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Peter Irons. *A People's History of the Supreme Court.* New York: Viking, 2000. xviii + 542 pp. 15.95 (paper), ISBN 978-0-14-029201-5.

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POWER TO THE PEOPLE?

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Peter Irons's *A People's History of the Supreme Court* is a frustrating book. Beginning in the colonial era, Irons provides a readable and well-structured survey of American constitutional history during the last 250 years. By confining his analysis to a relatively narrow band of cases, he is able to present a coherent and consistent argument detailing the often unhealthy intersection of law and politics, while also supplying enough detail to avoid an overly thin coverage. And Irons sprinkles the book with fresh interpretations, particularly in his discussions of the Marshall years and the Supreme Court during the Progressive Era.

He accomplishes these tasks, however, while generally falling short in his main argument: that understanding the personal lives of the people who filed key constitutional cases is a key part of coming to terms with constitutional history. In fact, Irons's generally persuasive portrayal of two centuries' worth of Supreme Court Justices as figures who approached cases with preconceived ideological and political biases tends to undermine his contention for the importance of a bottom-up approach to studying constitutional history.

The book is divided into six sections, analyzing the constitutional era, the Marshall years, the role of slavery and the Constitution, the Constitution and corporate power, civil rights and the Constitution, and the development of personal liberty and constitutional law. Irons's coverage of all six of these periods is solid, and, in two periods, he offers a series of provocative insights.

The opening section, on the role of the judiciary in the formation and implementation of the Constitution, is the least original: those familiar with the work of Jack Rakove, Bernard Bailyn, or Gordon S. Wood will in all likelihood find few new interpretations. That said, the section is clearly competent, and Irons raises one intriguing issue concerning the lack of discussion of the Supreme Court in the Constitutional Convention, a development he sees as reflecting an understood consensus among the delegates "in supporting a 'national judiciary' with expansive powers over state and federal legislation" (p. 39). Irons might have explored this theme a bit more, particularly with regard as to whether this was a conscious oversight employed by the framers in an attempt to neutralize the judiciary as a major item of contention in the ratification debates. If so, such a move would have complemented the book's overall theme on the multi-layered links between politics and the law. This section also could have provided a bit more detailed analysis of the judiciary-related arguments of the Anti-Federalists, especially given the group's prominence in the decision to adopt a Bill of Rights, which forms such a key role in Irons's interpretation of twentieth century constitutional history.

The book hits its stride in its discussion of John Marshall's tenure as Chief Justice. Contending that "the historical scale requires some balance" (p. 141) in analyzing the legendary Chief Justice, Irons sees Marshall as somewhat of a sloppy jurist for whom the ends outweighed the means. And those ends were passionately held: Marshall's idealized vision of American society revolved around an exalted role for private property at the expense of debtors, farmers, blacks, and women. Irons respects Marshall's political skills in tailoring his decisions in such a way that they would win respect from the public and the nationís political community, but he strongly criticizes the Chief Justice's reasoning in such cases as *Trustees of Dartmouth College v. Woodward* (1819) for ignoring constitutional principles in order to fulfill his ideological agenda.

The discussion of Marshall provides a good example of this book's strength and weaknesses. On the one hand, Irons does offer a compellingly-argued corrective view of the Marshall Court, stressing the fundamental importance of the capitalist order in understanding Marshall's

decisions. On the other hand, the book provides little insight on how Marshall was able so consistently to wield power within the Court. Irons seems content to note that Marshall had "little respect for the rights of 'the people' against the government," due to his essentially aristocratic bearing. But such a description could have applied to almost all members of the national political class in early 19th century America, and, as Irons convincingly shows, most of the cases that reached the Marshall court were highly controversial in nature.

In his treatment of Marshall, Irons cites the establishment of the centrality of the position of Chief Justice. He uses this point to analyze the Court's role in the slavery crisis, where he focuses on the opinions and activities of Chief Justice Roger B. Taney. As with this book's initial section, its coverage of the Taney court and the slavery issue offers little new, but the passion and precision of Irons's devastating critique of Taney's flawed arguments in such cases as *Dred Scott v. Sandford* (1857) nonetheless makes fascinating reading. His portrayal of the Supreme Court as the first of the three branches of the national government to divide firmly along sectional lines also provides a different way of looking at the run-up to the Civil War. Irons offers as much background as he can discover on Dred Scott and his family, as well as the family and supporters of Scott's masters. The value of this information is less clear: given Irons's utterly convincing portrayal of Taney as a jurist who willfully disregarded logic and constitutional principles to uphold the Slave Power, the Chief Justice certainly would have found another vehicle to fulfill his ideological agenda had the *Dred Scott* case never reached his docket.

