

ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT by Timothy R. Johnson. Albany, NY: State University of New York Press, 2004. 180pp. Cloth \$35.00. ISBN: 0-7914-6103-3.

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Few scholars have found systematic evidence that oral arguments play a significant role in the decision making of the U.S. Supreme Court. Studies of the solicitor general and other experienced lawyers find significant effects from advocacy in the Court, but for the most part it seems not to play a major role in determining how policies are made by the justices. One reason, suggests Timothy Johnson, is that we have been looking in the wrong place. Instead of testing for the impact of advocacy on case outcomes or written opinions, Johnson's book argues that we should see oral argument, not as an opportunity for attorneys to influence the justices, but rather as a tool that the members of the Court can exploit in order to maximize their preferred goals. Aware of the need to build coalitions internally and to avoid confrontations with external actors, the justices strategically employ arguments to extract information, to develop legal and policy issues for conference discussion, and ultimately to help form majorities and inform their written opinions. It is a cogently argued and well-researched book that deserves serious attention from those who want to understand the role of strategic decision making on a collegial court.

Johnson begins by highlighting the difficulty that the justices have in acquiring the kinds of information that will enable them to advance their goals. Litigation, by its very nature, constrains important issues of legal policy into a two-sided argument which, though often supplemented through the amicus briefs of outside interests, reflects the narrow self-interests of the litigants. Aware of this bias, the justices will use oral arguments to force to the fore those issues that are of greatest concern to the Court, regardless of whether they are formally presented by the parties.

Relying on a sample of cases from the early 1970s through the mid-1980s, Johnson examines the briefs filed by both parties and their amici and compares their content to the issues raised by the justices during oral argument. Do the justices ask attorneys simply to clarify points that are contained within the briefs? Or do they expand beyond the briefs and ask lawyers to address new concerns? Johnson finds that the vast majority of questions that the justices raise during oral argument — fully 80% — pertain to issues that the litigants and amici have not raised. Moreover, his data show a distinctive focus to those questions: when the justices ask about issues addressed by the briefs, they concentrate heavily on the implications of their decisions on public policy; when they take up concerns not raised by the litigants, however, the justices are generally interested in the preferences and likely reactions of external actors, such as Congress or executive agencies. To help flesh out the data, the book provides numerous substantive illustrations culled from argument transcripts. The examples reveal justices who are interested in legislative intent, agency proceedings, and potential public reactions to decisions. Since the justices are forward-looking, argues Johnson, they naturally try to

gauge the consequences of their decisions. Finding that the briefs generally do not address such issues, Johnson concludes that the members of the Court must be searching for intelligence regarding how various publics will receive potential policies.

Not only are the members of Court concerned with outside pressures, they also need to worry about building winning coalitions. Here again, says Johnson, oral arguments provide an avenue for information-gathering. In one of the more clever parts of the analysis, Johnson examines the personal papers of Justice Lewis Powell and analyzes which of his colleagues' questions during oral argument most interested him. During arguments, Powell frequently took notes regarding the issues raised by his fellow justices. In which justices was Powell most interested? It turns out that, controlling for several possible alternative explanations, Powell was "more likely to note oral argument questions and comments of colleagues who [could] help him form a majority opinion" (p.67). Less interested in coming to terms with the concerns of his colleagues who anchored the ends of the ideological continuum, Powell was much more concerned with what was on the minds of those who were closer to his ideological orientations. This behavior seems to have had actual policy consequences; all else being equal, the justices of greatest concern to Powell are the very ones who, in the end, joined Powell's coalition.

By Johnson's lights, Powell was not alone in his strategic use of oral arguments. Indeed, the book documents that all of the justices in his sample raised legal and policy questions during the conference that were addressed for the first time during oral argument. By most accounts, conference discussions are not terribly extensive, but Johnson's data suggest that their brevity belies a process in which the Court begins to circulate new issues that transcend what the parties presented in their briefs and instead reflect what issues are most on the minds of the justices.

These issues eventually find their way into the Court's written opinions. Across the board, opinion writers come to terms with issues that manifest themselves only during oral arguments. Johnson employs the well-known example of *Roe v. Wade* to illustrate how an issue raised for the first time in oral argument (i.e., at what point in a pregnancy can the state prohibit abortions) can later become a part of the Court's doctrine (i.e., the trimester framework). Johnson's results show that a good many issues — especially ones relating to actors external to the Court — have their origins in oral arguments.

The book documents how opinion writers, when faced with marginal coalitions and broad disparities among the views of the majority, seem to be compelled to address new issues to satisfy diverse demands. Thus, issues raised during oral arguments find their way into the Court's opinions because of the strategic demands of satisfying fellow justices as well as key constituents outside the Court.

Taken together, the evidence that Johnson musters makes a persuasive case that oral argument is a far more critical component of decision making than we have previously believed. Whatever impact legal advocacy may have on the justices, oral argument provides the justices with an important tool with which to animate their decision making and advance their goals. As Johnson demonstrates, the justices are not a

passive audience, listening and reacting to lawyers. Instead, they use arguments as a proactive opportunity to extract the information that will later be necessary to persuade colleagues and to buttress the Court’s policies.

Part of what makes Johnson’s book so fascinating is its innovative claims about the use of oral argument. Indeed, the book views oral arguments in ways that, I suspect, few of us have previously contemplated. Perhaps for that reason, though, some of the specific hypotheses that Johnson tests seem more the result of spontaneous combustion than well-constructed theories. For instance, Johnson formally posits that “the most prevalent questions from the bench should examine policy concerns about a case” (p.25), that the justices should ask about the preferences of outside actors “at about the same rate” (p.26), and that questions about precedent and other institutional constraints should be raised, “but less frequently than they raise questions about policy and external actors’ preferences” (p.27). Elsewhere, the book postulates that “a significant proportion of the issues justices discuss during conference should emanate from oral arguments” (p.74). These expectations about the relative frequency with which various questions are addressed are not driven by some causal variable nor are they derived from any formal set of principles that would constitute a theory about decision making. Given that Johnson is mapping some fairly uncharted territory, however, these weaknesses are understandable.

That said, I should emphasize that this book is the product of painstaking efforts in data collection, coding, and analysis. Johnson has done a first-rate job of pulling together a wide range of systematic data relating to the substantive content of oral arguments, conference discussions, and written opinions, while supplementing those data with relevant anecdotes. The result is an able and interesting exploration of what Johnson rightly notes is a facet of the Court that is not well understood. (Although, unlike Johnson, I am not convinced that previous scholarship has been so universally dismissive of its importance.)

Those who are interested in understanding the strategic politics of the Court will find much of interest in Johnson’s excellent book. It sheds new light on an understudied feature of the Court and provides the kinds of insights that will surely inspire further research on how the institutional structure of the Court’s decision making affects the substance of its policies.