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Nancy Maveety. *Justice Sandra Day O'Connor: Strategist on the Supreme Court.* London: Rowman & Littlefield Publishers, 1996. x + 152 pp. $83.00 (cloth), ISBN 978-0-8476-8194-5; $34.95 (paper), ISBN 978-0-8476-8195-2.

David L. Stebenne. *Arthur J. Goldberg: New Deal Liberal.* New York: Oxford University Press, 1996. viii + 539 pp. $49.95 (cloth), ISBN 978-0-19-507105-4.

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Biographers of Compromise, Compromisers of Biography

In a recent symposium on the subject of judicial biography held at New York University School of Law, critics of the genre voiced concerns ranging from its alleged "inefficiency" as a medium of scholarship to the hagiographic tendencies of its practitioners.[1] In their respective treatments of Justices Arthur J. Goldberg and Sandra Day O'Connor, David L. Stebenne and Nancy Maveety have avoided these problems by writing critical works that spare readers both extraneous anecdote and special pleading. Yet neither book professes to be a judicial biography in the traditional sense; *Arthur J. Goldberg: New Deal Liberal* deals strictly with its protagonist's connection to the American labor movement, and *Justice Sandra Day O'Connor: Strategist on the Supreme Court* is, as its author describes it, a judicial-process study. For those interested in labor-management relations in the postwar era, or in the dynamics of decision-making on collegial courts, this is good news. For those seeking insight into the judicial persona or inspiration from the lives of two important American judges, however, these books will fail to satisfy.

Stebenne, who is an assistant professor of history at the Ohio State University, declares in his preface that his book's subject is not Goldberg himself, but Goldberg's connection to a larger theme: "the rise and decline of a certain social bargain" between labor, management, and the state "that for all its problems remains central to the political economy of this society and all the other highly industrialized market systems" (p. vii). Following the lead of Nelson Lichtenstein and other labor historians, Stebenne sets out to document the narrowing of labor's vision over the course of the twentieth century and, in particular, its adoption of "the middle way"–an agreement by American workers to forgo efforts to disrupt production or to usurp managerial prerogatives in the workplace, in exchange for collectively-bargained, and state-monitored, economic security. (The term comes from journalist Marquis Childs's influential *Sweden: The Middle Way* [orig. ed., 1936], which, as Stebenne notes, had become popular some in American intellectual and trade-union circles [p. 43].)

Stebenne sees Goldberg as a key player in the design, effectuation, and preservation of this bargain, which took shape in the crucible of the Cold War, and he is to be commended for illuminating this subject, which has been overshadowed by more conventional examinations of Goldberg's career. Stebenne focuses on Goldberg's service as general counsel to the United Steelworkers Union and the Congress of Industrial Organizations and as Secretary of Labor in the Kennedy administration, rather than on his work as an Associate Justice of the United States Supreme Court (1962-1965). Yet this book leads the reader to believe that Goldberg's career propels the American labor movement, rather than the re-

verse. In this regard, Stebenne's otherwise-useful study of a lawyer's role in constructing the house of Labor represents a step backward for the historiography of the American labor movement to the days when labor's leaders drew more attention from historians than did those whom they purportedly led.

Perhaps this is precisely Stebenne's point, however, because one of the crucial features of "the middle way" is a shift in the resolution of conflict away from the rank-and-file to forums open only to union leaders and arbitrators. According to Stebenne, this shift has made the collective-bargaining process not only less "collective," but also less of a "bargain" for labor. Along with the displacement of class issues by those of race and gender on the agenda of liberals beginning in the 1960s, Stebenne sees the increasingly bureaucratized nature of labor-management relations as an important obstacle to labor's effort to stem the managerial revolt against the postwar social contract that Goldberg had helped to devise.

Stebenne is not entirely critical of Goldberg's moderate, conciliatory strategy as a labor leader, however, nor, for that matter, of Cold War liberalism in general or its emphasis on corporatist compromise over more radical approaches to combating inequality in particular. In fact, although one could very well attack the postwar social contract itself as an opportunity that organized labor missed to pursue more than economic security, Stebenne seems more disenchanted with the weak efforts of the Kennedy and Johnson administrations to defend the rights of American workers under that contract.

