

Envisioning a Protective Administrative Law Framework

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ABSTRACT

The administrative state is an instrument of deprivation and intrusion. While civil rights statutes and constitutional law have sought to rectify some of these dangers, the role of administrative law has been undervalued. This Essay initiates the construction of a protective administrative law paradigm. More specifically, it explores the idea that administrative law tools drawn from the Administrative Procedure Act (APA) could be utilized to protect people engaging with or targeted by the administrative agencies, including as directed by the President, in a manner that is complementary to—but distinct from—civil rights and constitutional law models. In doing so, it locates administrative law in conversations about preserving individual interests vis-à-vis the administrative state. Indeed, the APA is a cornerstone of administrative law that offers possibilities for constraining damaging administrative behavior, including violence furthered by nontransparent and arbitrary immigration enforcement policies. More specifically, this Essay explores the use of notice-and-comment rulemaking; arbitrary and capricious review; and APA-based review of administrative detention to protect individuals’ liberty and bodily autonomy. The essay’s suggested approaches fit within current doctrine, are useful across presidential administrations, and may also be pertinent to restraining harmful administration outside of the immigration context.

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I. INTRODUCTION

Last year, the Trump Administration started sending Venezuelan immigrants to a foreign prison in El Salvador “where detainees suffer egregious human rights abuses”¹. . . “without any due process of law, under the auspices of the Alien Enemies Act, a 1798 law designed for times of war.”² The Administration has justified its farfetched use of the Alien Enemies Act to deport noncitizens by attaching a “criminal” label to them; nonetheless, most of these people have not, in fact, been accused of committing or convicted of any crimes.³ Since then, the U.S. District Court for the District of Columbia found that the government denied constitutional due process to these Venezuelan men. More specifically, the judge said that the men deserved the right to a hearing—whether by bringing them back to the U.S. or by allowing them to pursue legal remedies from abroad.⁴

While the decision placed an important constraint on administrative enforcement actions, the court’s response was not extraordinary. Conventionally, the assertion of rights to or protections from deprivations or intrusions by administrative agencies has been based either in civil rights statutes or in claims to constitutional processes or protections.⁵ That having

¹ *Trump v. J.G.G.*, 604 U.S. 670, 689 (2025) (Sotomayor, J., dissenting).

² *Id.* at 675; see also Sarah Stillman, *Disappeared to a Foreign Prison*, THE NEW YORKER (Nov. 24, 2025), <https://www.newyorker.com/magazine/2025/12/01/disappeared-to-a-foreign-prison> [https://perma.cc/6LRT-ZECD].

³ Julie Turkewitz, Jazmine Ulloa, Isayen Herrera, Hamed Aleaziz & Zolan Kanno-Youngs, *‘Alien Enemies’ or Innocent Men? Inside Trump’s Rushed Effort to Deport 238 Migrants*, N.Y. TIMES (Apr. 16, 2025), <https://www.nytimes.com/2025/04/15/world/americas/trump-migrants-deportations.html> [https://perma.cc/VN3K-KW8A].

⁴ *Federal Judge Says U.S. Must Give Due Process to Deported Venezuelans*, NPR (Dec. 23, 2025, at 2:48 PM), <https://www.npr.org/2025/12/22/nx-s1-5652187/alien-enemies-act-deportations-case> [https://perma.cc/JPK8-BVSV].

⁵ See, e.g., Olatunde C.A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 N.Y.U. L. REV. 1339, 1362-70 (2012) (theorizing civil rights implementation as a form of administrative governance, in which agencies use regulatory and spending authority to affirmatively promote nondiscrimination, inclusion, and equity across government programs); Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1188-90 (2024) (illustrating how contemporary struggles over freedom and state coercion are articulated in the language of constitutional rights and due process); John Valery White, *Civil Rights Equity: An Introduction to a Theory of What Civil Rights Has Become*, 78 WASH. & LEE L. REV. 1889, 1894 (2022); Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to Present*, 96 VA. L. REV. 799, 801 (2010) (documenting “regulatory agencies’ interpretation and implementation of constitutional law,” including agencies’ affirmative and divergent constructions of equal protection in workplace regulation); Karen M. Tani, *Administrative Equal Protection: Federalism, the Fourteenth Amendment, and the Rights of the Poor*, 100 CORNELL L. REV. 825 (2015) (documenting and analyzing “administrative equal protection”); Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163, 165-66 (2017) (conceptualizing race-conscious administrative action as governed by equal protection and procedural constitutional norms); see also David E. Bernstein, *Antidiscrimination Laws and the Administrative State: A Skeptic’s Look at Administrative Constitutionalism*, 94 NOTRE DAME L. REV. 1381, 1396-99 (2019) (documenting how civil rights agencies’ enforcement practices are challenged as exceeding constitutional limits on government authority, especially with respect to speech and procedural protections).

been said, antidiscrimination law has been invoked with only mixed results to restrain agency actions that violate vulnerable communities. Put another way, harmful administrative behavior has been only partially corrected by civil rights and constitutional movements. These behaviors include the oppression of workers,⁶ systemic racism in access to education,⁷ subjugating restrictions to welfare,⁸ racially-segregated housing,⁹ abuse of Title VI of the Civil Rights Act of 1964 to undermine academic freedom,¹⁰ and LGBTQ+ discrimination and exclusion.¹¹ Interestingly, agencies themselves play a strong role in determining the efficacy of civil rights and constitutional law in these contexts,¹² which further lessens the capacity of these models to improve administration.

⁶ See, e.g., Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 633-42 (2019) (critiquing how modern administrative labor governance—despite formal commitments to rule-of-law and accountability—entrenches worker subordination through exclusions, weak enforcement, and technocratic decision-making that reinforces economic inequality); see also *id.* at 629 (observing that “though a merged labor and employment law system of sectoral bargaining, benefiting all workers, is consistent with existing constitutional doctrine, it is in significant tension with the emerging agenda of the conservative majority on the Supreme Court”).

⁷ Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847, 876-79 (2018) (noting how the Office of Education once directed taxpayer funds to segregated schools); see generally, *id.* (arguing that administrative agencies have been designed to undercut constitutional anti-discrimination principles).

⁸ See, e.g., Tani, *supra* note 5, at 844-51, 882-90 (examining how welfare rights advocates have wielded constitutional arguments); see generally *id.* (seeking, in part, to “explain the penurious protections that today’s equal protection jurisprudence offers the poor”).

⁹ See Steve Calandrillo & Kelsey Dunn, *The New Redlining: How Progressive Policies Restrict the Development of Housing Supply and Perpetuate America’s Racist Property Past*, 77 FLA. L. REV. 1085, 1095-98 (2025) (explaining how Federal Housing Administration mortgage insurance policies institutionalized racial segregation by refusing to insure loans in non-segregated neighborhoods, thereby excluding people of color from government-backed homeownership and wealth accumulation); Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924, 951-53 (2020) (describing how the Public Works Administration furthered “separate but equal” housing policy and describing government hostility to civil rights claims).

¹⁰ See Suzanne B. Goldberg & Olatunde C. A. Johnson, *Campus Crises and the Limits of Title VI*, 126 COLUM. L. REV. F. 1 (2026) (illustrating the recent punitive turn in the executive branch’s use of Title VI of the Civil Rights Act of 1964).

¹¹ See Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address ‘Alternative Facts’ in the Legislative Process*, 73 VANDERBILT L. REV. 425 (2020) (showing how agencies’ use of incorrect facts has thwarted constitutional equal protection for transgender, Latine, and noncitizen communities); Marie-Amelie George, *Bureaucratic Agency: Administering the Transformation of LGBT Rights*, 36 YALE L. & POL’Y REV. 83, 125-32 (2017) (illustrating the administrative state’s dual capacity to enforce discrimination and to undermine it, as bureaucrats both implemented anti-gay policies and later resisted statutory restrictions on LGBTQ rights); Peter Margulies, *Rescinding Inclusion in the Administrative State: Adjudicating DACA, the Census, and the Military’s Transgender Policy*, 71 FLA. L. REV. 1429, 1446 (2019) (describing the exclusion of transgender service members from the military as “invidious”).

¹² See generally, *supra* notes 6-11; see also Karen M. Tani, *Administrative Constitutionalism at the ‘Borders of Belonging’: Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603 (2019) (exploring how agency interpretations of the Thirteenth Amendment and due process rights constrained the rights of freed people and immigrants).

Notably, constitutional deficiencies have not stymied immigration agencies' recent attacks on noncitizens¹³ and citizens¹⁴ either. For instance, the second Trump Administration has intensified immigration detention¹⁵ and enforcement, including against those with documented immigration status,¹⁶ in order to chill noncitizens' lawful political speech.¹⁷ It has also threatened with illegitimate criminal charges,¹⁸ assaulted,¹⁹ and killed²⁰ U.S. citizens

¹³ See ALEJANDRA ARAMAYO & HILLEL R. SMITH, CONG. RSCH. SERV., LSB11299, RECENT EXECUTIVE BRANCH ACTIONS ON IMMIGRATION (PART 1) (2025); ALEJANDRA ARAMAYO & HILLEL R. SMITH, CONG. RSCH. SERV., LSB11300, RECENT EXECUTIVE BRANCH ACTIONS ON IMMIGRATION (PART 2) (2025).

¹⁴ See, e.g., John Woodrow Cox, *Homeland Security is targeting Americans with this secretive legal weapon*, WASH. POST (Feb. 3, 2026), <https://www.washingtonpost.com/investigations/2026/02/03/homeland-security-administrative-subpoena/> [<https://perma.cc/5G4R-AZQG>]; Joe Haim, *Md. woman facing deportation is a citizen, lawyer says. ICE disagrees*, WASH. POST (Dec. 24, 2026), <https://www.washingtonpost.com/dc-md-va/2025/12/24/diaz-morales-maryland-woman-detained-ice/> [<https://perma.cc/2CSX-VJ26>]; Robin Stein, Shawn Killebrew, Devon Lum, Alexander Cardia, Jeff Bernier, Dmitriy Khavin & Mimi Dwyer, *How 'Turn and Burn' Immigration Operations Unleash Chaos—and Sweep up U.S. Citizens*, N.Y. TIMES (Dec. 20, 2025), <https://www.nytimes.com/video/us/100000010596053/la-raid-immigration-us-citizens-video-investigation.html?smid=nytcore-android-share> [<https://perma.cc/6FBL-DDGP>].

¹⁵ See Sarah Stillman, *The Return of Family Detention*, THE NEW YORKER (Apr. 13, 2026), <https://www.newyorker.com/magazine/2026/04/20/the-return-of-family-detention> (illustrating that under the second Trump Administration, “thousands of immigrant children have been detained, and many have suffered from medical neglect”).

¹⁶ *A look at the people ensnared in Trump's campaign against pro-Palestinian activism at US colleges*, ASSOCIATED PRESS (Apr. 1, 2025, at 6:38 PM), <https://apnews.com/article/immigration-detainees-students-ozturk-khalil-78f544fb2c8b593c88a0c1f0e0ad9c5f> [<https://perma.cc/T42V-B5WN>].

¹⁷ Aleka Gomez-Sotomayor-Roel & Alexis Hernandez Lopez, *'Climate of Fear': Legal Experts say DHS activity chills campus expression, sets dangerous precedent*, COLUM. SPECTATOR (Apr. 24, 2025, at 11:11 PM), <https://www.columbiaspectator.com/news/2025/04/24/climate-of-fear-legal-experts-say-dhs-activity-chills-campus-expression-sets-dangerous-precedent/> [<https://perma.cc/X5SL-7KLD>].

¹⁸ Quinta Jurecic, *The Trump Administration's Favorite Tool for Criminalizing Dissent*, THE ATLANTIC (Nov. 18, 2025), <https://www.theatlantic.com/ideas/2025/11/favorite-statute-section-111-ice/684961/> [<https://perma.cc/NV52-AYKU>].

¹⁹ See Doc Louallen, *79-year-old US citizen claims ICE agents body-slammed him at his business, seeks \$50M*, ABC NEWS (Sep. 27, 2025, at 12:21 AM), <https://abcnews.go.com/US/79-year-us-citizen-claims-ice-agents-body/story?id=125978834> [<https://perma.cc/GLF5-EJ2G>]; Ward Jolles, *Portland man sues DHS after video shows federal agent tackling him from behind at protest*, FOX12 OREGON (Aug. 28, 2025, at 2:26 AM), <https://www.kptv.com/2025/08/28/portland-man-sues-dhs-after-video-shows-federal-agent-tackling-him-behind-protest/> [<https://perma.cc/ZSD4-BNE7>]; Democracy Now!, *ICE Assaults Congressional Candidate Kat Abughazaleh at Chicago Protest*, YOUTUBE (Sep. 23, 2025), <https://www.youtube.com/watch?v=JtnPgZdaNho> [<https://perma.cc/HJ7V-2AR4>].

