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## NAMING AND BLAMING: THE CASE OF "THE REHNQUIST COURT"

Edward A. Purcell, Jr.

**Nancy Maveety.** *Queen's Court: Judicial Power in the Rehnquist Era.* Lawrence: University of Kansas Press, 2008. ix + 194 pp. Notes, bibliography, and index. \$29.95.

Using the names of chief justices to demarcate periods in the history of the United States Supreme Court is as common as it is misleading. The label "Warren Court" seems etched in stone, for example, even though the Court went through two, if not three, quite distinct phases between 1953 and 1969 when the eponymous Earl Warren was chief. The last phase, moreover, arguably continued for almost a decade after Warren left the bench, and might—at least after the early 1960s—have more accurately been termed the "Brennan Court." Applying the chief justice's name to the recently terminated "Rehnquist Court" is particularly inapt, Professor Nancy Maveety argues in her new book, *Queen's Court*, a title that readily captures her thesis. Seeking "to assign a definitive meaning to the 'Rehnquist Court'" and "identify its historical importance," Maveety concludes that the Court under Chief Justice William Rehnquist "should be remembered legitimately as Justice O'Connor's." Both its long-term significance and the "real difficulties—jurisprudential and systemic" that it created—flowed from the "judicial O'Connorism" that characterized its work (p. 4).

A specialist in the Court's history and the author of *Justice Sandra Day O'Connor: Strategist on the Supreme Court* (1996), Maveety is well positioned to evaluate the contributions of the Court's first female member during her twenty-five-year tenure from 1981 to 2006. Few, of course, would dispute the author's general premise that O'Connor "sat, figuratively if not literally," at the center of the Rehnquist Court (p. 4). Indeed, her pivotal role has long been recognized. Edward Lazarus, who clerked for Justice Harry Blackmun in the late 1980s, concluded a decade later that the Court "remains, as it was in my day, a creature of Justices O'Connor and Kennedy." The two "swing" conservatives controlled. "In case after case," Lazarus explained, "these swing-vote justices write separate concurrences, usually modulating the conservative insurgency,

but always bending the Court and the law to their will."<sup>1</sup> Subsequently, surveying O'Connor's tenure after her retirement, Jeffrey Toobin portrayed her position similarly if more dramatically. "The way to win a majority in the Rehnquist Court was to earn O'Connor's support," he wrote, "so her colleagues invariably came to her as supplicants."<sup>2</sup> Thus, the importance of Maveety's book lies neither in its identification of O'Connor's pivotal position on the Rehnquist Court nor in its description of her "as a centrist conservative on a sharply divided and jurisprudentially polarized Supreme Court" (p. 3). Rather, its importance lies in its more specific argument that O'Connor used her key position not just to swing cases her way but also to reshape the Court's inner workings. Largely assuming, rather than examining, issues of political context, judicial values, and substantive doctrine, Maveety concentrates on the Court's evolving institutional norms and *de facto* decision-making process, and it is in those areas that she locates O'Connor's principal significance. O'Connor was "*the crucial contributor* to each of the several legacies of the Supreme Court during the Rehnquist era" she concludes, and the Rehnquist Court's primary legacy was its normative and behavioral acceptance of a distinctive "judicial O'Connorism" (p. 4, italics in original).

*Queen's Court* builds its argument in a series of steps. Chapter one, based largely on the papers of Justice Harry Blackmun covering three early terms (1986, 1991, and 1993), argues that "individuated judicial behavior defined the Rehnquist Court" (p. 5). The chief ran a "non-deliberative conference" (p. 14) that fostered a norm of "judicial individualism" (p. 35) as well as a practice of informal bargaining in which the justices strove to pull together majority coalitions to support specific results in individual cases. "O'Connor and her colleagues," Maveety explains, "behaved as if the circulation of conditional join memos and concurrence drafts was the duty of all justices in their individual performance of policy leadership exertion" (p. 33). Efforts to establish such policy leadership were widely dispersed, with the chief participating but never dominating and the associate justices—with the partial exception of the Court's two staunchest conservatives, Antonin Scalia and Clarence Thomas—seeking personal influence through accommodation and compromise. The prominent role of that informal bargaining process, and the personal dynamics that marked the varied relations among the justices—especially Scalia's "coalition-busting" behavior (p. 36)—prevented the formation of a cohesive and consistent conservative majority and thereby created the institutional conditions that allowed O'Connor to move into her central and often decisive position.

Chapter two examines the "emerging predominance of separate, concurring opinions," a development that Maveety terms "multivocality" and identifies as the defining characteristic of a new kind of "choral Court." The expanded use of concurrences, and the increased number of justices who joined them, "enhanced the authority of individual justices to promulgate doctrine" and

reflected the Court's animating "judicial individualism" (p. 40). In institutionalizing the new "choral Court," Maveety maintains, O'Connor's behavior was critical. She "established that concurrence could be constitutively important" in determining the law (as her separate opinions addressing abortion and the Establishment Clause surely demonstrated), and she helped establish the legitimacy of the concurrence in the Court's institutional norms and practices. The emergence of a "choral Court," Maveety declares, was "potentially the most significant of any legacy—doctrinal or behavioral—the Rehnquist Court leaves" (p. 38).

