First Among Equals: The Supreme Court in American Life
Kenneth W. Starr
New York: Warner Books, 2002, 320 pp.

Much has changed since John Jay's tenure as the nation's first Chief Justice. Not only did the Supreme Court's sparse caseload provide ample time for Jay to conduct overseas diplomatic missions, including negotiating what became known as Jay's Treaty, but Jay had few qualms about resigning his position as Chief Justice to become Governor of New York. After serving two terms, Jay was nominated by President John Adams to once again serve as Chief Justice. This time he declined, citing poor health, but he also pointedly informed Adams: "I left the bench perfectly convinced that under a system so defective [the Court] would not obtain the Energy, Weight and Dignity which are essential to its affording due support to the national Gover[ment]; nor acquire the public Confidence and Respect, which as the last Resort of Justice of the nation, it should possess."

As a nation, we have traveled a long way from a time when such minimalist expectations regarding the Supreme Court's place in our constitutional firmament could not be readily gainsaid. Now we have no less an astute observer of the Supreme Court than Kenneth W. Starr asserting that, "ultimately, in our system of government, the Supreme Court is first among equals." Indeed, in his new book, *First Among Equals: The Supreme Court in American Life*, Starr, the distinguished former independent counsel, solicitor general of the United States, and federal appeals court judge, argues that the modern Supreme Court is "the branch of government with *the* authoritative role in vital issues that deeply affect American life and politics."

Chief Justice Jay might be forgiven for portraying the Court's prospects somewhat dimly. After all, his view comported, at least superficially, with the conventional wisdom of the founding era. In the Federalist Papers, James Madison and Alexander Hamilton refer to the "celebrated" Montesquieu as "the oracle who is always consulted" on separation of powers matters. And consult him they did. For Montesquieu, more than any other Enlightenment political philosopher, articulated the familiar tripartite division of powers among the legislative, executive, and judicial branches that became, along with federalism, the structural hallmark of our constitutional system. But unlike Judge Starr, Montesquieu certainly did not consider the judicial branch to be "first among equals." Instead, in his *Spirit of Laws* he famously remarked that "Of the three powers above mentioned, the Judiciary is next to nothing."

Following Montesquieu, Hamilton proclaimed in *Federalist No. 78* that, "the judiciary, from the nature of its functions, will always be the least dangerous [branch] to the political rights of the Constitution." Why? Unlike the executive and legislature, the judiciary has no authority over the sword or the purse. Thus, in response to those who feared a too-powerful judiciary, Hamilton countered that the judiciary has "neither

force nor will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

So one is led to ask: Is the contemporary Supreme Court truly "first among equals" in the sense that, as Judge Starr posits, it is the branch with the "authoritative" role in settling today's vital issues? If so, is the judiciary still, if ever it was, the "least dangerous" branch? Is it possible to be simultaneously the foremost branch and the least dangerous one?

First Among Equals is principally devoted to providing an affirmative answer to the first question. As might be expected from someone with his keen intellect, breadth of government experience, and acknowledged constitutional law expertise, Judge Starr lays out a persuasive case in support of the judiciary's preeminence. Starr writes in an easygoing, jargon-free style, so the book is readily accessible to laypersons. For lawyers and others with more Court-watching experience, *First Among Equals,* if nothing else, is a very good refresher course on the leading cases of the Court's modern era.

First, Judge Starr briefly traces the Court's origins and provides informative sketches of the jurisprudential predilections of the current nine justices, who now have served together longer than any other cohort. Then, he dissects the major battles in the areas of free speech, religion in the public square and public schools, privacy and abortion rights, race and gender issues, criminal justice, and federalism. Here Starr describes the post-New Deal jurisprudential revolution that either swept away or altered many long-standing precedents, for example, under the Equal Protection and Establishment Clauses. Think *Brown v. Board of Education* (1954) outlawing segregation in the public schools and *Engle v. Vitale* (1962) outlawing public school prayer. Decisions such as these, especially during the Warren Court era (1953–69), significantly expanded the scope of federal authority vis-à-vis the states and individual rights vis-à-vis the popular will as reflected in legislative edicts. Not surprisingly, Starr concludes that "the Warren Court distinguished itself—for better or for worse—from its predecessors, insinuating itself deeply into American life."

Also not surprising is Starr's contention that the post-Warren Court, led by Chief Justices Warren Burger and William Rehnquist, has not abandoned its central role in American life. Here, for example, think of *Roe v. Wade* (1973) striking down state abortion restrictions based on a right to privacy, *Bakke v. Board of Regents* (1978) sanctioning consideration of race in public university admissions decisions, and *Lee v. Weisman* (1992) banning any form of prayer at public school graduation ceremonies. With decisions such as those, it is difficult to argue with Starr's claim that the modern Court continues to play the central role in deciding many issues of fundamental importance to Americans.