²⁰ See Pooja Salhotra & Edgar Sandoval, *A Fatal ICE Shooting Occurred in Texas Months Before Renee Good's Killing*, N.Y. TIMES (Feb. 20, 2026), <https://www.nytimes.com/2026/02/20/us/ruben-ray-martinez-ice-shooting-texas.html> [<https://perma.cc/LV6P-P8QK>]; Bora Erden, Devon Lum, Helmut Rosales, Elena Shao, Haley Willis & Ashley Wu, *Timeline: A Moment-by-Moment Look at the Shooting of Alex Pretti*, N.Y. TIMES (Jan. 25, 2026, 5:50 PM), <https://www.nytimes.com/interactive/2026/01/24/us/minneapolis-shooting-alex-pretti-timeline.html> [<https://perma.cc/GW8K-TJRK>]; Julia Gegenheimer, *Emerging Evidence Provides Basis for Opening Investigation of ICE Agent Who Killed Renee Good*, JUST SECURITY (Jan. 22, 2026), <https://www.justsecurity.org/129439/investigation-ice-jonathan-ross-renee-good/> [<https://perma.cc/>].

protesting on immigrants' behalf. This is not unlike previous governmental efforts to limit noncitizens' access to constitutional rights, including via surveillance.²¹ The Department of Homeland Security (DHS) also seems poised to defy Fourth Amendment protections in order to justify forcible entry by Immigration and Customs Enforcement (ICE)—a highly empowered enforcement component of DHS that is comprised of heavily-armed civil servants—into noncitizens' homes.²² These examples fit overall with the role of immigration enforcement and national security mechanisms in “permit[ting] the government to oppress people who are deemed risky.”²³

This all suggests that anti-discrimination efforts do not provide an infallible approach to solving administrative subordination.²⁴ “[I]f we care about creating a society without pervasive inequalities of status based on traits such as gender, race, or sexual orientation, we need to look beyond antidiscrimination laws.”²⁵ More to the point, in order to navigate and constrain *administrative behavior* that harms the public, we must look beyond civil rights claims and constitutional frameworks to consider the role of *administrative law* as well.

This Essay argues that harms requiring protection from administrative agencies should be governed by administrative law. In making this assertion,

cc/2RHJ-JCUV]; Julie Bosman, *Private Autopsy Shows Renee Good Was Shot at Least 3 Times*, *Lawyers Say*, N.Y. TIMES (Jan. 21, 2026), <https://www.nytimes.com/2026/01/21/us/renee-good-private-autopsy.html> [<https://perma.cc/5PUB-CJYV>].

²¹ See Azadeh Shahshahani & Chiraayu Gosrani, “Known Adversary”: *The Targeting of the Immigrants’ Rights Movement in the Post-Trump Era*, 72 EMORY L.J. 1245, 1246-49 (2023) (showing how immigration agencies deploy surveillance, detention, and discretionary enforcement as coercive tools to suppress dissent and punish rights-claiming by immigrants and their advocates); Alina Das, *Deportation and Dissent: Protecting the Voices of the Immigrant Rights Movement*, 65 N.Y. L. SCH. L. REV. 225, 246-49 (2020-2021) (showing how immigration agencies use discretionary enforcement, surveillance, and regulatory controls as coercive tools to chill speech, punish rights-claiming, and undermine civil-rights protections).

²² “Civics lesson to the government. Administrative warrants issued by the executive branch to itself do not pass probable cause muster. That is called the fox guarding the henhouse. The Constitution requires an independent judicial officer.” Conejo Arias v. Noem, No. SA-26-CV-415-FB at *2 (W.D. Tex. filed Jan. 31, 2026) (releasing five-year-old boy from immigration detention); see also Lindsay Nash, *Deportation Arrest Warrants*, 73 STAN. L. REV. 433, 41-42 (2021) (noting that “DHS’s administrative warrant regime has no neutral probable-cause-review mechanism at either the front or back end” and that the Supreme Court has left open the question of “whether administrative arrest warrants have any constitutional significance or whether neutral probable cause review is constitutionally required for deportation arrests”); Orin Kerr, *Can ICE Enter a Home to Make an Arrest With Only an Administrative Warrant?*, LAWFARE (Jan. 22, 2026, 9:10 AM), <https://www.lawfaremedia.org/article/can-ice-enter-a-home-to-make-an-arrest-with-only-an-administrative-warrant> [<https://perma.cc/7MJD-VL4V>] (“The standard view has been that administrative warrants can’t authorize home entry because they’re executive branch orders, and the executive branch can’t be in charge of deciding whether to give itself a warrant.”).

²³ Shah, *supra* note 13, at 1638 (citations omitted).

²⁴ See also Bijal Shah, *Administrative Subordination*, 91 U. CHI. L. REV. 1603 (2024) (describing agency structures resulting in harmful administration that are not easily checked by constitutional protections).

²⁵ See Sophia Moreau, *Beyond Discrimination Law: Realizing Equality through Other Laws, Such as Tort Law*, 2024 AM. J.L. EQUAL. 427 (2024) (taking up this challenge in tort law).

this Essay considers how the vulnerable public (broadly defined to include minority, marginalized, disadvantaged, and otherwise disempowered people) might use administrative law to protect and vindicate their interests in relation to federal administrative agencies.²⁶ And it takes seriously the idea that an administrative law paradigm could function as a meaningful site for marginalized communities to seek recognition, participation, and recourse.

This Essay's inquiry considers the capacity of administrative structures, doctrines, and tools to systematically protect. More specifically, it imagines the possibility of a protective administrative law framework by highlighting paths offered by the Administrative Procedure Act (APA) for the constraint of intrusive informal policies and enforcement by administrative agencies, including as directed by the President. To initiate this conversation, this Essay focuses on the role of the APA in navigating and constraining administrative violations of bodily autonomy and liberty in the immigration and national security contexts. In doing so, it identifies how the APA can be used to contest, shape, or resist agency action in ways that reframe administrative law as a supplement to traditional civil rights and constitutional law approaches.

An important foundation of administrative law, the APA is a "super-statute" that entrenches "governmental structures and quasi-constitutional norms."²⁷ Arguably, "the APA is more like a constitution than a statute."²⁸ At the very least, "it has symbolic value far exceeding its terms."²⁹ Moreover, it "provides for flexibility in decision-making; it can be changed through interpretation without the need for amendment; its movements are more pendulum-like than linear [and i]ts fundamental role is to shape the relationship between the people and their government."³⁰

Accounts of the enactment of the APA, which occurred in the mid-twentieth century,³¹ illustrate that Congress sought to balance governmental efficiency and procedural protections in response to the ongoing and expansive growth of the administrative state resulting from the New Deal. Arguably, the APA focuses on the provision of process to keep

²⁶ Note, however, that the term "interests" is used here in a generic sense, and not to refer to constitutionally protected rights or interests as defined by constitutional equal protection or due process jurisprudence, let alone to lay claim to any additional such rights or interests. The goal is to identify and bring to the fore core societal values and aspects of personhood that have been emphasized as important by administrative law itself, in order to offer a framework for how administrative law may enable and protect people who come into contact with the administrative state.

²⁷ William N. Eskridge Jr. & John Ferejohn, *The APA as a Super-Statute: Deep Compromise and Judicial Review of Notice-and-Comment Rulemaking*, 98 NOTRE DAME L. REV. 1893, 1894 (2023) (citations omitted).

²⁸ Alan B. Morrison, *The Administrative Procedure Act: A Living and Responsive Law*, 72 VA. L. REV. 253, 253 (1986).

²⁹ Paul R. Verkuil, *The Administrative Procedure Act at 75: Observations and Reflections*, 28 GEO. MASON L. REV. 533, 539 (2021).

³⁰ Morrison, *supra* note 28, at 253.

³¹ Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237.

administrative overreach or even tyranny at bay.³² In fact, the precursor to the APA required an even more formalized and intense set of public-facing procedures for administrative actions than did the APA.³³ Underlying this anxiety was concern about administrative agencies' potential to trample the rights and interests of the individual in their efforts to engage in broader, more impactful governance than ever before.

Nonetheless, those who study and implement the APA have seen only limited possibilities for it.³⁴ Indeed, the APA's protective function has been couched in the provision and preservation of procedural requirements for limited forms of administrative adjudication (known as "formal adjudication"³⁵), and otherwise understood to be devoid of substantive content. Likewise, even claims to constitutional rights in the administrative context tend to be procedural, rather than substantive in nature, because the due process provisions of the Constitution are applied to the administrative context more so than are the equal protection amendments.³⁶

Administrative law arguably has the capacity to offer substantive protection, including in contexts outside adjudication, such as statutory policymaking and enforcement. For one, statutes governing the administration of a particular legal scheme, such as the Immigration and Nationality Act (INA), can complement constitutional protections—for instance, for detained immigrants.³⁷ To draw on this conceptual analogy, the APA should be applied with an eye toward substantive protection, beyond its conventional emphasis on procedural irregularity.

³² See Adam Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1785 (2023) ("As Daniel R. Ernst and others have chronicled, securing impartiality and fairness in administrative adjudication was central to lawmakers' ultimate (uneasy) acceptance of a project that located so much federal adjudication in agencies rather than in Article III courts. The Administrative Procedure Act of 1946 (APA) codified this settlement."). More generally, the "APA grew out of the civil liberties" tradition. Sophia Z. Lee, *Racial Justice and Administrative Procedure*, 97 CHI.-KENT L. REV. 161, 166 (2022).

³³ Bijal Shah, *Administrative Procedural Discretion*, CORNELL L. REV. (forthcoming 2026), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6584898 (noting that the Walter-Logan Bill "obligated the administrative state to engage in far more formalized procedure than its successor, the Administrative Procedure Act, which was ultimately adopted instead").

³⁴ See Eskridge Jr. & Ferejohn, *supra* note 27, at 1901 (noting that some scholars "have invoked the APA as a framework statute imposing strict, unchanging rules for the administrative state," while others are more open to the idea that the APA is consistent with administrative common law); Jeffrey S. Lubbers, *Opinion: Putting the U.S. Administrative Procedure Act in Perspective*, THE REGUL. REV. (Nov. 8, 2022), <https://www.theregreview.org/2022/11/08/lubbers-putting-the-u-s-administrative-procedure-act-in-perspective/> [<https://perma.cc/4EEY-4EJQ>] (noting that both "liberal" and "conservative" scholars are "critical of the courts' departures from the text" of the APA).

³⁵ See Shah, *supra* note 33, at *7-8.

³⁶ The Fourteenth and Fifth Amendments provide a constitutional floor for administrative due process. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970). In contrast, efforts to establish substantive due process have often failed, including in the immigration context. See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 131-33 (1996).

³⁷ Alina Das, *The Law and Lawlessness of U.S. Immigration Detention*, 138 HARV. L. REV. 1186, 1227 (2025).

Essentially, this Essay conceives of a substantive due process-esque approach to applying the APA. In simple terms, “[s]ubstantive due process asks the question of whether the government’s deprivation of a person’s life, liberty or property is justified by a sufficient purpose.”³⁸ The APA’s available procedural requirements could be harnessed to force agencies to provide adequate justifications for violating individuals’ bodily autonomy and liberty. This could be accomplished via transparency and participation requirements, the prioritization of adequate reason-giving, and various pathways to judicial review offered by the APA in order to ensure that the administrative deprivations of individual interests do not run afoul of basic APA criteria for legitimate agency action.

The APA offers a pathway that runs parallel to civil rights and constitutional approaches by allowing for a new set of tools to help rectify harms suffered by people by the administrative state. With civil rights and constitutional claims, the focus is on the noncitizen as a rights holder, which has taken advocates on an unpredictable and often unsuccessful journey. The APA allows for a reframing by focusing not on the individual, but on the agency—and on whether it has offered a sufficient rationale for its actions. This framework casts the harms of administration as structural, rather than individualized, which could allow advocates to avoid some of the pitfalls of seeking constitutional protection for a community for whom access to those protections has long been tenuous.³⁹

To be clear, unlawful behavior in the name of immigration enforcement requires a multifaceted response. This certainly includes constitutional tools, such as properly enforcing the Fourth Amendment to stave off unlawful government intrusion,⁴⁰ criminally prosecuting ICE officials alongside

³⁸ Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999) (“Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.”).

³⁹ See generally Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 *DUKE L.J.* 1723 (2010) (discussing how unauthorized migrants, who cannot assert individual rights as directly as U.S. citizens, can use transsubstantive arguments to indirectly and obliquely assert individual rights).

