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2000

Review of Leaving the Bench: Supreme Court Justices at the End, by D. N. Atkinson

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Recommended Citation
Friedman, Richard D. Review of Leaving the Bench: Supreme Court Justices at the End, by D. N. Atkinson. Am. J. Legal Hist. 44, no. 4 (2000): 447-9.

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and Nineteenth Centuries" (pp. 227-64), dovetails nicely with Paul Johnson's equally impressive work on "Creditors, Debtors, and the Law in Victorian and Edwardian England" (pp. 485-504), in detailing how different social classes of individuals were treated by particular types of courts, and to what ends.

Culled from a larger research project,[1] Hay's paper examines the use of summary justice levied against wayward servants by magistrates from 1750 to 1850. Definite trends include a striking rise in the per capita rate of penal sanctions against insubordinate servants, an increase in the length of those sentences, and a greater likelihood that convicted servants would be confined to newly created prisons and jails. At the same time, there is little evidence of servants successfully asserting claims against their masters.

Johnson recounts and then analyzes four explanations for why Victorian England saw small debtors m county courts treated more harshly than bankrupts m bankruptcy courts. This income, and also enforcing those claims by threats of carceration for non-payment. Explore in turn differences in (i) the legislative bases of the debt recovery systems, (ii) their procedures, (iii) the debtors' economic situations, and (iv) their social standing, Johnson concludes that the unequal treatment originated from an unsubstantiated judicial presumption that small debtors lacked the "desire and intention to honor debts they had willingly entered into (p. 504)."[2]

Whether and how one should extrapolate this English-centered research to other national contexts is unclear For example, how great a connection should the reader make from the dissimilar treatment described by Hay and Johnson in the contexts of master/servant and creditor/debtor, to the power relationships played out in New York landlord-tenant courts (pp. 411-34), or Prussian patrimonial courts (pp. 69-88)? Because the possibility of connection is intriguing, this book serves an important function as an invitation to cross-cultural legal examinations.

Finally, special praise is owed to Angela Davies, Jane Rafferty, and Jim Underwood for their first-rate translation of the French essays, as well as some of the German into English.

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DAVID N. ATKINSON, *Leaving the Bench: Supreme Court Justices at the End.* Lawrence: University Press of Kansas, 1999. xiii, 248 pp. $29.95.

David Atkinson points out an interesting anomaly near the beginning of his book, *Leaving the Bench:* scholars have spent an enormous amount of energy studying entrance to the Supreme Court—how justices are chosen—but much less studying exit. It is indeed an important issue. Do justices stay too long (or perhaps leave too early)? What mechanisms are in place to induce them to leave the Court when the time has come, and passed? Are further mechanisms needed?

1. Among the publications originating from the Master and Servant Project at York University are Paul Craven & Douglas Hay, "The Criminalization of "Free" Labour: Master and Servant in Comparative Perspective," *Slavery and Abolition* 15 (1994):71; and Douglas Hay & Paul Craven, "Master and Servant in England and the Empire: A Comparative Study," *Labour/Le Travail* 31 (1993):175.

2. As with Hay, Johnson's work is part of a larger research scheme. *See* Paul Johnson, "Small Debts and Economic Distress in England and Wales, 1857-1913," Economic History Review 46 (1993):67; Paul Johnson, "Class Law in Victorian England," Past and Present 141 (1993):147.

Professor Atkinson has written a short and engaging book devoted largely to the theme of departure from the Court. It could have been a considerably shorter book if he had focused more closely on this theme. And it could have been a considerably more useful book if he had done more serious research, rather than being distracted by a potpourri of curios and anecdotes of varying degrees of interest but of dubious historical value.

Atkinson's introduction might be characterized as a stream of consciousness—except that, though the overall theme of such a stream may not be apparent, at least the connection between one passage and the immediately connecting ones is. Most of the balance of the book is a justice-by-justice account, with only slight deviations from pure chronology, of how the justice left the Court—or in some cases at first declined to leave. There is a considerable amount of absorbing but extraneous detail. Those who, like myself, are devoted obituary readers will not hasten past the full accounts of just how the justices died, however little significance the medical particulars may have for political or institutional theory. (Atkinson, who makes few factual mistakes, so far as I can tell, does make one medico-baseball error that will stick in the craw of many sports fans: Lou Gehrig's Disease is in fact amyotrophic lateral sclerosis, not chronic inflammatory polyneuropathy [p. 80]. Which disease prematurely killed Justice William Moody is therefore left unclear.) Those seeking information on how justices spent their days after leaving the Court—for example, what Justice John Clarke's daily routine was (pp. 90-92)—now have a place to turn. And anyone planning a tour of justices' gravesites would be foolish not to rely on Atkinson's Appendix C.

