Current Books

Reviews of new and noteworthy nonfiction

Prudence in Jurisprudence

FIRST AMONG EQUALS:
The Supreme Court in American Life.
By Kenneth W. Starr. Warner. 320 pp. $26.95

NARROWING THE NATION'S POWER:
The Supreme Court Sides with the States.
By John T. Noonan, Jr. Univ. of California Press. 203 pp. $24.95

Reviewed by David J. Garrow

Both Kenneth W. Starr and John T. Noonan, Jr., were among President Ronald Reagan's best-known nominees to the federal courts of appeal, which rank just below the Supreme Court in the American judicial hierarchy. Noonan, who still sits on the Ninth Circuit Court of Appeals as a senior judge, has written a shelf-load of distinguished books on religious and legal history but is perhaps most widely recognized as a leading scholarly critic of *Roe v. Wade* (1973) and legalized abortion. Starr, who stepped down from the Court of Appeals for the District of Columbia Circuit in 1989 to become solicitor general, the federal government's lead lawyer before the Supreme Court, is of course more widely remembered for his subsequent tenure as independent counsel investigating President Bill Clinton.

Starr's wide-ranging survey of the modern Supreme Court since the 1969 retirement of Chief Justice Earl Warren is an erudite historical essay, but *First Among Equals* is also a much more substantively opinionated piece of work than readers might immediately appreciate. Starr's most visible theme is his praise of the post-Warren Supreme Court as "a more lawyerly tribunal" that "has become increasingly dedicated to stability and moderation." In significant part, as Starr notes, this alteration in the Court stems from the fact that every new justice since 1968 "has been a person of the law, not of politics," a huge change from earlier eras in which judicially inexperienced public figures such as Senator Hugo L. Black of Alabama and California governor Warren were named to the high bench. Some modern nominees, such as Clarence Thomas, may have had relatively brief judicial careers before their ascension to the Court, but every nominee since Lewis F. Powell, Jr., and William H. Rehnquist in 1972 has been a sitting jurist from a federal or (in the case of Sandra Day O'Connor) state court.

But Starr's recurrent praise of "a Court dedicated to stability, not change," has its limits and exceptions, given that Starr also asserts that the present-day Court "ought to

A rare public gathering of the Supreme Court: From left, Chief Justice William Rehnquist, with Justices John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter and Clarence Thomas (both behind Kennedy), Ruth Bader Ginsburg, and Stephen Breyer.

be more willing to reassess its prior constitutional decisions" than it has been over the past decade. Starr's number one candidate for reconsideration and reversal is *Roe v. Wade*, which he terms "unspeakably unacceptable," but his feelings are equally strong concerning *Miranda v. Arizona* (1966), which the Rehnquist Court reconsidered but then forcefully reaffirmed in *Dickerson v. United States* (2000), with a 7 to 2 majority opinion written by none other than Chief Justice Rehnquist. Careful Court watchers know that on many issues, Rehnquist as chief justice has been a far more moderate and restrained voice than he was as a junior conservative on the Burger Court between 1972 and 1986. Still, his longstanding antipathy toward *Miranda* made his *Dickerson* opinion especially remarkable. Starr asserts that "overruling *Miranda* would have been the best result," and he terms *Dickerson* a regrettable example of "how restrained and cautious the Rehnquist Court tends to be."

Yet two glaring contradictions mar Starr's overall portrait of the Rehnquist Court. One, concerning *Bush v. Gore* (2000), Starr confronts forthrightly, albeit only at the very end of *First Among Equals*. He correctly notes that "the most significant fact" about the case was that the high court "chose, twice, to become involved at all," and he perceptively identifies crucial moments at the oral arguments when, first, a comment by Justice Ruth Bader Ginsburg, and, second, an unintended concession by Vice President Al Gore's counsel, David Boies, marked turning points in the Court's handling of the Florida dispute. But, perhaps surprisingly to some, Starr is openly uncomfortable with what he terms the "remarkably aggressive" 5 to 4 decision in *Bush v. Gore*. For someone who so visibly wants to champion judicial restraint when anything other than the survival of *Roe* or *Miranda* is on the line, *Bush v. Gore* is unpleasantly strong porridge.

Starr's greater difficulty involves the popularly unappreciated but nonetheless remarkably transformative sets of 5 to 4 federalism decisions the Rehnquist Court's reigning majority (the chief justice plus Justices O'Connor, Thomas, Antonin

Scalia, and Anthony Kennedy) has been handing down annually since *United States v. Lopez* (1995), which held unconstitutional the Gun-Free School Zones Act. Alfonzo Lopez, who took a .38-caliber handgun to his San Antonio high school, may never become as famous as Ernesto Miranda, but Lopez's successful challenge to Congress's use of the constitutional commerce power to make such an act a federal crime kicked off the most important jurisprudential development of the past quarter-century. Yet Starr refuses to acknowledge that these new federalism cases represent muscular judicial activism.

These cases come in three different but closely related flavors. Some of them, such as *Lopez*, entail new judicial constraints on the commerce power, while others, such as *City of Boerne v. Flores* (1997), greatly limit Congress's power to enforce the guarantees of the Fourteenth Amendment by "appropriate legislation." A third set, heralded by *Seminole Tribe of Florida v. Florida* (1996), uses the Eleventh Amendment to insulate state government entities from federal regulatory and anti-discrimination statutes.

Unlike Starr, Noonan sees the Rehnquist Court's federalism cases as not only remarkable but dangerously harmful. The key concepts in these cases may be unfamiliar even to attentive citizens, but Noonan's clearly written critique illuminates how damaging all three subsets are becoming. State "sovereign immunity" exemplifies the abstruse concepts involved, but Noonan pithily explains how it has "become the Court's way of restricting the powers of Congress and enlarging the areas where the states can escape effective control by Congress."

Anyone inclined to celebrate increased state independence, however, may miss the second essential ingredient in this below-the-radar constitutional revolution: The Court is dramatically constraining Congress's power, under both the commerce clause and the Fourteenth Amendment, while simultaneously enlarging and enhancing its own authority as the ultimate arbiter of the distribution of government power, a development that could—if one chose to acknowledge it as such—be the most persuasive example of all in a book that characterizes the Court as "first among equals." But it's Noonan, not Starr, who has the will and the zeal to articulate so profound a critique of the Rehnquist Court majority's constitutional behavior. As Noonan writes, "If five members of the Supreme Court are in agreement on an agenda, they are mightier than 500 members of Congress with unmobilized or warring constituencies."

Narrowing the Nation's Power is inescapably demanding, for its subjects aren't household names—for instance, *United States v. Morrison* (2000), in which the 5 to 4 majority voided the Violence against Women Act, and *Board of Trustees of the University of Alabama v. Garrett* (2001), in which the same majority inoculated the states from having to comply with the Americans with Disabilities Act. Still, this brief book is an immensely valuable and important critique of the Rehnquist Court's constitutional agenda. Noonan terms the current justices "highly original in their treatment of the Constitution," and adds: "It is an illusion to suppose that they are less inventive than their predecessors in their interpretation of constitutional texts."

As a judge with nearly two decades of experience, Noonan makes a further telling point about the impersonally abstract manner in which the Rehnquist Court majority has carried out its federalism revolution, a point that many academic critics of the Court overlook: "Facts should drive cases. That is the experience of most trial judges and of many appellate judges. . . . At the center of the facts are the persons who brought the facts into existence or responded to them. Forget the facts, and you forget the persons helped or hurt by the decisions." But for a Supreme Court "with an agenda," he adds, "the facts are of minor importance and the persons affected are worthy of almost no attention."

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