⁴⁰ See *How ICE Went Rogue*, AMERICAN IMMIGR. COUNCIL (Feb. 2026), https://www.americanimmigrationcouncil.org/wp-content/uploads/2026/02/ice_cbp_legal_analysis.pdf [https://perma.cc/5CR9-KEBD] (last visited Feb. 28, 2026) (discussing ICE behavior like racial profiling and unlawful arrests); Eisha Jain, *Call immigration enforcement actions what they are: lawless Terry stops*, THE HILL (Feb. 10, 2026, at 9:30 AM), <https://thehill.com/opinion/judiciary/supreme-court/5729977-lawless-conduct-immigration-stops/> [https://perma.cc/4ZWC-8PHR]; Letter from Richard Blumenthal, U.S. Senator, Ranking Member, Permanent Subcommittee on Investigations to Kristi Noem, Secretary of U.S. Department of Homeland Security and Todd Lyons, Acting Director of U.S. Immigration and Customs Enforcement at 1 (Jan. 21, 2026), <https://www.hsgac.senate.gov/wp-content/uploads/2026-01-21-Letter-from-Blumenthal-to-DHS-ICE.pdf> [https://perma.cc/7TZG-P8JD] [hereinafter Letter to Kristi Noem] (“The Fourth Amendment is a bedrock principle of our Constitution and an integral privacy protection against unreasonable searches and seizures, especially in the most intimate of settings, the home. It should thus appall every American that the May 12, 2025 memorandum detailing this policy (the ‘Memo’) states that ‘ICE immigration officers may arrest and detain aliens subject to a final order of removal’ relying only on ‘the use of a Form I-205 to arrest an alien in their place of

simultaneous revisitation of qualified and absolute immunity provisions that may shield government workers from liability,⁴¹ and drawing on habeas corpus to limit unlawful detention.⁴² Another pathway to reform would be to dismantle this aspect of administration by defunding and reducing the arms and capacity of the immigration bureaucracy.⁴³

However, this radical moment also allows for a reimagining of the APA as a potentially powerful framework of protection. Invasive governmental measures are being carried out under the auspices of federal administration of civil law and has resulted in intrusive behavior that harms individuals' bodily autonomy and liberty. This, in turn, justifies the need for a more protective function for administrative law. Rather than defaulting "to familiar administrative law values of procedural neutrality. . . to push back against the likely excesses of reactionary administration . . . administrative law scholars and reformers must offer an affirmative, alternative moral vision of the administrative state."⁴⁴

This rest of this Essay conceives of a protective administrative law paradigm. More specifically, it calls for an administrative law response protecting the interests of individuals targeted, detained, and deported by the administrative state. This Essay applies the APA as is (albeit not necessarily inconsistently with suggestions to augment or "modernize" the APA⁴⁵). First, courts can create a pathway for public participation and the modification of aggressive immigration enforcement policy by no longer allowing such policies to be established by guidance that is binding and impactful but nonetheless sidesteps the APA's notice-and-comment requirements in order to further a restrictionist presidential agenda as quickly as possible. Second, the courts could revitalize their use of the arbitrary and capricious standard (which the Supreme Court favored during the first Trump Administration) to force more reasoned and less brutal immigration enforcement policies, particularly in the face of presidential enforcement pressure. Third, the APA

residence.") (quoting Memorandum from Acting ICE Director Todd Lyons on Utilizing Form I-205, Warrant of Removal (May 12, 2025)).

⁴¹ Michael Biesecker, Jim Mustian & Jack Brook, *Feds investigate whether ICE officers lied about shooting of Venezuelan man in Minneapolis*, PBS NEWS (Feb. 13, 2026, at 3:43 PM), <https://www.pbs.org/newshour/nation/feds-investigate-whether-ice-officers-lied-about-shooting-of-venezuelan-man-in-minneapolis>) [<https://perma.cc/EDL6-8CEW>]; Jamiles Lartey, *How ICE Agent Who Killed Renee Good Could Face State Charges*, THE MARSHALL PROJECT (Jan. 17, 2026, 12:00 PM), <https://www.themarshallproject.org/2026/01/17/ice-minnesota-officer-renee-good> [<https://perma.cc/4MFZ-VKJL>].

⁴² See *infra* Part II.C.

⁴³ Riley Beggin, *Senate Democrats to block government funding after second fatal shooting in Minneapolis*, WASH. POST (Jan. 25, 2026), <https://www.washingtonpost.com/politics/2026/01/24/senate-democrats-block-funding-ice/> [<https://perma.cc/3K6D-3BW2>].

⁴⁴ K. Sabeel Rahman, *Anti-Domination and Administration*, 100 N.Y.U. L. REV. 1984, 1985 (2025).

⁴⁵ There have been some modest calls to adopt changes to the APA. See, e.g., The Portman-Heitkamp Regulatory Accountability Act (RAA) is a bipartisan Senate bill, 115 S.951 (2017); Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 ADMIN. L. REV. 629 (2017).

can and should complement constitutional tools of judicial review such as habeas corpus to protect liberty by helping to ensure noncitizens are not wrongfully detained or unlawfully deported, particularly considering presidential resistance to abiding by habeas requirements. These approaches fit within current doctrine, are useful across administrations, and may have broader implications for deprivative administrative enforcement outside of the immigration setting.

II. CONCEIVING OF THE ADMINISTRATIVE PROCEDURE ACT AS PROTECTIVE

The APA has resonance for a vulnerable community—immigrants and the U.S. citizens in proximity to them—that is consistently engaged by the administrative state. Therefore, the APA that could be utilized to protect the interests of individuals engaging with or targeted by the administrative state, including as a result of or in response to presidential interests. It is possible that the Supreme Court may prefer administrative law claims to constitutional frameworks in the immigration context.⁴⁶

Off the cuff, the APA offers several tools that comprise a provisional framework of protection. These include oversight of agency inaction and unreasonable delay,⁴⁷ which may compel agencies to act when harm arises from regulatory absence⁴⁸; administrative due process, especially when implemented with consideration of the gap between formal procedural entitlements and substantive protections⁴⁹; and various forms of judicial review, including constraints on actions taken in excess of statutory jurisdiction, authority, or limitations⁵⁰ that cause harm to vulnerable communities; limits to agencies' failures to observe required procedures⁵¹ in ways that restrict access to process for noncitizens; and application of the substantial evidence standard to reduce prejudice in agency adjudication.⁵² Abuse of discretion

⁴⁶ See Shalini Bhargava Ray, *The Emerging Lessons of Trump v. Hawaii*, 29 WM. & MARY BILL RTS. J. 775, 804-805 (2021).

⁴⁷ See, e.g., *Norton v. Southern Utah Wilderness Alliance (SUWA)*, 542 U.S. 55 (2004); *Telecommunications Research & Action Center (TRAC) v. FCC*, 750 F.2d 70 (D.C. Cir. 1984).

⁴⁸ See Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1337 (2013) ("The failure of an agency to act can be just as detrimental to social well-being as overzealousness, and special interests may seek deregulation, delay, and weak regulation as often as overregulation."); Cass R. Sunstein & Adrian Vermeule, *The Law of Not Now: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 157 (2014) ("Administrative agencies frequently say 'not now.' They defer decisions about rulemaking or adjudication, or decide not to decide, potentially jeopardizing public health, national security, or other important goals."); *id.* at 164-67 (illustrating ways in which agency delay might be harmful).

⁴⁹ See Shah, *supra* note 33 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

⁵⁰ 5 U.S.C. § 706(2)(C).

⁵¹ 5 U.S.C. § 706(2)(D).

⁵² See Bijal Shah, *A Critical Analysis of Separation-of-Powers Functionalism*, 85 OHIO ST. L.J. 1007, 1064-65 (2024) (citing 5 U.S.C. § 706(2)(E)).

review, which is complementary to judicial review under the APA, could also be deployed to manage agency adjudicator bias.⁵³

This rest of this Part explores the use of notice-and-comment rulemaking; arbitrary and capricious review; and APA-based review of individuals who are wrongfully detained or deported under the auspices of immigration enforcement. First, courts can force transparency, public participation, agency responsiveness and even justification for urgency on the basis of “national security” or other presidential priorities in enforcement policy violently targeting noncitizens, by no longer allowing such policies to be enshrined in guidance that is issued outside the APA’s notice-and-comment requirements. Second, the judiciary can force reason-giving and reduce hasty and pretextual enforcement policy initiated by presidential interests via the arbitrary and capricious standard (which the Supreme Court deployed to check the first Trump Administration), including as a foil to judicial scrutiny of invidious reasons for exclusionary policies. Third, courts could ensure adequate use of the APA alongside non-administrative tools of judicial review, such as habeas corpus review, to restrain haphazard and unlawful deportation and detention by the government—particularly under circumstances in which the Administration appears intent on resisting habeas requirements.

Before proceeding, it is worth ventilating possible impediments to implementing the framework offered in this Part. One challenge may be whether a protective administrative law framework could fit within the current doctrinal landscape. A goal of this Part is to connect to possibilities already present in the law. And yet, as will be noted throughout, the Supreme Court has shown relative apathy towards the second Trump Administration’s intensification of violence in immigration enforcement.⁵⁴ That having been said, this Part essentially advocates for harnessing the Court’s “anti-administrativist” streak to limit administrative discretion in ways that ultimately constrain presidential caprice. More specifically, this Part’s overall suggestion to intensify administrative judicial review is consistent with the Court’s recent elimination of mandatory deference to administrative statutory interpretation,⁵⁵ its constraints on agency policymaking and enforcement via the “major questions doctrine,”⁵⁶ and its overall skepticism toward administrative expertise.

First, *Chevron*’s justification for congressional delegation and judicial deference to agencies’ interpretation of the law⁵⁷—including institutional

⁵³ See *id.* at 1065-66.

⁵⁴ See, e.g., Amy Howe, *Supreme Court allows federal officers to more freely make immigration stops in LA*, SCOTUSBlog (Sep. 8, 2025), <https://www.scotusblog.com/2025/09/supreme-court-allows-federal-officers-to-more-freely-make-immigration-stops-in-los-angeles/> [<https://perma.cc/QBK5-JNKJ>]; *infra* notes 78, 233-235 and accompanying text.

⁵⁵ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412-13 (2024).

⁵⁶ Shah, *supra* note 52, at 1051.

⁵⁷ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984).

competence and benefits of deliberative process—may have always been weaker in the immigration context.⁵⁸ And like the *Loper-Bright* decision,⁵⁹ which overturned *Chevron* (at least in theory⁶⁰), a protective administrative law model favors constraint of administrative discretion. Second, per the so-called “major questions” doctrine,⁶¹ the Court has curtailed agencies’ authority to understand and apply their statutory mandates in expansive ways. Notably, these recent doctrinal moves shift policymaking power from agencies to the judiciary.⁶²

Emphasizing and broadening the application of APA tools of judicial review in immigration enforcement would seem consistent with the motivation behind *Loper Bright* and the new major questions doctrine: that courts should be less deferential to agencies as a matter of substance, and that there should be more of a judicial role in policymaking. These moves are also consistent with the Supreme Court’s increasing dismissiveness toward agency expertise, including as evidenced by its steady dismantling of the structural features of agency independence that encourage said expertise.⁶³ Consistent with this, a lower court held recently that the Board of Immigration’s exercise of its authority to terminate removal proceedings violates the major questions doctrine,⁶⁴ for better or for worse.

Another concern about this Part’s proposed approach is that it may feasibly constrain only certain ideological preferences (say, of a Republican or conservative administration). In fact, this Part intends to encourage consistency across presidencies. Immigration agencies are overly responsive to

⁵⁸ See Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1201-04 (2021); Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1679-87 (2007).

⁵⁹ See *Loper Bright*, 603 U.S. at 384-412.

⁶⁰ See Cary Coglianese & Daniel E. Waters, *The Great Unsettling: Administrative Governance After Loper Bright*, 77 ADMIN. L. REV. 1, 4 (2025) (“We cannot know, at least for some time, whether or how much *Loper Bright* will matter to what administrative agencies are able to deliver by way of public value.”).

⁶¹ Shah, *supra* note 52, at 1051.

⁶² *Id.* at 1028 (observing that the major questions doctrine has intensified the presence of “judicial administration” that allows courts to engage in legislative policymaking”); Bijal Shah, *Judicial Administration*, 11 U.C. IRVINE L. REV. 1119, 1176-79 (2021); Blake Emerson, *The Binary Executive*, 132 YALE L.J. F. 756 (Nov. 21, 2022):

As Bijal Shah observes, courts reviewing agency action engage in “judicial administration,” which is analogous to what Elena Kagan called “presidential administration.” The form of judicial administration practiced over the course of the twentieth century consisted of varying degrees of “oversight,” akin to the President’s indirect, supervisory role over agencies. With the decline of *Chevron* deference, however, the Court has moved from the role of “overseer” into the role of “decider,” akin to the role the President plays in the unitary theory of the Executive. The Court dictates how administrative discretion is to be exercised within the bounds of statutory authority.

⁶³ Bijal Shah, *On Administration by Fiat*, 125 MICH. L. REV. (forthcoming 2027), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5799862; see also *infra* note 76 and accompanying text.

⁶⁴ *Luvian v. Bondi*, 2025 WL 1616538 at *4-6.

presidential agendas and should be forced to justify burdensome or punitive measures beyond their consistency with the President's interests.⁶⁵ Indeed, presidents including Clinton and Obama have had fairly aggressive approaches to immigration enforcement,⁶⁶ and future administrations' immigration policies would likewise benefit from the various accountability measures outlined in this Part, as well as from the permanence offered by some of them.⁶⁷

Another possible obstacle to achieving the goals outlined by this Part is the possibility that a protective administrative law framework could be weaponized to harmful ends. This seems improbable. First, subjecting an immigration enforcement policy to the transparency and durability established by a notice-and-comment process seems unlikely to render the policy more problematic than if it were issued without any public input at all, as is currently and generally the case.⁶⁸ Second, forcing additional justification for immigration policies through the arbitrary and capricious process would ensure more reasoned decision-making that is less wholly defined by presidential whim of any stripe.⁶⁹ And third, added process in defense of liberty is preferable to a default to detention in perhaps any civil or administrative system of enforcement, including immigration.⁷⁰

Finally, one important inquiry about the potential reach of a protective APA concerns whether the judiciary may plausibly check problematic agency behavior stemming from presidential administration. Presidents have motivated governmental moves both to enhance⁷¹ and to limit⁷² rights and

⁶⁵ See Bijal Shah, *Presidential Administrative Discretion*, 100 N.Y.U. L. REV. 2128, 2185-86 (2025).

