
TOCQUEVILLE'S NIGHTMARE: INSTITUTIONAL AND INTELLECTUAL

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Professor Jeremy Kessler's insightful review of Professor Daniel Ernst's wonderful book on administrative law through the 1940s, *Tocqueville's Nightmare*, raises several important questions about the topic and about how we are to understand it through a historian's eyes.¹ His review brings out a disjuncture in our histories of administrative law: a disjuncture between the history of American governance (how the actual practices of the administrative apparatus of the national government have developed) and the intellectual history of the administrative state (how reflective analysts of that apparatus have understood it). Ernst's book, and Kessler's review, suggests that a next step in the study of the administrative state's history would integrate these strands.

Here I focus on a historiographical question, which also has a political dimension. Kessler introduces the historiographical question by locating *Tocqueville's Nightmare* in relation to recent scholarship on the development of the American state or, as he perhaps more accurately puts it, on the development of governance in the United States. As Kessler points out, this scholarship sharply challenges the view that "the state" in the United States was "weak" or barely developed — in Stephen Skowronek's words, a state of courts and parties, not of administration.² This scholarship has successfully altered our understanding of *that* topic, which I will call the history of American governance.

The history of governance deals with the actual institutions through which governance occurs. Prior accounts of the weakness of the American state were influenced by their authors' visions of the growth of multiple nationwide administrative bureaucracies in France and Germany in the nineteenth century. Not seeing such bureaucracies in the United States, scholars of an earlier generation described

* William Nelson Cromwell Professor of Law, Harvard Law School. Professor Ernst was a long-time colleague of mine at Georgetown University Law Center, and I relied heavily on his work-in-progress as I was working on chapters on administrative law in the 1930s for my own work-in-progress on the Supreme Court in the 1930s. The book contains a jacket endorsement from me.

¹ Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718 (2016) (reviewing DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014)).

² *Id.* at 726 (citing STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE 25 (1982)).

the American state as “weak” and “thin.”³ The new scholarship on governance shows that there were many more institutions of governance than the earlier literature suggests — the steamboat regulatory commission that Jerry Mashaw brought to historians’ attention, the urban regulations of sanitation that William Novak discusses, and the like.⁴

Parallel to the history of American governance is another, which I call the intellectual history of “the state” in America. *That* history deals with how leading thinkers conceptualized the institutions of governance, and how their thinking filtered into the general public’s understanding of the institutions to which it was subject. Recent scholarship on the history of governance has not yet changed the intellectual history of the state — and perhaps because the intellectual historians have gotten it as right as we are likely to get. That is, perhaps there was — not to be coy about it, I think there was — a disjunction between what was actually going on in governance and how intellectuals, and through them the public, conceptualized what was going on. One way of putting the point is that as far as I know, no significant thinker before the twentieth century characterized the U.S. system of governance as an administrative state.

The new scholarship on American governance, then, pushes at least two additional questions to the fore. First, exactly how can such a disjunction arise and persist? That is, how can intellectuals and those they influence persist in describing, criticizing, and defending a way of thinking about institutions that does not refer to the actual institutions in place? As Kessler suggests, consistent with Daniel Rodgers’s important work on “Atlantic crossings” of ideas,⁵ the answer may lie in the influence of German models in the case of Ernst Freund, or in U.S. thinking about administrative law in the case of A.V. Dicey and less adventuresome thinkers.⁶ Intellectuals work with the material at hand — not merely, or perhaps even primarily, the institutions they are trying to understand, but more important the ideas available to them. If those ideas map imperfectly onto the institutions, so much the worse for the institutions.

Second, Kessler emphasizes that we can see a similar — though substantively different — disjunction between institutions and ideas in the thinking of the most ardent defenders of the New Deal’s administrative law. Drawing on Ernst’s work, Kessler suggests that, just as

³ See *id.* at 727.

⁴ Representative examples of this scholarship are cited in Kessler, *supra* note 1, at 727 nn.45 & 47.

⁵ DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (2000).

