he wants the contradictory conclusions of his effort to be deemed as having scholarly merit.

All of which is to say that, properly understood, *Who Are We?* is a polemic and not a work of scholarship. In large measure, Huntington stipulates this in the foreword, where he writes: "The motives of patriotism and of scholarship, however, may conflict. Recognizing this problem, I attempt to engage in as detached and thorough analysis of the evidence as I can, while warning the reader that my selection and presentation of that evidence may well be influenced by my patriotic desire to find meaning and virtue in America's past and in its possible future" (p. xvii). A patriot, Huntington appears to be saying, should be forgiven for the selective examination of data and preordained conclusions—in this instance, American virtue. A scholar, I would suggest, is not entitled to such forgiveness.

One should not underestimate the currency that highly visible books, such as this one, attain in political circles. The example of Huntington's last book, *The Clash of Civilizations,* and its frequent citation during the current international conflicts in which the United States today finds itself embroiled are, fittingly, the best example. When polemic is presented as scholarship, it bestows legitimacy on the claims—supported or unsupported by the evidence marshaled—that would not have been afforded works more clearly journalistic or ideological on their face. The claims of this tome, unchallenged in a scholarly manner, will be presumed by ideologues and decision makers alike as the product of social science inquiry. They are not.

Oral Arguments and Decision Making on the United States Supreme Court. By Timothy R. Johnson. Albany: State University of New York Press, 2004. 180p. $35.00.

— Robert W. Langran, *Villanova University*

This book makes a persuasive thesis that the oral arguments presented in cases before the United States Supreme Court are used by the justices to help them arrive at substantive legal and policy decisions that closely parallel their preferred outcomes. Although that would seem to be logical, the author documents that many scholars who write about the Court do not share this thesis. Those scholars, such as the so-called attitudinalists, posit that oral arguments have no effect on justices' votes. In order to reinforce his thesis, Timothy Johnson uses the strategic model of decision making, namely, that justices are goal oriented, they are strategic, and they account for institutional rules. He then goes on to explain that because the briefs presented to the Court from both the litigants and from amici curiae are understandably biased in behalf of their particular points of view, the oral arguments serve to solve this problem.

In order to prove his thesis, Johnson does cite evidence presented by other scholars who discuss the role of oral arguments, and he cites statements made about oral arguments by the justices themselves. For original data, he uses litigant and amicus briefs, oral argument transcripts, notes and memoranda from the private papers of some of the justices, and the actual Court decisions. His time frame for the data was the years between 1972 and 1986. He looked at the private papers of Justices William Brennan, William Douglas, and Lewis Powell, with the latter being the most useful because of the notes Powell took during oral arguments. He then augmented his data with that obtained from the Inter-University Consortium for Political and Social Research.

Johnson begins his substantive argument by examining the informational role played by oral arguments. He says that justices ask questions during oral arguments to determine the extent of their policy options, as well as to assess the preferences of external actors and how they might react to decisions. He also says that the justices are able to use oral arguments to obtain information not previously provided them.

After that initial argument, Johnson next makes a jump based on Powell's notes and suggests that Powell, at least, used oral arguments as a means to learn about the other justices' preferred outcomes in the cases at hand. This is important in that a justice is then able to effectively build a coalition when deciding on the merits of the case. He sees no reason why Powell's approach would not be one utilized by the other justices as well.

The author then looked at the conference deliberations done by the justices in the contentious case of *Roe* v. *Wade,* as well as the bargaining memoranda circulated by the justices concerning this case, and then follows that by looking at the same material in other cases. The result is that the justices indeed do raise issues at these times from the oral arguments. He reminds the reader that Justice John Paul Stevens has said that oral arguments provide a time to raise issues about which he wants his colleagues to think.

Once the author's thesis has reached this point, there remains one final topic to examine, and that is whether the oral arguments really do affect substantive and legal policy decisions. His data says yes. The Court cited issues discussed during oral arguments more than three times per case, and almost one-third of the references were not even discussed in the written briefs: thus, a unique information source upon which to arrive at decisions. Johnson admits that his data show that although the Court does not often turn to oral arguments when making substantive decisions, it does so under one key condition: when the outcome of a case is in doubt. His data also show that the Court is, indeed, a collegial body and that the justices do not act as separate entities. They also use oral arguments to raise questions about outside forces, namely, the preferences of political institutions, public opinion, and the impact of their decisions. Thus, the Court is not an unaccountable entity.