⁶⁶ See Patrisia Macias-Rojas, *Liberal Policies, Punitive Effects: The Politics of Enforcement Discretion on the US-Mexico Border*, 46 LAW & SOC. INQUIRY 69 (2021) (explaining how the border crisis is at least partially the fault of the Obama and Clinton Administrations).

⁶⁷ See *infra* notes 122-125 (arguing that notice and comment process would create more stability in policies by rendering them more difficult to revoke), 212-222 (arguing that arbitrary and capricious review can block the rescission of policies that have engendered reliance).

⁶⁸ See *infra* Part II.A.

⁶⁹ See *infra* Part II.B.

⁷⁰ See *infra* Part II.C.

⁷¹ This includes initiatives pursued by President Franklin D. Roosevelt (see Andrias, *supra* note 6, at 622 (noting President Roosevelt's concerns about "widespread poverty, labor unrest, and economic instability")); Tani, *supra* note 5, at 844 (noting President Roosevelt's interest in providing public assistance); and by President Biden (see Richard L. Revesz, *The Evolution of Regulatory Review*, 77 ADMIN. L. REV. 131, 172 (2025) (noting President Biden's interest in the distributional consequences of regulations); Bijal Shah, *Statute-Focused Presidential Administration*, 90 GEO. WASH. L. REV. 1165, 1192-207 (2022) (describing President Biden's efforts to improve environmental regulation and public health, as well as land and other public welfare protection measures).

⁷² See, e.g., Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 693-97 (2020) (showing how Presidents Reagan, H.W. Bush, and Trump suppressed governmental civil rights measures); Bijal Shah, *Deploying the Internal Separation of Powers Against Racial Tyranny*, 166 NW. U. L. REV. ONLINE 224, 253-59 (2021) (explaining that Presidents Wilson, H.W. Bush, Reagan, and Trump have exacerbated racial inequality); Hannah Perls, *Deconstructing Environmental Deregulation Under the Trump Administration*, 45 VT. L. REV. 591, 631-38 (2021) (illustrating the Trump Administration's efforts to abdicate administrative

freedoms. Immigration enforcement, in particular, is heavily presidentialist.⁷³ Indeed, “the political control exercised over immigration enforcement officials is both nontransparent and can be unrelenting. Accordingly, presidents have long harnessed discretionary immigration decisionmaking to pursue restrictionist immigration agendas, and have done so while steadily decreasing the transparency and solidity of the underlying justifications for these decisions.”⁷⁴ This dynamic can be understood as “presidential immigration.”⁷⁵ The Supreme Court, for its part, is invested in unitary executive theory⁷⁶ and has aggrandized Executive authority in the immigration and national security contexts by allowing the current President to rely on

authority to regulate environmental harms); Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. OF AFR.-AM. L. & POL’Y 3, 23-35 (2013) (situating mass incarceration and criminal-record discrimination as products of racially charged state power that continues to deny meaningful civil and economic rights through law and administration).

⁷³ See Bijal Shah, *Presidential Administrative Discretion*, 100 N.Y.U. L. REV. 2128, 2162-70 (2025) (describing efforts by President Obama, Biden, and Trump to direct immigration enforcement).

⁷⁴ *Id.* at 2166 (citations omitted).

⁷⁵ Bijal Shah, *Judicial Acquiescence to Presidential Immigration*, VERFASSUNGSBLOG (July 10, 2025), <https://verfassungsblog.de/judicial-acquiescence-to-presidential-immigration> [<https://perma.cc/Z97U-MWG8>];

In a nutshell, presidential control over agencies’ immigration actions may be understood as “presidential immigration,” a variation on the well-known concept of “presidential administration.” “Presidential immigration” means that the President may issue directives to or otherwise wield control over a large and powerful administrative apparatus in order to meet his immigration objectives.

Bijal Shah, *Abandoning Administrative Law During a Presidential Immigration Crisis*, LPE (July 7, 2025), https://lpeproject.org/blog/abandoning-administrative-law_link-fixed/ [<https://perma.cc/XTX3-XULT>];

This means that the President can neither intensify immigration enforcement in the first instance nor violate a court decree proscribing his immigration efforts without harnessing the bureaucracy itself—in other words, without drawing on the discretionary authority and capacity of administrative agencies in order to further his immigration goals. One upshot of this is that the President’s immigration aims may be constrained by the Administrative Procedure Act (APA). While the President is not directly governed by the APA, the APA empowers the judiciary to ensure that administrative procedures and policymaking justifications are adequate, including in situations where agencies are implementing presidential directives.

⁷⁶ See Shah, *supra* note 63 (arguing that sitting Supreme Court Justices espouse unitary executive theory); Bijal Shah, *The President’s Fourth Branch?*, 92 FORDHAM L. REV. 499, 524-36 (2023) [hereinafter Shah, *The President’s Fourth Branch*] (discussing *Lucia v. SEC*, 585 U.S. 237 (2018); *Seila Law v. CFPB*, 591 U.S. 197 (2020); *U.S. v. Arthrex*, 594 U.S. 1 (2021); *Collins v. Yellen*, 594 U.S. 220 (2021); and *SEC v. Jarkesy*, 603 U.S. 109 (2024), recent Supreme Court decisions advancing unitary executive theory); Oral Argument at 1:01:32, *Trump v. Slaughter*, (U.S. argued Dec. 8, 2025) (No. 25-332), <https://www.oyez.org/cases/2025/25-332> [<https://perma.cc/6V3E-9MM4>] (suggesting that the Court is likely to overturn *Humphrey’s Executor v. U.S.*, 295 U.S. 602 (1935), a landmark Supreme Court case holding that Congress can constitutionally limit the President’s power to remove members of independent regulatory agencies).

dubious sources of authority⁷⁷ in order to weaponize immigration agencies to remarkably intrusive and violent ends.⁷⁸

And yet, harms that are advanced by administrative agencies—including those directed or motivated by the President—may be restrained by administrative law. Put another way, APA constraints on administrative action and discretion could also have the effect of curtailing presidentialism,⁷⁹ despite the fact that the President is not an agency.⁸⁰ This is because “administrative discretion is a vehicle for presidentialism.”⁸¹ Therefore, “curbing agency “autonomy” in fact constrains presidential power, for better or worse. [Indeed], an agency that is tightly constrained. . . would have no discretion for presidential administration to utilize.”⁸²

As an initial matter, “the overruling of *Chevron*, while undertaken with the clear goal of reducing administrative discretion, [could] also diminish the extent to which agency action is shaped by presidential preferences,”⁸³ including in immigration matters. In addition, were the Court moved to apply the major questions doctrine explicitly to limit presidentialism,⁸⁴ it could be a tool for constraining the excesses of Trump-era immigration enforcement. Thus far, the Court has only once shown an interest in applying the major questions doctrine to governmental action emboldened by President Trump—and that too, only to curb the President’s interference in free markets,⁸⁵ as opposed to constraining his channeling of administrative power to encroach on personal freedoms. (This stands in contrast to the

⁷⁷ See, e.g., *Trump v. J.G.G.*, 604 U.S. 670, 671-72 (2025) (allowing President Trump to use the Alien Enemies Act to deport individual noncitizens who pose no threat to national security); *Trump v. Hawaii*, 585 U.S. 667, 683-84 (2018) (allowing President Trump to use 8 U.S.C. §1182(f), which grants authority to suspend the entry of noncitizens if their entry is deemed detrimental to national interests, to restrict entry into the U.S. for all nationals from several predominantly Muslim countries like Iran, Libya, Somalia, Syria, Yemen, Chad, North Korea, and Venezuela).

⁷⁸ See Whitney Curry Wimbish, *A Running Count of How Many People ICE Has Killed and Injured*, THE AMERICAN PROSPECT (last updated Feb. 24, 2026), <https://prospect.org/2026/01/29/ice-trump-killed-injured-list-dhs-cbp-border-patrol-renee-good-alex-pretti/> [<https://perma.cc/6HHD-UST5>].

⁷⁹ See Shah, *supra* note 73, at 2144.

⁸⁰ See *id.* at 2185 (citations omitted).

⁸¹ See *id.* at 2144 (“The argument here is similar to the contention that reducing administrative resources, a complementary goal of anti-administrativists, likewise reduces presidential power because presidents need administrative capacity to implement their agendas.”).

⁸² *Id.*

⁸³ Shah, *supra* note 63.

⁸⁴ See Jodi L. Short & Jed H. Shugerman, *Major Questions about Presidentialism: Untangling the “Chain of Dependence” Across Administrative Law*, 65 B.C. L. REV. 511, 515-16 (2024) (“Indeed, despite presidents taking the lead and taking responsibility for each of the [major questions doctrine] policies promulgated this century, the Court continually ignores the President’s role and scapegoats the agencies that did the President’s bidding.”).

⁸⁵ See *Learning Resources, Inc. v. Trump*, 148 S. Ct. 628 (2026) (applying the major questions doctrine to rule that International Emergency Economic Powers Act lacks the clear congressional authorization required for the executive branch to impose tariffs, which are of vast “economic and political significance”).

Court's vigorous use of the doctrine to fell the Biden Administration's efforts to draw on administrative authority to solve problems and help people.⁸⁶)

Nonetheless, the major questions doctrine could play a stronger role in managing presidential immigration. Certainly, the judiciary has shown an appetite for constraining presidential initiatives that benefit noncitizens. In more than one decision involving the Obama Administration's policies deferring deportation for some noncitizens, the Fifth Circuit suggested that the major questions doctrine could apply to immigration enforcement decisions.⁸⁷ Furthermore, Supreme Court Justice Thomas mentioned the major questions doctrine as a limitation to the presidential efforts to set immigration priorities.⁸⁸

Admittedly, the Roberts Court seems, however, to have less interest in setting boundaries to expansive presidential efforts to exclude and deport. For example, Justice Thomas did not find a violation of the major questions doctrine in President Trump's imposition of tariffs under the International Emergency Economic Powers Act⁸⁹ or in President Trump's weaponization of the Alien Enemies Act to deport large groups of people ad hoc.⁹⁰ Still, there may be other opportunities for the Court to draw on the major questions doctrine to rebuke the large-scale targeting of noncitizens under doubtful authority.⁹¹ In any case, the rest of this Part identifies how the APA might restrict the excesses of the immigration and national security apparatus, including at the bidding of the President.

⁸⁶ See Bijal Shah, *A Critical Analysis of Separation-of-Powers Functionalism*, 85 OHIO ST. L.J. 1007, 1030 nn.139-143 (2024).

⁸⁷ See, e.g., *Texas v. United States*, 787 F.3d 733, 761 (5th Cir. 2015) (arguing that various statutes cannot reasonably be construed as assigning "decisions of vast 'economic and political significance,'" such as DAPA, to an agency) (citations omitted); see also *Texas v. United States*, 787 F.3d at 769-74 (Higginson, J., dissenting) (calling the majority out for invoking major questions, at the time an inquiry at step one of *Chevron*, against the DAPA program but not to constrain overly aggressive immigration enforcement policies); *Texas v. United States*, 50 F.4th 498, 526 (5th Cir. 2022) ("Like DAPA, DACA 'undoubtedly implicates question[s] of deep economic and political significance that [are] central to this statutory scheme; had Congress wished to assign that decision to an agency, it surely would have done so expressly.'" (citations and internal quotes omitted).

⁸⁸ *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 52 (2020). (Thomas, J., concurring) (stating that the Deferred Action for Childhood Arrivals (DACA) program "would also conflict with the major questions doctrine"); see also *infra* notes 121-124 and accompanying text (describing the DACA program as one in which immigration officials, at the direction of President Obama, implemented deportation priorities).

⁸⁹ *Learning Resources*, 607 U.S. at *41 (Thomas, J., dissenting).

⁹⁰ *J.G.G.*, 604 U.S. at 671-74 (2025) (joined by Justice Thomas and without mention of the major questions doctrine to determine whether the president's interpretation of the AEA is legitimate); see also *supra* notes 1-4 and accompanying text.

⁹¹ See, e.g., Amelia Wilson, *Immigration Enforcement and the Major Questions Doctrine*, 92 BROOKLYN L. REV. (forthcoming 2027) (arguing that the major questions doctrine should limit the Trump Administration's ability to use the Alien Registration Act as a tool for immigration enforcement).