With the aid of Appendix B, which is numerically rather than geographically oriented, one may learn that the Nine Old Men of 1937 really had the oldest average age, 72, of any Court to that time, a number that has been equaled but never surpassed, and that the Court's current (as of this writing) stretch of nearly seven years without a change of membership is second only to the run of nearly 12 years in the middle of the Marshall era.

But how bad is the problem of justices staying on too long? Though Atkinson does not offer any sustained analysis of changes in productivity or in quality of work, his seriatim accounts make clear that at times the problem has been quite significant. Recently, though, it seems to be much more contained. For a variety of factors—most significantly, a generous pension statute passed in 1937, and perhaps also a changing ethos on the Court, improved medical care, and a dollop of luck—no sitting justice has died since Robert Jackson did in 1954, and no justice has lingered on the Court very long while dying since Benjamin Cardozo missed most of the 1937 term. (Justice Hugo Black and the second Justice John M. Harlan both fell terminally ill over the summer of 1971 and retired before the beginning of the term.) Justice William O. Douglas probably should have retired several months sooner than he did, but the total time between his stroke and his retirement was about 10 months, much of which was summer recess. Justice Thurgood Marshall, whose incapacitation was not nearly as sudden or dramatic, arguably should have retired several years earlier.

The Court has at least two informal mechanisms to hasten overdue departures. Occasionally, the chief justice or other colleagues have told a justice that a consensus has been reached that it is time to go. Sometimes, as in the case of Justice Oliver Wendell Holmes, that is all that is needed. At least twice, in the cases of Justices Joseph McKenna and Douglas, most of the other justices have agreed that the disabled justice's vote would not be allowed to have decisive effect. The propriety of this heavy-handed technique is an interesting and contro-

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versial question; apart from summarizing Justice Byron White's objections, though, Atkinson does not offer analysis.

Recognizing the improbability of constitutional amendment, Atkinson does suggest three additional mechanisms. One is greater release of medical information. I doubt this would serve much purpose, and it would have a significant cost. Second, he proposes reducing the role of law clerks, perhaps by having them work in a pool rather than in individual chambers; the idea is that clerks are able to disguise the decline of a justice and postpone retirement. He is not the first to argue, and persuasively, that the increased role of law clerks is troublesome, but the problem is not limited to justices in decline. And, given that some justices of marginal competence will be on the Court—either because they have declined or because they were never very competent to begin with—it may be that the clerks mitigate the problem. Third, Atkinson asks for greater self-awareness on the part of the justices. Of course, that simply restates the problem. But Atkinson suggests giving self-awareness a boost by adding a justice to the Court if one does not leave by a designated retirement age. Court-packing, even if not motivated as in 1937 by ideological concerns, is unlikely ever again to be politically plausible, and with good reason. Nine justices are enough, a packing plan creates undesirable complexity, and it does not even remove the disabled judge.

One mechanism may be useful, however. Several justices, most notably Chief Justice Charles E. Hughes, have designated one or more family members to tell them if they stayed too long. The Court could adopt an institutional practice in which each justice is expected to confirm from time to time, perhaps each year, that he or she has designated such a committee.

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MAXWELL BLOOMFIELD, *Peaceful Revolution: Constitutional Change and American Culture from Progressivism to the New Deal.* Cambridge, Mass.: Harvard University Press, 2000. xi, 209 pp. $35.00.

In this light and engaging book, Maxwell Bloomfield demonstrates convincingly that forms of popular culture have both reflected and shaped formal constitutional development. Drawing on a wide array of sources—such as novels, plays, cartoons and movies—the author demonstrates that constitutional law does indeed have an important cultural context.

In terms of analytical approach, Bloomfield basically combines two themes of recent constitutional history. First and foremost, he echoes the interpretative approach of Michael Kammen,[1] locating an interesting—and often contested—collection of constitutional images and ideals in American culture. Unlike Kammen, Bloomfield broadens his definition of this "constitutional culture" to look beyond the "high" culture of intellectuals. He instead explores a wide array of popular culture to show that "constitutional culture" flourished at all levels of American society. And by situating his book in the early twentieth century, Bloomfield touches on his second trend—the revisionist interpretation of the

1. Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York, 1986).