In conclusion, Johnson has presented an interesting thesis and has admirably backed it up with data so that a reader does come away from the book with an understanding of the importance of oral arguments before the Supreme Court. The major drawback to the book is that it cites other scholars and works of which most students are unaware, and those citations tend to disrupt the arguments made. In a word, it tends to be difficult reading. It is a worthwhile book for scholars, but only graduate students studying the Court or highly Court-literate undergraduate students will find it holding their interest. *Oral Arguments and Decision Making on the United States Supreme Court* is obviously not geared for the general public. It is an important addition to Supreme Court literature and it is to be hoped that there will be more studies done on this topic.

The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism. By Thomas M. Keck. Chicago: University of Chicago Press, 2004. 370p. $65.00 cloth, $24.00 paper.

— William P. McLauchlan, *Purdue University*

The title of this work presents its thesis at the macro-level, but it is with limited support that the author claims that the current Supreme Court is the "most activist." The core argument of the book is actually presented in the last chapter in clear fashion. There, the author explicitly refers to the Court as the O'Connor Court since he determines that it is largely the blend of political conservatism and judicial moderation, long displayed by Sandra Day O'Connor, that encapsulates the modern Court. So the thesis is no more than stated as something of a straw man at the outset. Thomas Keck "reveals" that the political ideology (liberal/conservative) dimension of justices is not identical to the judicial activism/restraint dimension of their judicial perspectives. These are and always have been two separate dimensions, even if they may not be orthogonal. It is not clear why this is the first major point of the discussion.

The book is organized into three parts after the Introduction. The first three chapters focus on the post–New Deal Court and the Warren Court. This richly outlines the debates among the justices, ranging from Chief Justice Harlan Stone's Footnote 4 in the *Carolene Products* case, through Justice Hugo Black's total incorporation view, to Felix Frankfurter's traditional and strict judicial deference. By the end of this section, the Warren Court's rights-based activist jurisprudence is treated, in contrast with scholars and several justices. Each of these chapters follows a standard format, including a large number of short or excerpted quotations from the protagonists. Each chapter ends with some very limited treatment of the academic debate that reflects these same considerations. The value of this discussion is that it well provides the reader with an outline of the judicial debates that have driven the development of constitutional law in this country since the "switch-in-time that saved nine" in 1937.

Part II seems to be a prelude to the discussion of the Rehnquist Court (post-1994), and it could be shortened dramatically. The debate does change somewhat during this period of the Burger Court and the early Rehnquist Court. The part contains broad generalizations about the country's turn to the political right during the 1970s and 1980s. These may reflect a "trend" or a climate, but the discussion of these features in American politics adds little to the thesis.

These first two parts, Chapters 1–5, are interesting and heavily laden with the general outline of the activism and restraint debate over the past two-thirds of a century. They are largely supported by "clips"—brief quotations from various (selected) opinions or scholarly writings that Keck uses to illustrate or support the point he makes. There are too many of these quotations and not enough glue or text between them.

The last part is the core of the author's argument and his case for the Rehnquist Court's place in constitutional jurisprudence. It is the heart of the book, and after the Conclusions, it is the part I would assign next, for graduate students who are studying judicial activism or modern constitutional development. As noted below, it suffers from some difficulties. However, it is as clear a statement of the Rehnquist Court's jurisprudence as I have seen. It captures the essentials of the divisions and the tensions that underlie this court's decisions and the differences among its members.

It is not clear why the "Rehnquist Court" is divided into Early and Late periods, broken at 1994 when the current "natural court" came into existence. I am left with the question of what the differences between these two "courts" are in terms of constitutional jurisprudence and activism. Keck does not tell us. If nothing else, the division should be made when Justice Clarence Thomas assumed his position on the Court, since at that moment, the core conservative activists were in place (1991).

The Most Activist Supreme Court in History has some flaws. Small items include incorrectly cited references. Footnote 1 in the book refers to Tushnet 1996b, but there is no such reference listed. The endnotes (rather than footnotes), as always, make it difficult to follow the author's substantive discussion at places in the text. The larger issues relate to the use of tabular data with little reference and no discussion in the text of what they "prove." The material presented in Tables 2.1 and 2.2 supposedly prove that the Rehnquist Court is the most activist, but with little discussion of why unconstitutional holdings are the appropriate measure for activism. There are other measures. Table 2.2 indicates that the Taft Court, the Late Warren Court, and the entire Burger Court were more "activist" than the Early or the Late Rehnquist Courts, in