A. *Constraining secret and aggressive enforcement policy*

Enforcement “is an important form of policymaking” that “profoundly shapes the ‘law in action,’”⁹² and “presidential influence over agency enforcement activity [is a] primary mechanism for effecting national regulatory policy.”⁹³ In this vein, immigration enforcement policies driven by the President’s priorities have a substantial influence on various communities’ wellbeing and on the national perception of immigration matters. And yet, immigration enforcement policies have proliferated behind the scenes at the urging of presidents, structured as internal guidance⁹⁴ rather than via APA notice-and-comment rulemaking, even though the policies empower agencies to substantially effect the public. As history has shown, exempting the government from APA process forces advocates into the “fruitless realm of informal negotiation.”⁹⁵

Because punitive immigration enforcement policies impact noncitizens and the broader public, and given that they are experienced as binding⁹⁶ due to the force with which they are implemented, there should be a strong preference for these policies to be made transparent, vetted publicly, and shaped by the input of those most impacted by them. This could be accomplished by requiring immigration enforcement policies to abide by the APA’s notice-and-comment requirements, which emphasizes public access, participation, and procedural inclusion.

For instance, ICE has implemented new policies via internal memoranda that have never been released to the public. These policies allow the intrusive treatment and aggressive detention of noncitizens, including those who have not engaged in criminal activity and are legally in the country. In one memo, ICE instructed its enforcement officials that they can forcibly enter homes without a judicial warrant.⁹⁷ Minimal constraints on the

⁹² Margaret H. Lemos, *Democratic Enforcement: Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 947 (2017); see also Nicholas Almendares, Unitary Enforcement 9-11 (Feb. 8, 2026) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6262838 [<https://perma.cc/HLZ2-WGF8>].

⁹³ Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1034 (2013).

⁹⁴ Cf. Joshua D. Blank & Leigh Osofsky, *The Inequity of Informal Guidance*, 75 YALE L. REV. 1093, 1126 (2023) (illustrating that in the tax context, guidances further inequality more than policies promulgated through a notice-and-comment process, in part because guidances render taxpayers more vulnerable than rules).

⁹⁵ Lee, *supra* note 32, at 167.

⁹⁶ Under the APA, agencies “must follow onerous procedures to issue full-blown regulations (including notice and comment) but can issue guidance far more easily. What justifies this difference, in the familiar telling, is that guidance is not binding in the way regulations are.” See generally Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind*, 36 YALE J. ON REG. 165, 165 (2019); see also Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 397 (2007) (“[G]uidance[s] often closely resemble the policies agencies issue in ordinary notice-and-comment rulemaking. However, guidance[s] are generally developed with little public participation and are often immune from judicial review.”).

⁹⁷ Letter to Kristi Noem, *supra* note 40, at 1 (citing Memorandum from Acting ICE Director Todd Lyons on Utilizing Form I-205, Warrant of Removal 20 (May 12, 2025)).

“administrative warrant” (such as it is),⁹⁸ under general guidelines provided by an internal “Form I-205,” include that ICE agents should “knock and announce” and that “in announcing, officers and agents must state their identity and purpose” and “only use a necessary and reasonable amount of force” to enter a home.⁹⁹ Yet, in another memo, the agency blacked out¹⁰⁰ guidelines restricting the use of force by ICE agents, which suggests that nominal limits on ICE aggression¹⁰¹ may longer be in practice.

Another internal memo has made categories of people newly subject to mandatory detention, including many noncitizens following the proper process to obtain documentation.¹⁰² Specifically, anyone not admitted to the U.S. under a particular classification, like a tourist or student, is now subject to mandatory detention.¹⁰³ This policy requires mandatory detention for people who are lawfully awaiting green card or asylum interviews,¹⁰⁴ including “all new asylum-seekers, anyone who entered without authorization in the past even if they had been here for decades, and people who were paroled from border detention into the United States.”¹⁰⁵ Now, all undocumented immigrants, including a majority of those who crossed the border under the previous and current administrations, are subject to detention without bond.¹⁰⁶

Because these policies allowing for warrantless entries and aggressive deportations originate in an administrative agency, the APA could be applied to compel consistency, justification, and public awareness to the currently inconsistent, amorphous, and unspecified enforcement policies driving the immigration apparatus’s violation of noncitizen’s liberty and bodily integrity. More specifically, such policies should be required to abide by the APA’s rulemaking requirements, given that in the absence of these policies, there would not be an adequate legislative basis for enforcement action and that these policies have a substantial impact on the public, both of which

⁹⁸ See *supra* note 22 and accompanying text.

⁹⁹ See ICE Memo, *supra* note 97, at 21.

¹⁰⁰ See ICE Directive 19009. 3: Firearms and Use of Force (May 26, 2023), https://www.ice.gov/doclib/foia/policy/19009.3_firearmsUOF.pdf.

¹⁰¹ See, e.g., Memorandum from Secretary of Homeland Security Alejandro N. Mayorkas on Update to the Department Policy on the Use of Force at 2-3 (Feb. 6, 2023), <https://www.kenklippenstein.com/api/v1/file/6be497b5-8b8f-40e9-83d7-06012e563da1.pdf> [<https://perma.cc/CSB5-T3KG>].

¹⁰² Memorandum to All ICE Employees, Interim Guidance Regarding Detention Authority for Applicants for Admission at 1-2 (July 8, 2025), <https://immpolicytracking.org/policies/ice-issues-memo-eliminating-bond-hearings-for-undocumented-immigrants/#/tab-policy-documents> [<https://perma.cc/7PUM-NM6K>].

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ Nathan Yaffe, *Immigration Agencies Are Openly Defying Federal Courts*, LPE PROJECT (Jan. 20, 2026), <https://lpeproject.org/blog/immigration-agencies-are-openly-defying-federal-courts/> [<https://perma.cc/W5TV-KDBM>].

¹⁰⁶ See *id.*

require that a policy go through the notice-and-comment process.¹⁰⁷ Indeed, the APA mandates that all agency statements of general or particular applicability that are designed to make law or policy¹⁰⁸ undergo a notice and comment process.¹⁰⁹ This process ensures the agency's policy is sufficiently democratically accountable and responsive to the public, even—or perhaps especially—when it has been issued in furtherance of the President's agenda.

As part of this process, the agency has to provide, to the public, notice of the “legal authority under which the rule is proposed” and the “terms or substance of the proposed rule or a description of the subjects and issues involved.”¹¹⁰ It also has to implement a comment period during which “interested persons” can participate by submitting “written data, views or arguments,” and this may also include an opportunity for oral presentation.¹¹¹ And to justify the policy, agencies have to provide a general statement of the rule's basis and purpose.¹¹² Agencies need not address every comment they receive, but must respond “in a reasoned manner to those that raise significant problems.”¹¹³ Note that even in the case of a policy that involves revising a previous guidance,¹¹⁴ Notice and comment is required if there is a marked change in the impact (or “legal effect”) on the public.¹¹⁵

As an initial matter, no notice or information has been made available to targeted noncitizens regarding what has triggered more intense forms of immigration enforcement. Furthermore, the lack of notice indicates a deficient basis on which to enforce the law, given that ICE targets include legal permanent residents or people otherwise in the U.S. with valid documentation.¹¹⁶ In addition, the underlying procedure for determining that a noncitizen is “criminal” and therefore should be arrested or deported has been opaque and inconsistent at best and nonexistent at worst, resulting in a lack of participation by those regulated by these policies and the

¹⁰⁷ See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *Lewis-Mota v. Sec’y of Lab.*, 469 F.2d 478, 482 (2d Cir. 1972) (invalidating the Secretary of Labor's revocation of a precertification procedure whereby certain noncitizens could obtain visas for permanent residence because the Secretary's actions had a direct “substantial impact” on noncitizens seeking permanent residence and on their prospective employers).

¹⁰⁸ 5 U.S.C. § 551(4).

¹⁰⁹ 5 U.S.C. § 553.

¹¹⁰ 5 U.S.C. § 553(b)(2)-(3).

¹¹¹ 5 U.S.C. § 553(c).

¹¹² *Id.*

¹¹³ *Reyblatt v. Nuclear Regul. Comm’n*, 105 F.3d 715, 722 (D.C. Cir. 1997) (citing *Action on Smoking & Health v. CAB*, 699 F.2d 1209, 1216 (D.C. Cir. 1983)).

¹¹⁴ See *supra* notes 100-101 and accompanying text.

¹¹⁵ See *Am. Mining Cong.*, 995 F.2d at 1112; *Nat’l Fam. Plan. & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 241 (D.C. Cir. 1992).

¹¹⁶ See Zolan Kanno-Youngs, Tyler Pager & Hamed Aleaziz, *As Trump Broadens Crackdown, Focus Expands to Legal Immigrants and Tourists*, N.Y. TIMES (Mar. 21, 2025), <https://www.nytimes.com/2025/03/21/us/politics/trump-immigration-visa-crackdown.html> [https://perma.cc/4EN5-KA5S]; see also *supra* notes 72 & 20 and accompanying text.

wrongful treatment of documented immigrants without criminal records.¹¹⁷ Furthermore, sunlight might be the best disinfectant.¹¹⁸ Were some level of transparency, public involvement, and responsiveness required for these policies, the concerning results¹¹⁹ of their implementation without justification and accountability might have been avoided. Requiring such guidances to fall within the ambit of notice-and-comment provisions might also improve the likelihood that they are subject to judicial review.¹²⁰

Additionally, even well-intentioned immigration policies could provide more lasting benefits if proliferated as rules rather than guidances. Consider the Deferred Action for Childhood Arrivals (DACA) policy, implemented by the Obama Administration.¹²¹ This program allowed certain undocumented immigrants who were seen as favorable and a low priority for deportation to apply for a two-year deferral of deportation.¹²² Those granted this relief were also eligible for work authorization and various federal benefits.¹²³ Because it was couched in mere guidance, this policy suffered from greater instability and was especially vulnerable to revocation. Indeed, “as a result of lawsuits brought by pro-deportation activists, the DACA program was

¹¹⁷ “73.6% held in ICE detention have no criminal conviction according to data current as of February 7, 2026. Many of those convicted committed only minor offenses, including traffic violations.” Additionally, “only 1.64% of FY 2026 new cases sought deportation orders based on any alleged criminal activity of the immigrant, apart from possible illegal entry.” TRAC Immigr., <https://tracreports.org/immigration/quickfacts/detention.html> [<https://perma.cc/UGZ5-LNV7>] (last visited Feb. 28, 2026); see also Carlos F. v. Bondi, No. 26-cv-0469, at *9 (D.C.M.N. filed Mar. 4, 2026) (“DHS publicly announced [the Petitioner’s] ‘arrest’ on its website, labeled him among the ‘Worst of the Worst,’ published his photograph, and accused him of assaulting law enforcement officers—all at a time when no criminal charges had been filed.”); GRAEME BLAIR & DAVID HAUSMAN, IMMIGRATION ENFORCEMENT IN THE FIRST NINE MONTHS OF THE SECOND TRUMP ADMINISTRATION (Deportation Data Project 2026), <https://deportationdata.org/analysis/immigration-enforcement-first-nine-months-trump.html> [<https://perma.cc/TJ9H-TTCQ>] (last visited Feb. 28, 2026); Melissa Sanchez, Jodi S. Cohen, T. Christian Miller, Sebastian Rotella & Mariam Elba, “*I Lost Everything*”: Venezuelans Were Rounded Up in a Dramatic Midnight Raid but Never Charged With a Crime, PROPUBLICA (Nov. 13, 2025), <https://www.propublica.org/article/chicago-venezuela-immigration-ice-fbi-raids-no-criminal-charges> [<https://perma.cc/F4XN-C8Q6>] (discussing how immigration enforcement falsely uses noncitizen criminality as a justification for brutality); Emmanuel Martinez, Marianne LeVine & Álvaro Valiño, *ICE increasingly targets undocumented migrants with no criminal record*, WASH. POST (July 3, 2025), <https://www.washingtonpost.com/immigration/2025/07/03/ice-arrests-migrants-criminal-record-numbers/> [<https://perma.cc/2X4C-ZCMC>].

¹¹⁸ Louis D. Brandeis, *What Publicity Can Do*, Harper’s Weekly, Dec. 20, 1913, at 10.

¹¹⁹ See, e.g., *supra* notes 19-22 and accompanying text.

¹²⁰ See Mendelson, *supra* note 96, at 420.

¹²¹ Memorandum from Janet Napolitano, Sec’y, Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/3TUT-8TZJ>] (framing the policy as “measures” that are “necessary to ensure that our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities”).

¹²² *Id.*

¹²³ See *id.*

subject to judicial scrutiny regarding whether it [was] promulgated through adequate process.”¹²⁴

Furthermore, the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), a descendent of DACA that was also implemented via guidance alone, “was invalidated by a lawsuit, and due to a federal court order, first-time DACA applications also cannot currently be adjudicated by the agency. These decisions will be difficult to reverse, and noncitizens face difficulties in advocating for new policies establishing temporary relief from immigration enforcement.”¹²⁵ If future policies offering deferral and other forms of relief to noncitizens are implemented via the notice-and-comment process, they might be more difficult to withdraw and thus provide more stable ground for noncitizens.

