A Second Look at the Administrative State: Deconstruction as Reassessment

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Aaron L. Nielson, *Deconstruction (Not Destruction)*, 150(3) **Dædalus** 143 (Spring 2021).

This summer, *Dædalus*, the Journal of the American Academy of the Arts and Sciences, turned its focus to public administration and the regulatory state. Mark Tushnet served as the Summer 2021 *Dædalus* Issue's Guest Editor, compiling essays from leading lights of administrative law like Cass Sunstein, Aaron Nielson, and Judge Neomi Rao. Professor Nielson's piece, *Deconstruction (Not Destruction)*, is the latest work in a line of scholarly literature that acknowledges the growing libertarian discomfort with perceived excesses of administrative governance (perhaps best embodied in the scholarship of Professor Philip Hamburger and the jurisprudence of Justice Neil Gorsuch) and proposes an alternative path forward for regulatory state skeptics. Some other such works include Professor Jeff Pojanowski's 2020 *Harvard Law Review* article *Neoclassical Administrative Law* and Professors Sunstein and Adrian Vermeule's new book *Law and Leviathan*.

Conceding at the beginning of the essay that "[t]he Supreme Court is not about to declare most of the federal government unconstitutional," Professor Nielson is nevertheless sympathetic to the idea that today's administrative-centric federal model presents serious issues. Professor Nielson's thesis proceeds from the premise that, in the context of administrative law, commentators typically associate the word "deconstruction" with former White House Chief Strategist Stephen Bannon's assertion that the Trump Administration sought to "deconstruct"—read: destroy—the administrative state. Professor Nielson takes a step back and reinterprets deconstruction in the "more technical sense of examining the administrative state to identify where theory and reality diverge and what can be done to fix it." This reconsideration, Professor Nielson argues, is long overdue; to the extent that the federal government has constructed the administrative state over the last century or so, Professor Nielson proposes deconstruction as a way of rigorously interrogating the theories and assumptions underlying said efforts.

Professor Nielson deconstructs administrative law down to its foundation and lodges structural critiques that call important aspects of the whole enterprise into question. While Professor Nielson allows that "the 'expertise' theory of administrative law contains much truth," he points out that the "theory is not *always* true," explaining the many shortcomings of expert-driven governance and evincing skepticism about "the theory of policy-making as an objective science." He also describes how modern presidents have taken control of the administrative state to achieve policies they could not get passed through Congress, calling out as "problematic" the bypassing of the bicameralism and presentment process enshrined in the Constitution, a process meant to "produc[e] higher-quality, more legitimate laws." Furthermore, Professor Nielson showcases how the increased reliance on agency rulemaking to effectuate certain administrative goals has led to regulatory uncertainty, as different administrations quickly change directions on important policies, like net neutrality and environmental protection. As Professor Nielson puts it, "It is difficult to encourage the private sector to invest in, say, new forms of energy when policy changes every four to eight years."

Taking stock of these criticisms, Professor Nielson makes clear that "[d]econstruction . . . does not have to mean destruction. It is possible to reform the administrative state without tossing it out." And looking at the current composition of the Court, as well as the path of the law, Professor Nielson opines that good reform is forthcoming. He points to recent cases like Kisor v. Wilkie as examples of how the Court can balance its respect for stability with the imposition of safeguards in the administrative process. In *Kisor*, the Supreme Court reaffirmed the rule that courts must defer to agencies' interpretations of their own ambiguous regulations. But Justice Elena Kagan, writing for the Court, cabined the universe of situations in which such deference applies—regulations must be *genuinely* ambiguous, and

certain other conditions must apply. Justice Gorsuch wrote a sharp dissent, seeking to "overrul[e] this species of deference altogether." The Court split 5-4 in *Kisor*, but both Justice Kagan and Justice Gorsuch did agree on a baseline principle: unchecked judicial deference to agencies' interpretations of their own regulations is inappropriate. Justice Kagan significantly narrowed the circumstances in which deference applies, while Justice Gorsuch would have ended deference altogether. These two approaches, Chief Justice John Roberts pointed out in his decisive concurrence, are not so far apart.

Compared to some of the other scholarly works mentioned above, Professor Nielson's ideal solution diverges from that of Professor Pojanowski, as well as that of Professors Sunstein and Vermeule. To be sure, Professor Pojanowski's "neoclassical approach" to administrative law would restore the judicial role in answering questions of law, resolving the brouhaha over so-called *Chevron* deference through a shift back to a system in which judges, not bureaucrats (and their "political masters"), interpret seemingly ambiguous laws. But Professor Pojanowski advocates that courts respect agency policy choices made within "the discretionary space Congress has given them." Meanwhile, in their book, Professors Sunstein and Vermeule take a more enthusiastic view of the administrative state. The two argue that administrative law has a kind of internal morality that flows from judicial enforcement of certain principles, like the longstanding rule that courts should not defer to the government's after-the-fact rationalizations of agency actions.

At bottom, Professor Nielson argues for administrative safeguards. So does Professor Pojanowski. Professors Sunstein and Vermeule do, too; they just believe that the safeguards—adapted from the philosopher Lon Fuller's principles—are already in place and simply require continued judicial enforcement. To borrow a phrase from Chief Justice Roberts's *Kisor* concurrence, the distance between and among the works of Professor Nielson, Professor Pojanowski, and Professors Sunstein and Vermeule "is not as great as it may initially appear." All agree that safeguards are necessary in administrative law. Yet all agree—perhaps contrary to the hopes of some libertarian critics of the administrative state—that the Court should not declare that "most of Government is unconstitutional."

Now, as the Court reconsiders its approach in various areas of administrative law, scholars are working to understand what the Court is doing, while advocating what they think are the best solutions. Professor Nielson's solution—deconstruction—has more teeth than does Professor Pojanowski's neoclassical vision or Professors Sunstein and Vermeule's internal morality, but it is another middle course charted between ripping the administrative state down to the studs and allowing it to operate without any guardrails. Professor Nielson's essay, however, takes most serious account of the libertarian critiques of the administrative state, channeling them into the beginnings of a thoughtful way forward for those with serious misgivings about the structure and practice of modern government. His piece, along with the rest of this latest issue of *Dædalus*, is a worthwhile read.

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