legal realm, it is naïve to believe that the Justices should behave impartially. The common belief is that because Supreme Court Justices serve indefinite terms, then they may behave as they wish.[84] Political scientists and lawyers have long recognized that ideological strategy is a key role in the Supreme Court, particularly with major decisions. Books have chronicled the pervasive struggles within the Court and have questioned whether Justices should behave in such a preferential manner.[85] And yet the Supreme Court's ideal, "Equal Justice Under Law," stands emblazoned across the entrance to the Supreme Court. Chief Justice Hughes chose those words to epitomize the Supreme Court because he felt that "'Equal Justice is a time honored phrase placing a strong emphasis on impartiality,—an emphasis which it is well to retain."[86] The Supreme Court building itself is designed with symmetry and balance in mind, and symbolic marble carvings of blind justice and balanced scales pepper the walls, epitomizing impartiality. For Justices to ignore and intentionally disregard the Court's directed purpose and institutional symbolism seems potentially dangerous. Jeffrey Rosen has pointed out that "legal authority is based upon impartiality" and this authority "requires a mystique" and respect for the Court as an institution.[87] Because the Court does not have any self-enforcing powers, it relies on the will of the people, Congress, and the President to enforce its laws. To continue functioning properly with the respect of the American people, the Court relies on the integrity and quality of the Justices' decision making and their rhetorical discursive approach to oral argument.

84 *See* Segal & Spaeth, *The Attitudinal Model Revisited*, *supra* n. 10, at 430–35; Lazarus, *supra* n. 80, at 419–24; Toobin, *supra* n. 6, at 339–40.

85 *See* Lazarus, *supra* n. 80; David O'Brien, *Storm Center: The Supreme Court in American Politics* (7th ed., Norton 2005); Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon & Schuster 2005); Toobin, *supra* n. 6.

86 Fred Maroon & Suzy Maroon, *The Supreme Court of the United States* 38 (Thomasson-Grant & Lickle 1996).

87 Jeffrey Rosen, *Pinpointed*, The New Republic 47 (Dec. 10, 2007) (reviewing Clarence Thomas, *My Grandfather's Son: A Memoir* (Harper 2007) and Kevin Merida & Michael A. Fletcher, *Supreme Discomfort: The Divided Soul of Clarence Thomas* (Doubleday 2007)).

VI. Conclusion

This article revealed the Justices' rhetorical discursive interaction, and examined how Justices' interactional bias could influence other Justices' understanding of the case. From this biased interaction, scholars in political science, psychology, law, and communication may implement a new model of understanding how Justices act as sensemakers. Sensemaking proves significant to understanding judicial decision making because it emphasizes the role communication plays in the process by which humans reach a decision. Sensemaking also foregrounds the role in which a variety of commitments may cognitively influence humans' decision-making process. The dynamics between communication and cognitive commitments are complex because communication may both reflect and create individual and group commitments. Sensemaking may lead Justices to poor decision making, causing them to overlook superior arguments or more preferable outcomes.

At the individual level, sensemaking Justices may skew how other Justices understand a case, particularly within oral argument. On the group level, sensemaking Justices may attack a counsel so vigorously that they prevent advocates from capably articulating their arguments. Sensemaking also provides a behavioral model of decision making that advocates could use to manage the rhetorical discursive bias of Justices by appealing to supporters and deflecting antagonists. Interactional bias may be corrected through Justices being mindful of their own particular bias and understanding how their participation may influence other Justices. Justices should be mindful of their bias and rhetorical behavior because they must protect the integrity of the Supreme Court as an institution and maintain the trust of the American people.

This article began by considering Justice Thomas's lack of communication in oral arguments. Although Justice Thomas did not participate in this case's oral arguments, his behavior was less biased than that of his fellow Justices. In this case he provided lawyers with the opportunity to advance their arguments, and he provided his fellow Justices with the opportunity to resolve potential questions. Is Justice Thomas's behavior more agreeable and reflective of judicial principles than Justice Scalia's behavior? Critics of Justice Thomas complain that his silence in oral arguments indicates his lack of attention or indifference to the case. As an observer at oral argument, I can understand why critics see this in Justice Thomas. He regularly leans back in his chair, covering his eyes for a few minutes, or he leans forward with his hand on his forehead shielding his eyes. He also frequently turns to Justice Breyer on one side or Justice Scalia on the other and speaks without paying attention to oral arguments.

I also have observed him intensely rifling through the parties' briefs, pointing out sections to Justices Breyer and Scalia, quietly arguing legal points.[88] What critics have perceived as indifference is more likely intense reflection and careful listening. In these moments of intense listening, Justice Thomas assumes a seemingly indifferent posture, typically followed by a frenetic reaction to an advocate's argument, causing him to request materials, thumb through briefs, or argue with Justices Breyer or Scalia. During my weeks of observation, Justice Thomas's behavior has appeared to indicate careful reflection rather than bored indifference.

Top advocates often mention their appreciation for questions by the Justices, and while Justice Thomas may not represent the ideal audience for these advocates, his behavior more closely reflects how Justices should act than some of his colleagues. In noting Justice Thomas's silence, I am not suggesting his lack of questioning is the preferred method of oral arguments, but rather that his interaction in oral argument does not hinder an advocate's ability to advance an argument, or negatively influence how his colleagues understand a case. When comparing Justice Thomas's silence to the aggressive pugnacious style of Justice Scalia's biased questioning, it is easy to see which Justice has the greater potential for committing injustice. For all of Justice Thomas's silence, he does not stand in the way of justice.

In his own personal observations, Justice Thomas has pointed out that he thinks his colleagues should "ask questions. But I don't think that for judging, and for what we are doing, all those questions are necessary."[89] His comment suggests that Justices should limit their questions to those essential to the case, because "once the cases get to the Supreme Court, there are no surprises left," no new discoveries for the Court to make; as Justice Thomas puts it, "[T]his is not Perry Mason."[90] Justice Thomas recognizes that each Justice has his or her own particular approach to oral argument, some Justices "like to talk about it," other Justices "enjoy the questioning and the back and forth," and other Justices "think that if they listen deeply and hear the people who are presenting their arguments, they might hear something that's not already in several hundred pages of record."[91]

88 I have also spoken with clerks who sit behind the Justices, and they confirm that the Justices' discussions nearly always refer to legal arguments at hand.

89 Paul Bedard, Washington Whispers, *This is Not Perry Mason*, http://www.usnews.com/blogs/washington-whispers/2007/11/29/this-is-not-perry-mason.html (Nov. 11, 2007).

90 *Id.*

91 *Id.*