⁶ Kessler, *supra* note 1, at 734–36.

scholars who characterized the prior system of governance as weak understated the state's strength, so the New Deal's defenders overstated what the New Deal achieved in administrative law.⁷ Felix Frankfurter and, even more, James Landis described the administrative law they worked with and helped create as a full-fledged system of hierarchical, expert-dominated governance. Ernst shows that they misunderstood the reality. Diceyan ideas about control of administrative law by ordinary law — or, as Ernst emphasizes, control of administrative lawyers by ordinary lawyers — remained central to the new system of governance.⁸ Here, Ernst operates at the intersection of the history of American governance and the intellectual history of the American state.

Juxtaposing the history-of-governance and the intellectual-history views of the administrative state in the New Deal period helps us see Landis's position more clearly: in light of the disjuncture between his academic reflections and the reality of administrative governance in the New Deal, perhaps we should see him not as a detached academic scholar attempting to describe the new reality, but as a political actor intervening to press forward one contested view of the proper direction of legal development.

Kessler's main criticism of *Tocqueville's Nightmare* is that it mistakenly identifies a consensus as the New Deal consolidated in the late 1930s and early 1940s.⁹ As Kessler correctly notes, Ernst describes a consensus in which administrative lawyers accepted some degree of "legalization" — supervision of their work by ordinary lawyers both in the bar and the general judiciary — in exchange for substantial discretion in exercising expertise through procedures roughly similar to those used in the ordinary courts (though "roughly similar" actually gave the administrative lawyers rather significant flexibility).¹⁰ But, Kessler argues, there was no such consensus; the very existence of an administrative state has been subject to political challenge from before the New Deal to the present.¹¹ Sometimes there are full-scale battles, sometimes skirmishes, sometimes strategic retreats, but at no point have the contending forces left the field.

As I have suggested, integrating the history of American governance with the intellectual history of the administrative state can suggest insights that do not immediately arise when we consider either approach on its own terms. This seems to me correct, and perhaps a useful corrective to Ernst's overall argument, though its seeds can be

⁷ *Id.* at 732–34.

⁸ E.g., ERNST, *supra* note 1, at 3.

⁹ Kessler, *supra* note 1, at 725–26.

¹⁰ *Id.* at 757–58.

¹¹ E.g., *id.* at 762.

found in *Tocqueville's Nightmare* too. Ernst's work provides a model for going forward, because it suggests that historians of administrative law should try to integrate the history of American governance with the intellectual history of the American state.

One starting point might be to thicken the accounts that both Ernst and Kessler offer of the connection between the critique of the administrative state and recent Tea Party and originalist challenges to that state.¹² My suggestion would be to begin with the dismay some New Dealers expressed over what they viewed as the Hughes Court's gutting of their program through the jurisdictional fact doctrine of *Crowell v. Benson*¹³ and with the questions about the relationship between investigation and adjudication raised by *Morgan v. United States*¹⁴ (*Morgan II*). That New Dealers *were* dismayed is unquestionable: Secretary of Agriculture Henry Wallace's vociferous rebukes to the Supreme Court after *Morgan II* were featured prominently in leading newspapers, for example.¹⁵ Whether their dismay was justified is another question. Or, perhaps a better phrasing is: the grounds for their dismay ran quite deep, and can be captured only by moving from political history to intellectual history.

Ernst argues that Chief Justice Hughes simultaneously endorsed and sharply narrowed the jurisdictional fact doctrine in *Crowell*.¹⁶ Contrary to Kessler, I believe that the narrowing was far more significant than the endorsement.¹⁷ *Morgan II* is a bit more difficult for Ernst's account, except for the fact that it was readily domesticated within the administrative state. Several important ongoing proceedings were interrupted by *Morgan II*, the most notable being the National Labor Relations Board's consideration of legal issues associated with efforts to organize at the Ford Motor Company.¹⁸ But, once agencies assimilated *Morgan II*'s holding — particularly as later interpreted by the lower courts — their operations were left changed only slightly.

¹² ERNST, *supra* note 1, at 143–44; Kessler, *supra* note 1, at 719–22. I note that the originalist challenge does not rest on historical study as historians understand that idea, but for present purposes that proposition is of no moment.

¹³ 285 U.S. 22 (1932).

¹⁴ 304 U.S. 1 (1938).

¹⁵ See, e.g., *New Battle on Power of Court over Agencies Seen by Wallace*, WASH. POST, May 19, 1938, at X2; Henry A. Wallace, Letter to the Editor, *Secretary Wallace Explains Kansas City Rate Decision*, N.Y. TIMES, May 8, 1938, at 72.