A similar, more recent example involves a policy issued under the Biden Administration, under which noncitizen youth approved for “special immigrant juvenile status” were considered for deferred action and, if granted, would be eligible to apply for a work permit.¹²⁶ Special immigrant juvenile status is a humanitarian classification for unmarried people under the age of twenty-one who cannot reunite with one or both parents due to abuse, neglect, or abandonment.¹²⁷ The agency did not conduct a notice-and-comment process for this policy, which it characterized as consisting of only “internal policy clarifications.”¹²⁸ As a result, when the policy was rescinded in 2025, plaintiffs fighting the rescission conceded that the Trump Administration did not have to “proceed through notice-and-comment before rescinding.”¹²⁹ Like the DACA policy, this form of protection from deportation for vulnerable youths would have been better preserved had it gone through the rulemaking process instead of being issued as a guidance.

Despite the potential benefits of a notice-and-comment process for immigration enforcement policies, the Trump Administration could claim rulemaking exceptions. One such assertion an agency could invoke is the “good cause” exception.¹³⁰ In order to assert an exception to rulemaking, the agency has to show that a notice-and-comment process is either

¹²⁴ Shah, *supra* note 73, at 2164 (citations omitted).

¹²⁵ *Id.* (citations omitted).

¹²⁶ U.S. Citizenship and Immigr. Servs. Pol’y Alert (Mar. 7, 2022), <https://nlpnl.org/sites/default/files/2025-12/2022-policy-alert.pdf> [<https://perma.cc/BKK2-9KXU>].

¹²⁷ U.S. Citizenship and Immigration Services, *Special Immigrant Juveniles*, <https://www.uscis.gov/working-in-US/eb4/SIJ> [<https://perma.cc/8DCU-L72S>].

¹²⁸ U.S. Citizenship and Immigr. Servs. Pol’y Alert, *supra* note 126, at 3 (“USCIS will not publish Federal Register notices requesting public comment because public notice is not required for internal policy clarifications. This policy update is based on our interpretation of the applicable terms in the Code of Federal Regulations and the Immigration and Nationality Act.”).

¹²⁹ *A.C.R. v. Noem*, No. 25-cv-3962, 2025 U.S. Dist. LEXIS 228076, at *34-35 (E.D.N.Y. filed Nov. 19, 2025).

¹³⁰ 5 U.S.C. § 553(b)(3)(B) (permitting agencies to skip notice-and-comment procedures when “the agency for good cause finds” that “notice and public procedure[s] . . . are impracticable, unnecessary, or contrary to the public interest”).

impracticable,¹³¹ unnecessary,¹³² or not in the public interest (a justification associated, as of late, with “national security” interests¹³³). In fact, the first Trump presidency quickly furthered a polarizing “‘moral” and religious exemption to the contraceptive mandate of the Affordable Care Act by claiming “good cause to waive notice and comment based on . . . the urgent need to alleviate harm to those with religious objections,” and the judiciary acquiesced.¹³⁴ Although the Supreme Court has been open to good cause exceptions for controversial guidances issued at the behest of President Trump,¹³⁵ invoking this exception would still require justification from the agency that courts should closely review. For instance, if a government action is substantial or would impose new duties on parties, as is likely in the immigration enforcement context, courts should be reluctant to apply a good cause exception asserting that notice and comment are unnecessary.¹³⁶

Another potential way that agencies might contest the use of notice-and-comment rulemaking in immigration is via the “foreign affairs” exception.¹³⁷ Last year, the Secretary of State declared that “all efforts, conducted by any agency” of the federal government to “control the status, entry, and exit of people . . . across the borders of the United States” would not be subject to the APA’s notice-and-comment requirements.¹³⁸ The State Department has made this claim in the past to apply to narrow visa policies.¹³⁹ In contrast, the declaration by the Trump Administration “reflects an

¹³¹ See, e.g., *Or. Trollers Ass’n v. Gutierrez*, 452 F.3d 1104, 1123 (9th Cir. 2006) (affirming that an agency can bypass public notice and comment if it provides a fact-specific rationale demonstrating that delay would be “impracticable, unnecessary, or contrary to the public interest”); *NRDC v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003) (finding that simply citing the need for speed or the timing of data collection does give an agency good cause to avoid notice and comment); *De Rieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974), *cert denied*, 419 U.S. 896 (1974) (determining that in cases of emergency, particularly regarding price controls and economic stabilization, the standard notice-and-comment rulemaking process could be bypassed to prevent detrimental market behavior).

¹³² See, e.g., *Nat’l Helium Corp. v. Fed. Energy Admin.*, 569 F.2d 1137, 1146 (Temp. Emer. Ct. App. 1977) (holding that the “good cause” exception is to be interpreted narrowly, and an agency cannot rely on it simply to avoid the “slight delay” caused by public comment, especially when a regulation is not an urgent emergency measure).

¹³³ See, e.g., *Jifry v. FAA*, 370 F.3d 1174, 1177-79 (D.C. Cir. 2004) (“The [good cause] exception excuses notice and comment in emergency situations or where delay could result in serious harm.” (citation omitted)).

¹³⁴ Shah, *The President’s Fourth Branch*, *supra* note 76, at 511-518.

¹³⁵ *Id.* at 512, 515-17, 539.

¹³⁶ See, e.g., *United Airlines v. Brien*, 588 F.3d 158, 167 (2d. Cir. 2009) (holding that notice and comment required for a State Department policy imposing a fee on airlines for transporting undocumented immigrants).

¹³⁷ 5 U.S.C. § 553(1) (stating that notice-and-comment provisions do not apply “to the extent there is involved . . . a military or foreign affairs function of the United States”).

¹³⁸ Determination: Foreign Affairs Functions of the United States, 90 Fed. Reg. 12200 (Mar. 14, 2025).

¹³⁹ See Stephen Migala, *The Lost History of the APA’s Foreign Affairs Exception*, 31 GEO. MASON L. REV. 119, 127-28 (2024); see, e.g., Public Notice of Revised Exchange Visitor Skills List, 89 Fed. Reg. 97693 (Dec. 9, 2024) (adjusting, without notice-and comment, the list of

extraordinarily broad understanding of [the] ‘foreign affairs function’ that seeks to give the executive branch a much freer hand in international trade, immigration, and any other issue involving cross-border exchange.”¹⁴⁰

In general, courts have noted that the “dangers of an expansive reading of the foreign affairs exception” in the immigration context “are manifest.”¹⁴¹ “While ‘immigration matters typically implicate foreign affairs’ at least to some extent, it would be problematic if incidental foreign affairs effects eliminated public participation in this entire area of administrative law.”¹⁴² Furthermore, APA legislative history shows that both the Senate and House state that the “phrase ‘foreign affairs functions’ . . . is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those ‘affairs’ which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences.”¹⁴³ In this vein, courts have limited the exception in the immigration context to prevent the exception from becoming “distended”¹⁴⁴ and required a showing that notice and comment would cause “definitely undesirable international consequences.”¹⁴⁵ In addition, courts have also consistently drawn a distinction between the application of the foreign affairs exception to visa policies, which it has generally accepted (notwithstanding recent rejections),¹⁴⁶ and the invocation of this exception for immigration policies, towards which the judiciary has been more skeptical.¹⁴⁷

countries designated used to determine whether certain kind of nonimmigrant visitor is subject to the two-year foreign resident requirement before becoming eligible for a visa or permanent residence in the U.S.).

¹⁴⁰ Kathleen Claussen & Timothy Meyer, *The Trump Admin’s Attempt to Redefine a ‘Foreign Affairs Function’*, LAWFARE (May 13, 2025), <https://www.lawfaremedia.org/article/the-trump-admin-s-attempt-to-redefine-a-foreign-affairs-function>.

¹⁴¹ *City of New York v. Permanent Mission of India to United Nations*, 618 F.3d 172, 202 (2d Cir. 2010); see also Migala, *supra* note 139, at 128, 181-82 (noting courts’ skepticism toward accepting this exception in immigration cases) (citations omitted).

¹⁴² *Permanent Mission of India*, 618 F.3d at 202 (citing *Yassini v. Crosland*, 618 F.2d 1356, 1360 n.4 (9th Cir.1980)).

¹⁴³ Senate Judiciary Committee, S. Rep. No. 752, 79th Cong., 1st Sess. 13 (1945), reprinted in *Administrative Procedure Act Legislative History, 1944-46*, S. Doc. No. 79-248, 199 (1946); House Judiciary Committee, H.R. Rep. No. 1980, 79th Cong., 2nd Sess. 23 (1946), reprinted in *Administrative Procedure Act Legislative History 1944-46*, S. Doc. No. 79-248, 257 (1946).

¹⁴⁴ *Id.* (quoting *Zhang v. Slattery*, 55 F.3d 732, 744 (2d Cir. 1995)).

¹⁴⁵ *Id.* at 201 (suggesting that application of the exception in “areas of law like immigration that only indirectly implicate international relations” should necessarily show that notice and comment would cause “definitely undesirable international consequences”) (quoting *Rajah v. Mukasey*, 544 F.3d 427 (2d Cir. 2008)); see also *East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 676 (9th Cir. 2021) (quoting *Yassini*, 618 F.2d at 1360 n.4) (expressing concern about distending the foreign affairs exception to immigration matters and explaining that “[f]or the foreign affairs exception to apply, ‘the public rulemaking provisions should provoke definitely undesirable international consequences.’”).

¹⁴⁶ See, e.g., *E.B. v. U.S. Department of State*, 583 F.Supp.3d 58 (D.D.C. 2022).

¹⁴⁷ See Migala, *supra* note 139, at 126, 158, 164.

More recently, during the first Trump Administration, a federal court invalidated a policy prohibiting asylum for migrants who crossed the southern border without first seeking protection in a third country, on the grounds that the rule was issued without proper notice-and-comment procedures.¹⁴⁸ Furthermore, it rebuked the “definitely undesirable international consequences” standard, suggesting that inconsistency with legislative history, redundancy with the good cause exception, and the possibility of allowing rules with only indirect effects on foreign relations to qualify for an exception indicate that the exception should be invoked only when the policy at issue “clearly and directly” implicates a foreign affairs function.¹⁴⁹ Here, “indirect” effects on foreign relations of forcing noncitizens to seek asylum in other countries did “not clear the high bar necessary to dispense with notice-and-comment rulemaking under the foreign affairs exception.”¹⁵⁰

Courts should scrutinize the Trump Administration’s interpretation of and attempts to apply its new, broad definition of the foreign affairs exception as a general matter.¹⁵¹ Furthermore, because of the difference between visa issuance and immigration enforcement policies and the lack of evidence that restraint in domestic immigration enforcement causes “definitely undesirable international consequences”—let alone clearly and directly impacts a foreign affair function of the U.S.—courts should be especially reluctant to allow aggressive immigration enforcement to operate outside the notice-and-comment process.

In an ideal world, policies as controversial and disproportionately harmful to minorities as these issued by ICE would benefit from the participation and influence of the least politically-represented communities of noncitizens, who are also the most vulnerable to administrative overreach.¹⁵² One critique of the notice-and-comment process is that it may encourage capture by particularized interests, thus influencing agencies to issue policy that is overly solicitous of those interests. However, this problem is not intrinsic to more accessible approaches to developing policy, but rather due to the imbalanced or inequitable way in which public access to an agency may be provided.¹⁵³ In general, the efficacy of rulemaking “mechanisms and the degree to which they serve to counterbalance power disparities depends a great deal on presumptions about who makes use of these vehicles, and

¹⁴⁸ Capital Area Immigrants’ Rights (CAIR) Coalition v. Trump, 471 F.Supp.3d 25 (D.D.C. 2020).

¹⁴⁹ *Id.* at 53-53 (citing *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1082 (D.C. Cir. 1978)).

¹⁵⁰ *Id.* at 55.

¹⁵¹ Claussen & Meyer, *supra* note 140.

¹⁵² See Shah, *supra* note 73, at 2181 (noting that “the growing recognition that inclusive public participation is key to incorporating the values and needs of vulnerable and marginalized communities into administrative decisionmaking processes and outcomes”).

¹⁵³ Brian D. Feinstein, *Identity-Conscious Administrative Law: Lessons from Financial Regulators*, 90 GEO. WASH. L. REV. 1, 3 (2022) (noting that “in practice,” notice-and-comment rulemaking may “privilege powerful and unrepresentative voices”).

how influential those uses actually are.”¹⁵⁴ If implemented intentionally, including with an eye toward supporting noncitizens in participating effectively,¹⁵⁵ a rulemaking process could offer a chance for noncitizen advocates to offset powerful anti-immigrant perspectives that might otherwise wholly shape immigration enforcement.

Furthermore, building conflict into the policymaking process might encourage the inclusion of oft-excluded voices.¹⁵⁶ In addition, “representational mandates [and] consultation requirements” could help to “correct for power disparities that are present in” an identity-neutral approach to notice-and-comment.¹⁵⁷ The goal would “develop a more durable infrastructure for meaningful public engagement early in the regulatory process”;¹⁵⁸ “redress inequities”;¹⁵⁹ and foster “deliberation among diverse actors”¹⁶⁰ in the development of immigration enforcement policies. Conversely, generalized suggestions that the APA incorporate benefit-cost analysis without consideration of distributive outcomes¹⁶¹ might make it easier to justify enforcement policies that hurt people by orienting the agency toward speed or cost-cutting instead of other important values¹⁶²—although it is also possible that even a conventional cost-benefit calculation would find the impact of aggressive immigration enforcement on businesses and the economy suggests that the policy should be prohibited. Furthermore, imposing process could reduce agencies’ own monopoly on the policy’s orientation.¹⁶³

¹⁵⁴ K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 328 (2018).

