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Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940 (book review)

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Ernst, Daniel R. *Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940*. Oxford: Oxford University Press, 2014. 240p. \$35.96. ISBN-13: 978-0199920860.

Tocqueville's Nightmare is an intellectual legal history that focuses on the history of legal intellectuals. The general story told by Daniel Ernst is a history of the American administrative state from 1910-1940. This general story is generated by particular stories, stories that involve an intense study of the work of a relatively few lawmen. For American legal historians, and for at least some lawyers, these men remain well known: Charles Evans Hughes, a New York lawyer and twice a member of the Supreme Court (first as an Associate Justice (1910-1916) and later as Chief Justice (1930-1941)), Felix Frankfurter, Professor at Harvard Law School during the time of this study (he later served as Associate Justice of the Supreme Court), Roscoe Pound, Dean of the Harvard Law School from 1916-1936, and Jerome Frank, a lawyer tied to Franklin Delano Roosevelt's New Deal and one of the prominent figures of American legal realism. Ernst also discusses the work of Ernst Freund, an emigrant from Germany and legal academic whose approach to the administrative state (the German *Rechtsstaat*) was rejected in favor of a particularly American model. Ernst's history of legal intellectuals may be intuited by the titles of his five numbered chapters: all but one is named after one of those lawyers listed above.

The theme of Ernst's book is how American lawyers and American lawmakers accommodated the rise of the administrative state. As Ernst states in his Introduction, Tocqueville praised the American system of government for avoiding an "insufferable despotism." By 1940, Ernst argues, Americans largely accepted a system of administrative governance. More importantly, that system did not give rise to despotism, but "had confounded Tocqueville's expectations." How had it done so? Ernst argues that the American understanding of the rule of law involved "an appeal from government officials to independent, common-law courts." The wherewithal of Americans to appeal in order or dictate of a government bureaucrat to the neutral and independent courts ensured a government of laws and not of men. Ernst traces the manner in which this understanding of the rule of law was slightly altered. The courts lacked the manpower to oversee bureaucratic governance, but unchecked bureaucratic governance might generate Tocqueville's nightmare, the tyranny of the majority. To avoid either paralysis or petty tyranny, the American administrative state was given a "legalistic cast." Legalization was "the key to understanding the twentieth-century origins of the administrative

state in America.” Legalization in part required government commissions to conduct hearings, gather evidence, explain their reasoning, and avoid *ex parte* communications. In general, administrative agencies were required to play fair, to follow generalized court-based notions of due process. Courts continued to oversee the actions of administrators, but “increasingly, court review was procedural rather than substantive.”

Ernst begins with a chapter explaining why Freund’s *Rechtsaat* model was shelved in favor of this American model. He ends in 1940 with an explanation of how a “day in commission” supplanted the traditional “day in court” model in the common law. This relatively short book begins by contrasting the approaches of Freund and Frankfurter, offers two chapters in which Hughes is the central character (first as lawyer and governor, and second as Chief Justice), discusses the failed effort to include an “anti-bureaucracy” clause in New York’s constitution, and ends with the “debate” between Pound and Frank regarding reform of administrative law making.

Part of the value of *Tocqueville’s Nightmare* is found in its explanation of how and why so many lawyers, who were trained and expert in the court-centered common-law model, were willing and ready (despite opposition by other lawyers) by 1940 to accept administrative governance. The shift to administrative governance redirected much of the energy expended by lawyers, but it seems unlikely lawyers accepted the administrative state because it would expand the practice of law.

Ernst’s decision to analyze the legal progressives who created the foundation for the modern administrative state in the United States is sound. His pointillist work (the number of archives rummaged about is impressive) takes the reader from the particular to the general, and the result is satisfying overall.

Ernst includes a number of photographs, figures and cartoons. This is uncommon, and a welcome addition. The inclusion of photographs of the protagonists and political cartoons is a nice touch. More importantly, Ernst uses two murals found in the Library of Congress to emphasize the theme of his study. Again, the photographs reinforce the book’s study of the history of legal intellectuals,.

One brief complaint concerns the title. *Tocqueville’s Nightmare* is inaccurate, as Ernst acknowledges. He concludes that the American administrative state has been neither Tocqueville’s nightmare nor a cure for the ills of legislative mismanagement or judicial in-

dolence or bias. Possibly the title was intended to grab the indifferent reader. Finally, I enjoyed the historical exegesis. But I doubt this history has much to say to us regarding our present circumstances, particularly disagreements regarding the role of legislative enactments since 2009.

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