¹⁶ See Kessler, *supra* note 1, at 745.

¹⁷ I note that Ernst and I were developing our interpretations of *Crowell* almost simultaneously, and we exchanged thoughts as we did so. My version of the argument is Mark Tushnet, *The Story of Crowell: Grounding the Administrative State*, in FEDERAL COURTS STORIES 329 (Vicki C. Jackson & Judith Resnik eds., 2010).

¹⁸ *Labor Board Recalls Cases, Due to Ruling*, WASH. POST, May 3, 1938, at X2.

What then accounts for the New Dealers' dismay? My view is that they achieved quite a bit of their program from the Hughes Court in the 1930s, the period with which I am most familiar. As I sometimes put it a bit hyperbolically, during the 1930s the theorists of the administrative state got 75 percent to 80 percent of what they wanted. They were upset that they did not get 100 percent. That seems politically foolish, but their judgment, I believe, rested on their conceptualization of legality in the administrative state, not on actual conditions "on the ground." The judgment, that is, rested on matters addressed by intellectual history, and specifically by the history of legal thought in the United States.

The New Deal theorists understood law in light of Progressive legal theory as articulated by the American legal realists. And, they understood legal realism to have undermined the conceptual basis of traditional ideas about what legality required. For some, like Jerome Frank, those ideas were facades for the immaturity of traditionalists.¹⁹ For others, like Karl Llewellyn, the ideas were rooted in an essentially sociological agreement among a well-socialized group of lawyers and judges.²⁰ To revert to my metaphor, the twenty percent that the advocates for the administrative state failed to achieve was, from their point of view, sheer nonsense that no respectable legal theorist could endorse. And, particularly for those who held views like Llewellyn's, the existence of the residual twenty percent was simply a political challenge like all those they had faced in working up to the eighty percent they had achieved. On this interpretation, the New Dealers' dismay makes some sense.

The interpretation also connects the intellectual history of administrative law to broader elements in intellectual history. For example, the best historically based conservative challenge to the administrative state, articulated for example by Professors Paul Moreno and Richard Epstein, roots the challenge in the transformations in constitutional thought wrought by Progressivism (embodied, probably for expository purposes, by Woodrow Wilson).²¹ Progressivism purported to rest public policy on the public interest, as discerned by experts. But, the conservative challenge holds, Progressives abandoned a traditional idea of the public interest, which they believed to be founded on a transhistorical (and mistaken) commitment to classical liberal rights, and substituted for it ideas about the public interest that were read out from contemporary circumstances. One facet of Progressivism was legal realism, and one of its earliest manifestations was precisely a cri-

¹⁹ See generally JEROME FRANK, LAW AND THE MODERN MIND (1930).

²⁰ See generally KARL N. LLEWELLYN, THE COMMON LAW TRADITION (1960).

²¹ See PAUL D. MORENO, THE AMERICAN STATE FROM THE CIVIL WAR TO THE NEW DEAL (2013); RICHARD A. EPSTEIN, DESIGN FOR LIBERTY (2011).

tique of the concept of rights that conservatives find at the heart of the American project. Again to revert to my metaphor, if for the administrative state's advocates the twenty percent they had not achieved was nonsense, for conservatives the eighty percent the New Dealers did achieve was lawless. The intellectual history of legal thought deals with the ideas — crudely summarized as legal realist and formalist — that generate these competing characterizations.²²

Kessler's references to Professors Cass Sunstein and Adrian Vermeule's critique of libertarian administrative law²³ show that a political critique of the conservative challenge to the administrative state remains quite forceful, roughly because too many people find too much of value in what that state does. The thicker critique I have suggested here is that the conservative challenge is vulnerable on jurisprudential grounds as well, at least in the absence of a conservative reaction to legal realism that goes beyond mere disagreement. Political battles over the administrative state persist, as Kessler points out.²⁴ Whether there are serious battles over the legal realist foundations of the New Deal administrative state seems to me at least an open question — or one to which the answer, as of now, is "No."

²² The intellectual history of legal thought deals with much more than that single topic, of course.

²³ Kessler, *supra* note 1, at 720 (citing Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015)).

²⁴ *Id.* at 757.