Chapter three turns to the Court's substantive jurisprudence, focusing closely on thirteen of the "most important" cases the Rehnquist Court decided, a plausible if inevitably debatable selection.<sup>3</sup> Examining those cases, Maveety highlights O'Connor's role in establishing the "Rehnquist Court's 'supremely individualist' conception of judicial power" (p. 61). That judicial individualism led to a distinctive and pluralistic "associates' justice," a "case-fact-sensitive jurisprudential pragmatism that occurred as individual associate justices vied for influence from the center and with one another." Its ultimate result—given the Court's "lack of an overarching ideological unity"—was a jurisprudence of "contextual-factor, reasonableness-based balancing," (p. 61) a "rule-of-thumb doctrinal approach" that "became the predominant judicial methodology of a majority of the Rehnquist associates" (p. 102). The approach was rooted in "a judicial procedural commitment to the idea of the Court as a set of justices determined to record their various individual views, yet cooperative enough to accede reciprocity in doing so." Those characteristics composed the "O'Connor Court made manifest" (p. 103).

Chapters four and five shift the book's focus to a consideration of the ways in which the Rehnquist Court led commentators to question and revise their views about the Court and its proper role. Bypassing some of the more obvious changes, Maveety zeroes in on the creation of a "judicial mythology" about O'Connor and her jurisprudence (p. 125). Increasingly pictured as restrained, moderate, and minimalist, O'Connor became "the contemporary gold standard for a judge" (p. 126). Although the two chapters are relatively thin in their analysis of the many debates the Rehnquist Court inspired, they nonetheless make the fair point that many commentators shaped their interpretations of O'Connor and her jurisprudence far more in the hope of controlling the future of the Court than in any effort to understand her actual judicial behavior and significance. Rejecting the O'Connor "mythology," Maveety argues that the justice was in fact a major force shaping the Rehnquist Court's expansive and insistent "juricentrism." The Court's restless, assertive, and rightward pressing judicial activism was "essentially indistinguishable from O'Connorist jurisprudence, except perhaps in terms of tone" (p. 115). O'Connor's true legacy, Maveety declares, was a demonstration not of the virtues of judicial

restraint but of "the power that lies in judicial pragmatism" (p. 12). Indeed, she suggests, "the real legacy of O'Connor-style jurisprudence is arrogance cloaked as humility" (p. 9).

Thus, Maveety indicts the judicial O'Connorism she identifies and places at center stage. Although the pragmatism and moderation of judicial O'Connorism seemed to make it widely acceptable to both scholars and the public, the author explains, its particularistic and even *ad hoc* method—and the uncabined individualism it nourished—created profound institutional and doctrinal problems. One was the influence that it exerted on the federal judiciary as a whole, where it empowered lower court judges to go their own individual ways and fostered "a declining norm of consensus" (p. 149). Another was its *de facto* challenge to the idea of a "rule of law." As the lower courts were "handed doctrine difficult to understand and impossible to apply," they were compelled "to resort to O'Connoresque" techniques themselves (p. 149), thereby undermining the law's predictability, expanding areas of legal uncertainty, and spurring repeated litigations over essentially the same issues. A third problem, "the real detrimental impact of O'Connor-style judicial pragmatism," was the fact that its ostensible "restraint" was "fundamentally dishonest." In reality, O'Connoresque jurisprudence did not minimize or limit judicial power but rather "extended judicial influence and policy discretion" (p. 154). While O'Connor and "her" Court hewed to a relatively moderate if rightward leaning path, her jurisprudence posed serious dangers for the future. "The balancing approaches and empowered pragmatic judicial pluralities easily can be put to work for more ambitious, less conciliatory accomplishments that are then, disconcertingly, rendered hard to criticize in terms of invalid juridical methods or ends. O'Connorism's wrapping dresses as it conceals the vagaries of judicial power" (p. 155).

Thus, the "true risk" of judicial O'Connorism was its unprincipled subjectivism, the abandonment of "any notion that legal principle governs or restrains judging" (p. 156). The "greatest danger and the most worrisome legacy of the 'model justice' as a judicial guide," Maveety warns, is that it "inures us to judicial power without frankly acknowledging it as such, and provides comfort and cover where none should exist for unaccountable and possibly unwarranted judicial decision making" (p. 155).

In its ultimate conclusion, then, *Queen's Court* brings us face to face once again with the central and long-recognized intellectual challenge of modern American constitutionalism: the problem of judicial "subjectivity" and its relationship to fundamental ideas about constitutionalism and a "rule of law." Maveety's critique of O'Connoresque jurisprudence seems acute, and her skepticism about some of the correctives that have been suggested—judicial minimalism, bright-line doctrinalism, and "popular" constitutionalism—seems equally warranted. Not surprisingly, *Queen's Court* offers no prescription to

resolve the difficulty it underscores except, possibly, a faint and implicit suggestion that greater candor about judicial values and more determined efforts to articulate rules—however narrow—might impose some limits. Of course, such a suggestion—if, indeed, the author actually intends to offer it—seems unlikely to carry us far. Maveety can, however, hardly be blamed for failing to resolve such a fundamental problem, even if it is the central problem her book highlights.