The end of the Civil War ushered in a transition in the Supreme Court, with issues of economic rights replacing those of personal liberty as the major item on the Court's agenda. And, as with his treatment of Marshall, Irons is on firm ground in his discussion of the Court during the Gilded Age and the Progressive Era. He sees the body as a fundamentally political institution, determined to rein in the (usually tentative) attempts of the states and Congress to establish greater government control over private enterprise. In this, Irons does not challenge the traditional interpretation of the Court as a bastion of conservatism during this period. But he does provide fresh insight on the degree of unethical ties between the Court's members and the political and economic elite of the day. More important, he provides a subtle and stimulating argument on the fitful nature of the transformation of Republican jurists from the pro-government, social issues agenda of the pre-Civil War G.O.P. to the conservative, pro-business perspective of the late 19th and early 20th centuries. And Irons even hints – although he does not develop the point – that other paths might have been possible, citing cases such as *Munn v. Illinois* (1877), in which the Waite court upheld the state right to regulation.

Irons covers familiar ground in the book's final two sections –unsurprisingly so, given that he has written pioneering work on issues relating to civil rights and civil liberties. Irons devotes surprisingly little attention (one fairly cursory chapter) to the rulings of the Warren Court outside of *Brown v. Board of Education* (1954) and privacy, but otherwise he presents a solid narrative that borrows from his own work on civil liberties, the efforts of Mark Tushnet, Howard Ball, Taylor Branch, and others on civil rights, and David Garrow on the right to privacy.

Irons admits in his preface that he approaches his topic with an ideological bias, noting that he had no wish to conceal his "values behind a mask of scholarly 'objectivity' or a veil of 'neutrality'" (p. xv). No book on constitutional history, he reasons, "has failed to conceal its author's personal values or political stance, despite the disclaimers of some" (ibid.).

That claim may very well be true, but, in two ways, Irons's values and politics influence some aspects of this book to an unusual degree. First, Irons's preference for juxtaposing a broadly defined class of the "people" against the interests makes it difficult for him to avoid blanket negative evaluations of individual Justices. Before the 1920s, the only three Justices to receive praise for their judicial reasoning (quite justifiably) are John Marshall Harlan I, Louis D. Brandeis, and John H. Clarke. A favorite adjective for almost all of the rest is "undistinguished."

But surely some difference exists between the likes of the reactionary "Four Horsemen" from the New Deal Era or Roger Taney and a figure such as Chief Justice Morrison R. Waite from the Gilded Age. Irons pointedly characterizes Waite's *Cruikshank* (1873) opinion (which used pre-Fourteenth Amendment precedents to deny that the Fourteenth Amendment bound the states to enforce the Bill of Rights) as a "deliberate misreading of law and history." But Waite also penned *Munn v. Illinois*, a rare Gilded Age case upholding the state's right to regulate business. It may be, as Irons argues, that Waite's designation as "near great" in a poll of constitutional historians flowed from the length of his service rather than the quality of his jurisprudence. But Irons would have served his argument better by at least addressing alternative explanations. This tendency to lump members of the political elite together as rivals of the "people" appears in more

than just Irons's commentary on the Supreme Court. For instance, the book describes Elihu Root, Theodore Roosevelt's attorney general and secretary of state, as "one of Wilson's closest advisors" (p. 266), a designation that would undoubtedly have surprised both men.

The book's second difficulty also stems from Irons's attempts to write constitutional history through the lens of his ideological agenda. The book's operative framework is that students of constitutional history need to understand the people behind the cases as much as they need to analyze the opinions and motives of Supreme Court Justices. Irons notes that "American constitutional history is the history of real people with real grievances. Judges – who are also real people – do not always uphold these claims, but their decisions affect many lives" (p. 157).

On one level, this statement is self-evident. And obviously, analyzing the motives of legal interest groups such as the NAACP, ACLU, or various conservative organizations from more recent times is critical to the history of the cases in which these groups were involved. But the fact that cases would not have existed without people filing them does not imply that the individual lives of these people – the likes of Dred Scott, William Cruikshank, Walter Gobitis, or the other figures detailed by Irons – are critical to understanding constitutional history. Indeed, the evidence that Irons presents often suggests exactly the reverse. As he argues throughout the book, Justices have been motivated as much by their preconceived ideological and political agendas as the facts of the cases at hand. Surely Roger Taney's determination to expand the constitutional rights of slavery would have allowed him to find another vehicle for his efforts even had the *Dred Scott* case never been filed. Likewise, the Gilded Age Court would have found ways to limit the Fourteenth Amendment even without a *Cruikshank* case. >From the other side of the ideological spectrum, Justice William O. Douglas's "penumbra" of privacy surely would have appeared even had *Griswold v. Connecticut* (1962) never had appeared on the Court's docket.

The book's strengths outweigh these weaknesses; indeed, readers can skim the material on the individual lives of Court participants without losing the flow of the argument at all. But the reader should be conscious of the ideological agenda of this text before starting it.

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