¹⁵⁵ Federico Holm & James Goodwin, *Beyond Notice-and-Comment: Bridging the Participation Gap for an Equity-Focused Regulatory System*, 10 ADMIN. L. REV. ACCORD 67, 98-101 (2025) (suggesting that agencies’ providing technical support, fostering communitarian discussion, and going beyond the comment process to engage the public could help individuals more effectively influence the regulatory process).

¹⁵⁶ See Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 69 (2022).

¹⁵⁷ Cf. Feinstein, *supra* note 153 (considering identity-conscious measures to structure agency boards).

¹⁵⁸ Michael Sant’Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793, 799 (2021).

¹⁵⁹ Feinstein, *supra* note 153, at 3.

¹⁶⁰ *Id.* at 1.

¹⁶¹ See Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 UNIV. CHI. L. REV. 649, 649 (2022) (noting that “agencies’ cost-benefit analyses typically have ignored the income-distributive consequences of those regulations”); see also Kenta Tsuda, *Making Bureaucracies Think Distributively: Reforming the Administrative State with Action-Forcing Distributional Review*, 7 MICH. J. ENVTL. & ADMIN. L. 131 (2017) (proposing that agencies analyze the distributional impacts of major regulatory actions in the environmental context).

¹⁶² See Shah, *supra* note 24, at 1625 (“[T]he administrative pursuit of institutional values—including efficiency, cost-effectiveness, and centralized mandates dictated by administrative structure—favors the powerful and is not, in practice, race-, gender-, or wealth-neutral.”); Bijal Shah, *Acknowledging Values in Administration*, YALE J. ON REG. NOTICE AND COMMENT (Nov. 15, 2022), <https://www.yalejreg.com/nc/symposium-stiglitz-reasoning-state-03/> [<https://perma.cc/X8UH-FV9M>] (noting the difficulty of quantifying important values like human dignity).

¹⁶³ See Walters, *supra* note 156, at 67 (observing that it is “difficult for all but the most organized to shape what agencies decide to focus on”).

Requiring transparency in policies by way of a rulemaking process could give noncitizen advocates the chance to offer insight on best practices that balance aggression that is endogenous to ICE, stemming from the agency's culture itself,¹⁶⁴ and that has led to today's violent enforcement policies.

B. Staving off arbitrary rescissions and intrusion

Immigration enforcement policies should be rational, despite agencies' singular emphasis on furthering an increasingly restrictionist presidential agenda. The APA empowers courts to review most agency action to ensure that it is not "arbitrary" or "capricious."¹⁶⁵ The arbitrary and capricious standard could constrain aggressive deportation policies if, for instance, they are not based in a rational connection to facts,¹⁶⁶ particularly if the policy is inconsistent with legislative intent or if the agency's explanation for the policy is implausible or inconsistent with evidence, among other criteria sometimes referred to as "hard look" review.¹⁶⁷

This form of judicial review could be implemented to ensure adequate reason-giving requirements for agency decisions affecting the wellbeing of vulnerable groups. This is precisely what federal courts have decided in recent cases evaluating the legitimacy of the Trump Administration's decisions to revoke Temporary Protected Status (TPS) programs protecting foreign nationals from returning to direly unsafe conditions and allowing them to reside and work in the U.S. in the meantime.¹⁶⁸ In fact, a federal court granted a stay of the second Trump Administration's decision to terminate Haiti's TPS designation because the Administration's explanation for doing so was "'implausible and contrary to the evidence.'"¹⁶⁹ More specifically, the judge found that the rescission runs counter to evidence that Haiti is profoundly unsafe.¹⁷⁰ The court also found that allowing Haitians to remain in the U.S. is not "'contrary to the national interest'" per DHS's justification

¹⁶⁴ See Shah, *supra* note 24, at 1648-56 (suggesting that agency culture can influence, top down, how bureaucrats treat people).

¹⁶⁵ 5 U.S.C. § 706(2)(A).

¹⁶⁶ See *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983) (noting that for a policy to pass muster under APA § 706(2)(A), agencies must have examined the relevant data, articulated a satisfactory explanation for its actions, and included a rational connection between the facts found and the choice made).

¹⁶⁷ See *id.* (establishing that agencies could fail to meet the arbitrary and capricious standard if it relies on factors Congress did not intend, fails to consider important aspect of the problem, or offers an explanation that is implausible or inconsistent with evidence).

¹⁶⁸ U.S. Citizenship and Immigration Services, *Temporary Protected Status*, <https://www.uscis.gov/humanitarian/temporary-protected-status> [<https://perma.cc/C692-WXAD>] (last visited Feb. 28, 2026).

¹⁶⁹ *Miot v. Trump*, No. 25-cv-02471, 2026 U.S. Dist. LEXIS 21504, at *66 (D.D.C. filed Feb. 2, 2026).

¹⁷⁰ *Id.* at 67-79.

for the rescission, particularly considering the actual identities of Haitian TPS holders and their positive impact on the U.S. economy.¹⁷¹

Another federal court found that the Administration's decision to rescind TPS designation for Nepal, Honduras, and Nicaragua is also plausibly arbitrary and capricious due to its purposeful exclusion of negative country conditions data.¹⁷² Likewise, a court could find DHS revocation of TPS for Yemenis¹⁷³ to be similarly arbitrary and capricious, given ongoing strife in Yemen¹⁷⁴ and the Secretary of DHS's unsubstantiated, blanket claim that "[a]llowing TPS Yemen beneficiaries to remain temporarily in the United States is contrary to our national interest."¹⁷⁵

In addition, the judiciary could draw on the arbitrary and capricious standard to limit intrusive immigration enforcement policies. By forcing administrative accountability, judicial review under this standard could protect noncitizens from undue governmental force. In addition, requiring agencies to provide adequate justification for enforcement policies beyond their role in the President's aggressive immigration agenda could force agencies to limit the scope of these policies, if not eliminate them completely.

Consider the enforcement policies discussed in the previous section: ICE's self-empowerment to enter homes without a judicial warrant;¹⁷⁶ its erasure of guidelines limiting force against the public;¹⁷⁷ and its inclusion of many new categories of noncitizens into the group of people that ICE can capture.¹⁷⁸ Importantly, all of these policies are based in unproven assertions about the dangerousness and criminality of noncitizens. A more rational assessment may reveal that ICE's enforcement policies allow profoundly disproportionate uses of force and detention in the process of enforcing civil law.¹⁷⁹

¹⁷¹ *Id.* at 79-87.

¹⁷² *Nat'l TPS All. v. Noem*, No. 25-CV-05687-TLT, 2025 U.S. Dist. LEXIS 271537, at *78-86 (N.D. Cal. Dec. 31, 2025) [hereinafter *Nat'l TPS All.* 3]. Note that the Ninth Circuit appears to disagree. *Nat'l TPS All. v. Noem*, No. 26-129, 2026 U.S. App. LEXIS 4124, at *10-11 (9th Cir. Feb. 9, 2026) [hereinafter *Nat'l TPS All.* 4].

¹⁷³ U.S. Citizenship and Immigration Services, DHS Terminates Temporary Protected Status for Yemen (Feb. 13, 2026), <https://www.uscis.gov/newsroom/news-releases/dhs-terminates-temporary-protected-status-for-yemen> [https://perma.cc/XU8B-J6QF].

¹⁷⁴ Ismaeel Naar, *Yemen Sends Its Military to Push Out Separatist Faction*, N.Y. TIMES (Jan. 2, 2026), <https://www.nytimes.com/2026/01/02/world/middleeast/yemen-separatists-government.html> [https://perma.cc/6PD3-6D7X].

¹⁷⁵ U.S. Citizenship and Immigration Services, DHS Terminates Temporary Protected Status for Yemen, *supra* note 173.

¹⁷⁶ See *supra* notes 97-99 and accompanying text.

¹⁷⁷ See *supra* notes 100-101 and accompanying text.

¹⁷⁸ See *supra* notes 102-104 and accompanying text.

¹⁷⁹ Immigration law is civil and administrative in nature. Nonetheless, ICE has engaged in increasingly violent behavior and inhumane detention against noncitizens that exceeds the level of cruelty that could be legally leveraged even against criminal defendants. See, e.g., Jonathan O'Connell & Douglas MacMillan, *ICE Buys Warehouses for Mass Detention Network, Rattling Locals*, WASH. POST (Jan. 30, 2026), <https://www.washingtonpost.com/investigations/2026/01/30/ice-warehouse-detention-dhs-immigration/> [https://perma.cc/4856-V2W7];

Per a “hard look” approach, it also cannot be that Congress intended¹⁸⁰ for ICE to wholly suspend either constitutional mandates or existing statutory law in the enforcement of civil immigration law. Regarding the first two policies, ICE’s enforcement, entries, and arrests are administrative in nature, and the agency has provided a new “necessary and reasonable amount of force” standard. Accordingly, these memos appear to assume that ICE agents are not constrained by the Fourth Amendment requirements and doctrine that check criminal law enforcement,¹⁸¹ which suggests they do not pass muster under hard look. The third policy results in the detention of many categories of people that are in the country legitimately. The agency justifies this detention under a statutory provision¹⁸² that was “originally enacted as part of the ‘expedited removal’ process meant to apply only to people arriving at an international border without documents.”¹⁸³ And yet, the provision is being applied to asylum seekers as a whole, for whom both international and domestic law establish the U.S.’s duty to protect,¹⁸⁴ and

Priscilla Alvarez, Chris Boyette & Amanda Musa, *5-year-old Boy Taken by ICE in Minneapolis Area Being Held with Father at Texas Facility*, CNN (Jan. 23, 2026), <https://www.cnn.com/2026/01/22/us/minnesota-liam-conejo-ramos-ice-detained> [<https://perma.cc/NWV6-T52H>]; *Autopsy Finds Cuban Immigrant in ICE Custody Died of Homicide Due to Asphyxia*, NPR (Jan. 22, 2026), <https://www.npr.org/2026/01/22/g-s1-106773/cuban-immigrant-ice-custody-died-homicide> [<https://perma.cc/LC7D-H6QL>]; Beth Wang, Maia Spoto & Megan Crepeau, *Lawyers Fight ICE for Access: ‘I Want to Hear My Client’s Voice’*, BLOOMBERG L. (Jan. 30, 2026), <https://news.bloomberglaw.com/litigation/lawyers-fight-ice-for-access-i-want-to-hear-my-clients-voice> [<https://perma.cc/LC7D-H6QL>] (illustrating that noncitizens have been relocated and detained without adequate food or water, and without access to their counsel); Michael Macher, *Enforcement Regime*, PHENOMENAL WORLD (Jan. 9, 2026), <https://www.phenomenalworld.org/analysis/enforcement-regime/> [<https://perma.cc/6AVP-NY7Z>] (“Communities targeted by this [immigration] enforcement blitz are familiar with its hallmarks, from indiscriminate force to the abandonment of due process, vacuous claims of criminality to theatrical violence.”); Douglas MacMillan & Jonathan O’Connell, *ICE Documents Reveal Plan to Hold 80,000 Immigrants in Warehouses*, WASH. POST (Dec. 24, 2025), <https://www.washingtonpost.com/business/2025/12/24/ice-immigrants-detention-warehouses-deportation-trump/> [<https://perma.cc/A8RH-GKCV>]; Julie Bosman, Hamed Aleaziz & Jesus Jiménez, *Man Fatally Shot in Confrontation With ICE Officers in Chicago Area*, N.Y. TIMES (Sep. 12, 2025), <https://www.nytimes.com/2025/09/12/us/ice-shooting-chicago.html> [<https://perma.cc/3LGL-MZSL>]; Jonah Valdez, *A Pattern of Violence: Documenting ICE Agents’ Brutal Use of Force in LA Immigration Raids*, THE INTERCEPT (July 7, 2025), <https://theintercept.com/2025/07/07/ice-raids-la-violence-video-bystanders/> [<https://perma.cc/S58R-3QR9>].

¹⁸⁰ See *State Farm*, 463 U.S., *supra* note 166, at 42–43 (noting that consistency with legislative intent as a requirement to withstand “hard look” review).

¹⁸¹ See *id.*

¹⁸² See ICE Memo, *supra* note 102 (citing 8 U.S.C. § 1225(b)).

¹⁸³ Yaffe, *supra* note 105.