While its analysis of the Rehnquist Court's inner workings is insightful and its warning about the dangers of an *ad hoc* pragmatic constitutionalism is apt, *Queen's Court* is less satisfactory in its truncated and largely allusive treatment of the broader historical forces that led to the emergence of a "choral Court." The author acknowledges that O'Connor consciously followed the footsteps of Justices John M. Harlan the younger and Lewis F. Powell in using concurrences to shape and sometimes control the law, for example, but she does little to explore the more general and longer-term forces that have gradually reshaped the Court's institutional norms and fostered its new "multivocality." Throughout the nineteenth century and into the 1930s, unanimity rates in the Court's decisions were extremely high, often reaching 90 percent.<sup>4</sup> Indeed, as late as the 1920s the justices exhibited a strong preference for unanimity and, in order to make Court decisions unanimous, frequently acquiesced in judgments they doubted or opposed.<sup>5</sup> Thus, it was only in the years after the New Deal that the Court's decisions commonly became fragmented by separate individual opinions, increasingly concurrences as well as dissents, with both more recently coming in multiples.<sup>6</sup> Many developments—including the spread of legal realist assumptions, the increasingly heterogeneous nature of American society, and the appearance of new and especially divisive social and moral issues on the Court's docket—contributed to the fragmentation. *Queen's Court* recognizes the importance of such broader historical forces, but it consigns them to the periphery of its analysis. Instead, consistent with its narrow contemporary and institutional focus, it stresses the personal qualities of the sitting justices: O'Connor's combination of pragmatism and moderation, Stephen Breyer's ingrained problem-solving orientation, John Paul Stevens's faith in the value of honestly stated differences, the relative unwillingness of Scalia and Thomas to bargain, and the inability of the chief "to wield the power of his realm" (p. 151).

Similarly, largely assuming rather than examining the substantive value conflicts that divided the Rehnquist justices, *Queen's Court* tends to obscure the jurisprudential problem obverse to the one it identifies. If O'Connoresque pragmatism has its dangers, so too do ostensibly "principled" approaches that are, in fact, generated and contoured by the demands of political ideology. A sweeping textualism or originalism that purports to provide "objective" or "correct" answers to contemporary legal problems, for example, may threaten

American constitutionalism as much as does the pragmatism of judicial moderates. Given the dangers of such ideologically based "certainties," it might be useful to reconsider Maveety's seemingly implicit suggestion that greater judicial candor about the role of personal values in decision making might make a useful, if necessarily limited, contribution to American constitutional jurisprudence.

Ironically, given Maveety's concerns, *Queen's Court* also obscures another quality of judicial O'Connorism. Its pragmatic accommodationism, which may well undermine "rule of law" ideas, was in some part inspired by a desire to exhibit doctrinal continuity, reaffirm the role of precedent, and minimize the extent to which the values of Republican judicial appointees were reshaping the nation's constitutional law. Judicial O'Connorism, in other words, can also be seen as a determined effort to maintain the image of an objective constitutional "rule of law" in the face of political change and ideological pressure. Thus, its "true" nature seems somewhat more complex than Maveety suggests.

*Queen's Court* is a thoughtful and illuminating book; and it accomplishes what it set out to do, exploring the ways in which the Rehnquist Court—and its most famous swing justice—shaped the Court's internal norms of judicial behavior. Maveety has identified important changes in the Court's norms and practices, thoughtfully challenged the claim that O'Connor represents a judicial "gold standard," and illuminated from a new perspective the fundamental jurisprudential problem that lies at the heart of modern American constitutionalism.

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1. Edward Lazarus, *Closed Chambers: The Rise, Fall, and Future of the Modern Supreme Court* (1998), 515.

2. Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (2007), 48.

3. The cases, in alphabetical order, are: *Bush v. Gore*, *City of Boerne v. Flores*, *Clinton v. Jones*, *Dickerson v. U.S.*, *Gratz/Grutter v. Bollinger*, *Hamdi v. Rumsfeld*, *Kelo v. City of New London*, *Lawrence v. Texas*, *Planned Parenthood v. Casey*, *Shaw v. Reno*, *Texas v. Johnson*, *U.S. v. Lopez*, and *Zelman v. Simmons-Harris*.

4. See, for example, John P. Kelsh, "The Opinion Delivery Practices of the United States Supreme Court, 1790–1945," *Washington University Law Quarterly* 77 (1999): 137, 178.

5. Robert Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court," *Minnesota Law Review* 85 (2001): 1267, 1331–45.

6. See, for example, Thomas G. Walker, Lee Epstein, and William J. Dixon, "On the Mysterious Demise of Consensual Norms in the United States Supreme Court," *Journal of Politics* 50 (1998): 361; Gregory A. Caldeira and Christopher J. W. Zorn, "Of Time and Consensual Norms in the Supreme Court," *American Journal of Political Science* 42 (1998): 874.