WAIT, LAWYERS! Don’t be run off by “Rhetoric and Discourse” in the title or by other high-sounding non-legal phrases inside, such as “theoretical and methodological perspectives,” “discourse and organizational communication,” or “rhetorical discursive interaction” that appear throughout, or because the book is not written by a lawyer, law professor, or judge.

Those who are about to put the book back on the shelf should pause and consider:
• The author examines in detail the oral argument in three highly publicized and controversial recent Supreme Court cases, one involving a high school student’s freedom of speech rights, another the death penalty for rape, and one on gun rights.
• Based on the nature, number, length, and content of the individual justices’ questions and comments to counsel, as well as the number of interruptions in each case, the author sets out his opinions and conclusions about how these are (or may be) reflected in the Court’s decision in that case.
• There are two provocative and challenging letters about current problems with oral argument and recommended improvements from the author to Chief Justice Roberts, one at the beginning and another near the end of the book. (It should be noted that the same justices sat in all three cases: Justice Samuel Alito Jr., Justice Stephen Breyer, Justice Ruth Bader Ginsburg, Justice Anthony Kennedy, Chief Justice John Roberts, Justice Antonio Scalia, Justice David Souter, Justice John Paul Stevens and Justice Clarence Thomas).

Ryan A. Malphus holds a PhD in Communications from Texas A&M University and is a litigation consultant. His first interest in the role of communication in Supreme Court argument began with the preparation of his doctoral thesis at Texas A&M. This interest continued to grow and resulted in this book. He studied countless treatises discussing Supreme Court oral argument from the fields of law, politics, psychology, and others, read many case transcripts and attended the Court to observe the arguments in a large number of cases.

In studying the writings about the Supreme Court, the author found virtually nothing on the part played by communications between the justices and counsel during oral argument. This led to his development of what he considers to be new theory or model of analysis of court oral argument, which he calls “judicial sense making.” Judicial sense making “emphasizes the role of communication in the process of judicial decision making.” Otherwise stated, any analysis of the outcome of a case should include not only the case precedents, the politics of the individual justices, the practical aspect of the decision and other factors, but should take into special account the effect of oral argument communications on the court’s opinion in the case and on the individual votes of the justices.

In Morse v. Frederick (2007) a high school student (Frederick) skipped school, positioned himself across the street from his school and displayed a large banner reading “Bong Hits 4 Jesus” in full view of a group of students gathered on school grounds to watch the passing of the Olympic torch. The school principal (Morse) directed Frederick to take down the sign because she concluded it promoted the use of illegal drugs. Upon Frederick’s refusal, the principal confiscated the sign and later suspended Frederick. He unsuccessfully appealed the suspension and later filed a suit for monetary damages for violation of his First Amendment freedom of speech rights. Frederick’s suit ultimately reached the Supreme Court and in a 5-4 decision, the Court decided for the school principal, holding that her actions were appropriate in “safeguarding students from speech that can be reasonably interpreted to encourage drug use.”

The author analyzes the justices’ questions and comments to counsel in this case to evaluate whether they indicate “a substantial preference for one
advocate over another.” Specific issues addressed are whether the particular justice’s participation challenged an advocate, permitted the advocate sufficient time to respond, was more frequent than reasonably expected, assisted the advocate, and whether the justice’s treatment of the advocate was fair.

To evaluate these measurements the author provides statistical tables showing the number of questions, interruptions, and statements of the various justices to counsel, the speaking time consumed by each justice’s participation and the amount of speaking time each advocate had to support or explain his position. Indications from these tables of a bias for or against either appellate counsel are pointed out and discussed.

In *Kennedy v. Louisiana* (2008) the Court had to decide whether the death penalty for rape of a child provided by a Louisiana statute constituted cruel and unusual punishment prohibited by the Eighth Amendment. The Court upheld (again by 5-4) that the Louisiana statute was unconstitutional.

In arriving at his examples of how behavior by a justice can hinder or assist an advocate and/or influence that justice’s decision in this case the author addresses the same issues considered in *Morse v. Frederick* and again sets out tables providing statistics. He concludes that the conduct of the various justices discussed did indeed affect the proceedings in several ways and likely contributed to how the justices reached their decisions.

In *District of Columbia v. Heller* (2008) a DC security guard, (Heller), applied for a permit for his handgun, which he wanted to keep in his home for self-defense. DC had a statute which prohibited possession of a handgun by anyone except someone in law enforcement and Heller’s application was thus denied. In determining the constitutionality of the statute, the Court had to decide whether the Second Amendment gives citizens the individual right to “keep and bear arms” apart from such a right created in order to maintain a “well-regulated militia.” The case drew national attention and Amicus Curiae briefs were filed by nearly every state. At oral argument the discussion was “vigorous” and nearly every justice participated. Once more the Court split 5-4 in deciding in favor of Heller, concluding that the Second Amendment granted American citizens the personal and individual right to possess firearms.

From a historical constitutional perspective, the author considers *Heller* a much more important case than *Morse* or *Kennedy* and analyzes its oral argument in comparison. He notes that Chief Justice Roberts’s extension of argument time to counsel was something he had not seen in his extensive research of many previous cases and comments that the quoted exchanges between the justices and counsel seemed “to indicate that the justices treated the case with greater care and attention than other cases.”

The real meat in this book is of course in the three chapters discussing the three cases (7, 8, and 9). However the chapters on the history of oral argument (Chap. 2), on whether oral argument really matters (Chap. 4), and on the purposes of oral argument from the viewpoint of both advocates and justices (Chap. 6) should be of considerable interest and add extra substance to the author’s analysis of the arguments in the three cases. Although the other chapters may have more non-legal information from the field of communications than we need to know, the author has mixed into these chapters valuable lawyer-like observations.

Your reviewer considered including in this review some of the quoted questions and comments by justices in the three cases but concluded that the reader should digest and evaluate the quotes and the author’s conclusions and opinions in the setting of the entire discussion in each case as written by the author from beginning to end.

This book is recommended to:

1. US Supreme Court justices;
2. Federal circuit court judges and state appellate court justices and judges;
3. Lawyers specializing in appellate practice in federal and/or state courts;
4. Lawyers who occasionally engage in appellate practice;
5. Lawyers who appeal their cases on their own;
6. Law professors teaching appellate court proceedings and practice; and
7. All lawyers and others in any way interested in US Supreme Court proceedings and decisions, (everyone, lawyer and non-lawyer alike, should be).

William B. Smith is a retired member of the Dickerson and Smith Law Group in Virginia Beach and a former president of the Virginia Beach Bar Association. He is a former member of the Virginia State Bar Council, chair of its Litigation Section, and chair of the Senior Lawyers Conferences.