Moreover, by conflating Goldberg's career with that of the social bargain this book describes, Stebenne deprives us of a more nuanced understanding of a complex individual and his place in the story Stebenne seeks to tell. It is not that thematically-driven biographies cannot work, as Gerald Gunther's *Learned Hand: The Man and the Judge* attests, but some insight into the personality of the biography's subject is crucial to the biographer's task, as Gunther's book shows as well.[2] We learn little about Goldberg the person from Stebenne, and thus are left to speculate about why Goldberg preferred "the middle way" to more ambitious schemes on behalf of American workers. More importantly, Stebenne's effort to depict Goldberg as a lifelong crusader for strategic compromise may lead to some mischaracterization of his behavior as a Supreme Court Justice and as the American Ambassador to the United Nations after Goldberg left labor's payroll in 1961.

For example, in the short section of the book devoted to Goldberg's decisions as a member of the Warren Court (pp. 316-37), Stebenne explains Goldberg's well-documented commitment to civil rights as a function of his belief that such rights were a prerequisite to expanding the reach of the bargain that labor had struck with management. This explanation may be correct as far as it goes, but it ignores the influence of other factors on Goldberg's thinking–such as his Russian-Jewish background and his status as the youngest in a family of eight children, both of which may have sensitized him to the plight of those seeking relief from certain kinds of discrimination. Similarly, Stebenne's explanation of Goldberg's opposition to the escalation of the war in Vietnam as a function of his strategy for labor prevents him from delving deeper into the sources and character of Goldberg's opposition–and perhaps that as well of other liberals who became dissatisfied with President Johnson's war policies.

Stebenne's failure to examine Goldberg's personality raises questions about why he chose the medium of biography to tell his story, but it does not detract from his accomplishment: he has written an insightful account of the development of the privatized welfare state in the postwar decades, and of the strategic compromises between labor and management that fostered that development.

Nancy Maveety, a political scientist at Tulane University, is also concerned with compromise, or, as she calls it, the strategy of "accommodation," in her discussion of Sandra Day O'Connor's behavior as a member of the United States Supreme Court since 1981. Unlike Stebenne, however, Maveety confines her analysis to O'Connor's tenure as a Justice rather than addressing her pre-judicial career. She argues that O'Connor's jurisprudence should not be understood as a product of her gender or of her commitment to federalist principles, as some scholars have argued,[3] but rather as a strategic means of achieving conservative outcomes without adopting an ideological or "attitudinal" model of judging.

Paying particular attention to O'Connor's concurring opinions in cases involving reproductive rights and church-state relations, Maveety seeks to demonstrate the value of such concurrences as an alternative strategy of leadership and to contribute thereby to what she calls a "richer neo-institutionalist appreciation of the Supreme Court decision-making environment" (p. 133). As a matter of logic, her argument that the concurrence as

O'Connor uses it disguises the bloc-like nature of the majority coalition and thereby discourages the development of a counter-bloc is compelling, but the ahistorical nature of her discussion leaves one wondering how much of a pioneer O'Connor is in using this strategy. The concurring opinion has become an increasingly popular form of judicial expression on the Supreme Court since the 1940s, and Maveety's study leaves it unclear how O'Connor's use of the concurrence has fostered consensus rather than disunity. Moreover, as Maveety's own statistical work shows, "O'Connor's concurring opinion-writing proclivity, generally, is surpassed by a majority" of her colleagues on the Court, which tends to downplay the salience of those opinions to understanding her particular role on the Rehnquist Court (p. 57).

The lack of historical context in Maveety's book is also troubling in another connection–her discussion of the relevance of O'Connor's experience as a member of the Arizona state legislature (1969-1974) to her ability and commitment to imparting "a more choral convention of cooperative decision-making on the Supreme Court" (p. 6). Surely, the "achoral" behavior of legislator-turned-Justice Hugo L. Black, Jr. (A former Democratic Senator from Alabama), belies this facile connection, as does the case of Justice George Sutherland, the leader of the so-called "Four Horsemen," a Republican who represented Utah in the United States Senate from 1905 to 1917. Maveety admits that "a small sample of the decisional record of one Justice is hardly definitive evidence of a macro trend," but she remains convinced that O'Connor's style of judging–her "jurisprudential flexibility"–represents "a profound revision of what it means to be a 'judicial conservative' and a profound revision of the judicial process on collegial courts" (p. 134).