But, alas, we are still left with the "for better or for worse" question. This brings us back to asking whether the Court remains the "least dangerous" branch, or, at least, relatively nondangerous. Is the Court

doing its job in the way the Founders envisioned, consistent with the maintenance of a republic in which both individual freedom and democracy reign?

On those fundamental normative questions, Judge Starr has far less to say than he does with regard to his descriptive project. He recognizes that the issue comes down to this:

> In a constitutional democracy, the Constitution is the ultimate authority, binding on all branches and levels of government. But the Constitution, since it is a written document, must be interpreted. Who is to do that? May each branch of government interpret the Constitution for itself? What if the president or Congress reads the Constitution differently from the Supreme Court? Which branch prevails?

Merely posing the questions conjures the risks to a government purporting to rest on the rule of law and not of men. It has been argued by some throughout our history that the branches are co-equal, each with coordinate responsibility to act in accordance with its own constitutional understanding. Jefferson was largely of this view, writing in 1820 that with regard to constitutional interpretation, "the Constitution has erected no such single tribunal." And, Andrew Jackson, in his message vetoing the bill establishing the national bank, said in 1832—

> The Congress, the Executive, and the Court must each be guided by its own opinion of the Constitution. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or Executive…, but to only have such influence as the force of their reasoning may deserve.

Of course, *Marbury v. Madison* (1803) had been decided 29 years earlier. In this most preeminent of all constitutional cases, the Court for the first time struck down an act of Congress as inconsistent with the Constitution. Without resorting to lengthy or intricate arguments, Chief Justice John Marshall, as was his wont, simply proclaimed, "It is emphatically the province and duty of the judicial department to say what the law is."

That grand one-sentence pronouncement, more than anything else, has served as the foundation for judicial review as we have come to know it. Over time the public has come to accept the federal judiciary's power to overrule actions of the chief executive and Congress alike, along with the orders issued by the highest courts of the states. As Starr points out, that's why President Nixon knew he had no choice but to turn over the Watergate tapes after the Court ruled against him in *United States v. Nixon* (1974), and why Vice President Gore knew he had no choice but to accept the Court's decision in *Bush v. Gore* (2000) effectively deciding the election.

But with little critique of the *Marbury* decision, we are left wondering whether, as a normative matter, Judge Starr harbors any doubts about Marshall's ruling. My hunch is that, like me, in the main Starr approves of the way in which *Marbury* took root, nourishing a regime in which the

judiciary plays such a vital role. Because the alternative, a system in which who has the final word on constitutional matters remains unsettled, is one which, inevitably, will tempt those who do control the sword or the purse to substitute raw power for actions grounded in principle. This is especially true where popular passions run counter to individual rights secured by the Constitution.

Alexander Hamilton most likely understood that all too well. For in the same *Federalist No. 78* in which he assured his countrymen that the judiciary always will be the least dangerous branch, Hamilton laid Marshall's groundwork well. Pointing to the Constitution's prohibitions on certain legislative actions, he declared: "Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it is to declare all acts contrary to the manifest tenor of the Constitution void." And there was more: "It is far more rational to suppose that the courts were designed to be the intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the court."

In the end, the judiciary—with the Supreme Court at its apex—can only be the least dangerous, or at least a nondangerous, branch if it exercises sufficient self-restraint for the public to retain confidence that it is sticking rather closely to its assigned function of "say[ing] what the law is." The line between principled interpretation and judicial lawmaking is not always clear. But to the extent judges' decisions are perceived by the public as based on political preferences and not law, then confidence in and respect for the judiciary is undermined.

Judge Starr criticizes the controlling plurality of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood v. Casey* (1992), which reaffirmed the vitality of *Roe v. Wade* largely based on the stability value inherent in adhering to constitutional precedent and the public expectations grounded in such precedent. He bluntly states that *Planned Parenthood* "was an overtly political and cultural approach toward constitutional interpretation." More of his views concerning the rightness or wrongness (as a matter of law) of the Court's most controversial decisions would have been welcome. Also welcome would have been greater attention to the Court's jurisprudence affecting economic liberty, such as cases involving the protection of property and contract rights. Although such cases tend not to capture the public's imagination as much as those involving political rights, such as free speech and freedom of religion, faithfulness to the Constitution requires preservation of our economic as well as political liberties. There is no doubt that the preservation of both is intertwined and depends on a regime in which the rule of law is rendered secure by a judiciary that enjoys public confidence.

Kenneth Starr's *First Among Equals* makes a valuable contribution by showing the extent to which John Jay underestimated the role the Supreme Court would come to play in American life. For the Court to play

this prominent role is, in the main, consistent with the constitutional vision set forth by Alexander Hamilton in *Federalist No. 78* and affirmed by John Marshall in *Marbury v. Madison*. For the public to accept the Court's authoritative role in settling controversial constitutional issues, the Court must enjoy the public confidence and respect Jay predicted it would never acquire. And, for this, all depends on a judiciary widely perceived by the public to be interpreting the Constitution in a principled way, not creating new law based on personal political preferences.

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