At times, however, and to her credit, Maveety departs from her effort to cast O'Connor's anti-bright-line approach to deciding cases as a consistent model of judging, and recognizes the Justice's "maddening tendency to straddle the fence," particularly in cases involving "the choice between two distinct philosophies of racial identity and civil rights: color-blind individualism and group-conscious community empowerment" (pp. 120-21). Yet O'Connor's view that strict scrutiny should be applied to all race-based classifications clearly indicates her commitment to the first of these philosophical positions. Given that, in constitutional jurisprudence, strict scrutiny almost always means metaphorical death for the legislation at issue, it is hard to accept Maveety's view that O'Connor's decisions in race cases are indeed accommodationist.

She is on firmer ground in her discussion of the "undu[e] burdens" test that O'Connor formulated (in a 1983 dissent) to determine the constitutionality of state laws restricting a woman's right to obtain an abortion,[4] and the "endorsement of religion" test that she crafted (in a 1984 concurrence) to lower the high wall of separation between church and state that received its most famous formulation in *Lemon v. Kurtzman* (1971).[5] Both tests have become majority positions supporting Maveety's claim that the Justice's "most distinctive contribution has been to perpetuate the balancing-of-interests approach in contemporary Supreme Court jurisprudence" (p. 44). Unfortunately, casting O'Connor as the "quintessential balancer blessed by circumstance" (p. 70) or as a purely strategic force on the modern Court robs her of the human qualities that a more biographical approach to understanding her jurisprudence might have given us.

In this regard, the thirteen-page "bioprofile" that Maveety offers in her book's second chapter (pp. 11-23) is not sufficient; it provides little more than an argument that O'Connor's old-style feminism–one that does not celebrate women's difference from men–does not inform her jurisprudence. Whether or not O'Connor's active support for the Equal Rights Amendment in the 1970s merits more attention that it gets in these pages, Maveety's effort to cast O'Connor as a contextual conservative and a "post-legal realist" (p. 4) requires her to downplay the human aspects of judging that legal realism exposed in the first place. This irony detracts from Maveety's otherwise laudable effort to prove that "O'Connor has been a more sophisticated and influential judicial actor than initial observations indicated" (p. ix).

To be sure, like Stebenne, Maveety disclaims the intention of writing a traditional, comprehensive judicial biography. Furthermore, the approach that she has taken–presenting a thematic analysis prefaced by a biographical sketch–has produced such enlightening and valuable studies as Charles F. Hobson's *The Great Chief Justice: John Marshall and the Rule of Law* (1996). But Maveety's study poses two problems–one rooted in the historiographical need for a comprehensive biography of O'Connor, which her book does not seek to provide, and the other rooted in her emphasis on judicial process, which in this book obscures the distinctiveness of O'Connor's substantive constitutional thought and its development before and after her appointment to the Court. Though the latter concern may be no more than a historian's discomfort with political scientists' approaches to studying a judge's life, thought, and work, these methodological differences need to be addressed–if

for no other reason than to define more precisely and usefully the respective disciplines' expectations and hopes for the various kinds of judicial biography.

Both of the books reviewed here are useful and well-conceived accounts of how important twentieth-century figures have wielded compromise as a powerful weapon in the worlds of American politics and American jurisprudence. Ultimately, however, Stebenne's account of how Arthur Goldberg helped to construct "the middle way" in American labor-management relations and Maveety's portrayal of Sandra Day O'Connor as an accommodationist Justice fail to capture the complexity of these two Americans who each rose from pedestrian backgrounds to the apex of the legal profession. Whatever the inherent pitfalls of the biographical medium may be, those using it should not compromise with their subjects.

Notes:

[1]. See "Symposium: National Conference on Judicial Biography," *New York University Law Review* 70 (June 1995): 485 ff.

[2]. Gerald Gunther, *Learned Hand: The Man and the Judge* (New York: Alfred A. Knopf, 1994).

[3]. For examples of the former line of interpretation, see Susanna Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication," *Virginia Law Review* 72 (1986): 543-616, and Susan Behuniak-Long, "Justice Sandra Day O'Connor and the Power of Maternal Thinking," *Review of Politics* 1992: 417-444. For an example of the latter interpretative model, see David M. Gelfand and Keith Werhan, "Federalism and Separation of Powers on a 'Conservative' Court: Currents and Crosscurrents from Justices O'Connor and Scalia," *Tulane Law Review* 64 (1990): 1443-1476.

[4]. See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting) (maintaining that a state regulation would have to "unduly burden" a woman in her right to choose an abortion before heightened scrutiny would be employed by the reviewing court).

[5]. See *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (arguing that a state-sponsored Nativity scene did not violate the First Amendment's establishment clause because it did not constitute an "endorsement of religion" by the government).

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