¹⁸⁴ Immigration and Nationality Act § 208, 8 U.S.C. § 1158; see also Philip G. Schrag, *The Border Crisis and the Right to Seek Asylum*, 53 HOFSTRA L. REV. 115, 115 (2024) (“Any migrant who crosses that border into the United States has a statutory right to seek asylum. But the process for adjudicating asylum claims in the nation’s immigration courts has essentially collapsed. . . .”); Convention relating to the Status of Refugees (adopted July 1951), available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-relating-status-refugees>; U.S. Citizenship and Immigration Services, *Refugee Timeline*, <https://www.uscis.gov/about-us/our-history/stories-from-the-archives/refugee-timeline#:~:text=Though%20the%20U.S.%20did%20not,the%20scope%20of%20the%20Convention>:

therefore includes many asylum applicants who do not fall under “expedited removal” requirements at the border. This suggests that the ICE policy is inconsistent with statutory factors and therefore likely to fail hard look review.¹⁸⁵

Notably, the Supreme Court drew on arbitrary and capricious review to constrain the excesses of the first Trump presidency. In two cases, “the Supreme Court evolved the arbitrary and capricious standard into an accountability-forcing mechanism for censuring pretextual, or otherwise unethical, agency justifications for policies that [were implemented only to] further the President’s [immigration] interests.”¹⁸⁶ These precedents provide a blueprint for the application of arbitrary and capricious review to policymaking that is problematic and justified primarily in terms of its responsiveness to the President and aligns with the suggestion that courts should take a “harder look” at policies instigated by the President.¹⁸⁷

First, the Supreme Court invalidated¹⁸⁸ the Trump-directed DHS rescission¹⁸⁹ of the DACA policy.¹⁹⁰ According to the Court’s decision, the agency acted in an arbitrary and capricious manner because it did not adequately justify its action, and instead rescinded the policy merely to achieve, as quickly as possible, the Attorney General’s (and by extension, the President’s) goal of eradicating the DACA program.¹⁹¹ Second, the Supreme Court found that the Department of Commerce’s decision to add a question to the Census inquiring about citizenship status was unsubstantiated—a

In response to the refugee crisis after World War II, in 1950 the United Nations created the United Nations High Commissioner for Refugees (UNHCR), also known as the UN Refugee Agency. The United Nations High Commissioner for Refugees acts as the guardian of the 1951 Convention Relating to the Status of Refugees, which defines the legal protections for refugees. Though the U.S. did not sign the 1951 Convention, the U.S. later signed the 1967 Protocol Relating to the Status of Refugees, which broadened the scope of the Convention.

“[L]ike refugee admissions, asylum routinely leads individuals and their spouses and children to both permanent residence and citizenship eligibility.” Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 41 IMMIGR. & NAT’LITY L. REV. 3, 478-83 (2020).

¹⁸⁵ See *State Farm*, 463 U.S., *supra* note 166.

¹⁸⁶ See Shah, *Judicial Administration*, *supra* note 62, at 1260.

¹⁸⁷ Cf. Mariano-Florentino Cuéllar, *The New Presidential Adjudication*, 135 YALE L.J. F. 597, 630 (2026) (advocating for “a kind of ‘harder look’ scrutiny of presidential adjudication rooted in the country’s traditional expectation that the uses of official power, and particularly coercive power, reflect legitimate public purposes,” loosely based in concepts behind hard look review).

¹⁸⁸ *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 35 (2020).

¹⁸⁹ Elaine C. Duke, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)*, DEP’T OF HOMELAND SEC. (Sep. 5, 2017), <https://www.dhs.gov/archive/news/2017/09/05/memorandum-rescission-daca> [<https://perma.cc/4VXE-XVEY>].

¹⁹⁰ See *supra* notes 121-124 and accompanying text.

¹⁹¹ *Regents*, 591 U.S. at 22-35 (noting that the Secretary of the Department of Homeland Security “failed to consider . . . important aspects of the problem,” per the requirements of *State Farm*) (alteration in original)).

cover for mere responsiveness to the White House's policy position.¹⁹² In doing so, the Court acted consistently with hard look doctrine "to consider 'what role political judgments can and should play' in the administration of the Census."¹⁹³ In this way, "the Court reinvigorated arbitrary and capricious review as a means for sniffing out pretextual justifications for policies developed at the President's request."¹⁹⁴ Ultimately, the majority determined that the Secretary of Commerce lied to meet the President's objectives, rendering the new Census policy arbitrary and capricious.¹⁹⁵

Similarly, the D.C. District court recently granted the plaintiff's motion to stay the Trump Administration's rapid rescission of Haiti's TPS status by finding that DHS "follow[ed] the President's direction to terminate before conducting any analysis [and made] gross generalizations without any supporting data."¹⁹⁶ So too did another federal court find that the rescission of TPS designation for Nicaragua and Honduras was pretextual.¹⁹⁷ Noting that "TPS decisions that are 'preordained' or based on 'political influence,' rather than country conditions, violate the APA,"¹⁹⁸ the court held that that the Secretary of DHS "executed a preordained decision to terminate TPS and searched for a rationale to support the decision" under pressure from President Trump's interest in eliminating TPS protections altogether.¹⁹⁹

Arbitrary and capricious review may also push agencies to take into consideration reliance on policies instituted by previous administrations that are disliked by the current President, thus protecting beneficial immigration policies. The Court has recognized reliance interests may constrain whether an agency can rescind a policy;²⁰⁰ this insight could also play an ongoing role in evaluating deportation and exclusion priorities. At the time of the DACA rescission, 700,000 people had applied for and received deferral of deportation under DACA.²⁰¹ Accordingly, the Supreme Court found reliance interests present when evaluating DACA's forbearance of

¹⁹² See *Dep't of Com. v. New York*, 588 U.S. 752, 783-86 (2019) ("We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process. [W]e cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'") (citation omitted).

¹⁹³ See Shah, *supra* note 72, at 1260.

¹⁹⁴ *Id.* at 1261.

¹⁹⁵ See Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 9 nn.26-27 (2020) (citations omitted); Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1788 (2021) (noting that when the Secretary "lied about his reasons for adding the citizenship question, [there was] damage to political accountability" as well) (emphasis in original).

¹⁹⁶ *Miot v. Trump*, No. 25-CV-02471, 2026 U.S. Dist. LEXIS 21504, at *88 (D.D.C. Feb. 2, 2026).

¹⁹⁷ *Nat'l TPS All.* 3, *supra* note 172, at *15.

¹⁹⁸ *Id.* at *41 (citing *Saget*, 375 F. Supp. 3d at 345-46 (quoting 5 U.S.C. § 706(2)(A))).

¹⁹⁹ *Id.* at *39, 43.

²⁰⁰ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

²⁰¹ *Regents*, 591 U.S. at 9.

deportation.²⁰² In doing so, the Court rendered it more difficult for the first Trump Administration to revoke the entire DACA program.²⁰³

Likewise, in a recent decision considering whether the rescission of a policy protecting youths who have special immigrant juvenile status from deportation²⁰⁴ is arbitrary or capricious, a federal court found that “when rescinding a policy, an agency must consider both ‘serious reliance interests’ engendered by that policy [and] ‘reasonably obvious alternatives’.”²⁰⁵ Because the agency “failed to consider reliance interests and reasonably obvious alternatives,”²⁰⁶ its decision to rescind the special immigrant juvenile policy may be arbitrary and capricious.²⁰⁷

Courts have also found reliance interests implicated when the government tries to rescind other noncitizen protections. For example, a federal judge resisted the second Trump Administration’s decision to strip 350,000 Venezuelan nationals of their TPS status in the U.S., “subjecting them to possible imminent deportation back to a country[] rife with economic and political upheaval and danger,”²⁰⁸ by asserting that reliance interest would require that the Trump Administration continue the Biden Administration’s extension of the TPS program.²⁰⁹ Reliance interests may also be of concern when the government yanks away TPS designations without adequate time for those impacted to transition into an unprotected status.²¹⁰ Overall, if the Supreme Court were to maintain and build on its previous commitment to applying the APA to constrain pretextual and poorly-justified policies as well as to preserve policies that impact reliance interests, the Court could set clear boundaries to the second Trump Administration’s immigration actions.

Finally, arbitrary and capricious review could have the benefit of indirectly curbing immigration enforcement that targets or disproportionately burdens certain racial and ethnic communities. Noncitizens rarely succeed on equal protection grounds, which courts is often attributed to a lack of discriminatory intent.²¹¹ Furthermore, the Supreme Court has declined to recognize even egregious motivations for immigration exclusion,²¹² as have

²⁰² See *id.* at 30-32; Haiyun Damon-Feng, *Administrative Reliance*, 73 DUKE L.J. 1743, 1787-89 (2024).

²⁰³ See Shah, *supra* note 73, at 2164.

²⁰⁴ See *supra* notes 126-129 and accompanying text.

²⁰⁵ A.C.R., 2025 U.S. Dist. LEXIS 228076, at *29.

²⁰⁶ *Id.* at *29-30.

²⁰⁷ *Id.* at *29-34 (going through the analysis).

²⁰⁸ Nat’l TPS All. v. Noem, 773 F. Supp. 3d 807, 814 (N.D. Cal. 2025) [hereinafter *Nat’l TPS All.* 1].

²⁰⁹ *Id.* at *52-53. Note that the Supreme Court chose not to reaffirm the district court’s recent decision asserting reliance interests implicated by the TPS program. Noem v. Nat’l TPS All., 145 S.Ct. 2728, 2728 (2025) (mem.) [hereinafter *Nat’l TPS All.* 2].

²¹⁰ *Nat’l TPS All.* 3, *supra* note 172, at *10.

²¹¹ See Motomura, *supra* note 39, at 1735.

²¹² See Eidelson, *supra* note 195, at 1822 (citing Jennifer M. Chacón, *The Inside-Out Constitution: Department of Commerce v. New York*, 2019 SUP. CT. REV. 231, 268 (2019)):

federal courts of appeal.²¹³ Arguably, “there is no reason to think that if the APA challenges to [exclusionary policies] had been wiped away, a majority of the Court would have invalidated those policies based on racial animus instead; far more likely, the Court would simply have upheld them.”²¹⁴ This suggests that while the Court may not be receptive to equal protection challenges in the immigration context,²¹⁵ it may be open to APA-based claims that allow the claimant to fight discriminatory or disparately impactful policies without asking the Court to overcome its opposition to equal protection claims on behalf of immigrants.

More specifically, the judiciary’s resistance to finding race-based discrimination in exclusionary policies renders arbitrary and capricious review perhaps the best tool for constraining immigration enforcement based in discriminatory intent. As of now, immigration agencies have been forced to implement better policies by shoring up their underlying rationales,²¹⁶ which has resulted in reducing the detrimental effects these policies have on racial and ethnic minorities by compelling the government to rationalize immigration enforcement policies beyond their responsiveness to the Administration. An APA-based analysis may spur, as well, a limited judicial exploration of race-based or other invidious reasons for the presidentially-directed policies. In some cases, judicial discussion of whether an immigration policy is arbitrary or capricious appears to overlap with concerns about the disproportionate impact of said policies on racial minorities.²¹⁷ Ideally, courts will also someday reinvigorate the potential use of arbitrary

[The] opinion in *Department of Commerce* “manages never to mention Hispanics or Latinos at all,” despite the administration’s apparent “intent to increase white political power at the expense of communities of color.” And in *Regents*, Roberts went out of his way to reject the plaintiffs’ equal-protection challenge, including by suggesting (quite implausibly) that President Trump’s motives were barely relevant.

Id. at 1824 n.217-22 and accompanying text (observing that, in *Trump v. Hawaii*, 585 U.S. 667 (2018), the Court all but ignored the Trump Administration’s clear intention to keep all Muslims out of the U.S. as a motivation for the first Trump presidency’s “travel ban”).

²¹³ See Ray, *supra* note 46, at 783-84.

²¹⁴ Eidelson, *supra* note 195, at 1824.

²¹⁵ See, e.g., Ray, *supra* note 46, at 803 (describing the Court’s resistance to an equal protection challenge to the Trump Administration’s rescission of the DACA program despite the President’s demonstrated racial animus).

²¹⁶ See *supra* notes 189-210 and accompanying text.

²¹⁷ In the decision evaluating whether the Trump Administration’s rescission of Haiti’s TPS designation was arbitrary and capricious, the court noted that the Secretary of DHS “join[ed] President Trump in insisting that nonwhite immigrants be forced to leave the United States,” and then launched into an analysis finding that the plaintiff’s equal protection claim is also likely to be successful. *Miot*, 2026 U.S. Dist. LEXIS 21504, at *88. Furthermore, in discussing the legitimacy of the decision to rescind TPS for Nicaraguans, Hondurans and Nepalese nationals, the court finds that the plaintiffs “raise a plausible inference that an ‘invidious discriminatory purpose was a motivating factor’ for the Secretary’s decisions” and that even under a “rational basis standard, the Secretary’s invocation of racist tropes reveal that her decision was not rationally related to the stated goal.” *Nat’l TPS All.* 3, *supra* note 172, at *53-54, *57-58.

and capricious review to more directly curb racially-biased incentives for immigration policies.²¹⁸

C. *Defending personal autonomy and liberty*

“The nation’s ‘mandatory’ immigration-detention laws sustain its largest civil-imprisonment system. . . turn[ing] split-second arrest decisions into potentially lengthy jail sentences [and] confound[ing] the historic presumptions—liberty, innocence, prosecutorial discretion, and bail—undergirding other pretrial-detention regimes.”²¹⁹ The most utilized tool to fight immigration detentions are petitions for habeas corpus review.²²⁰ “A writ of habeas corpus is used to bring a prisoner or other detainee before the court to determine if the person’s imprisonment or detention is lawful. It is commonly used to determine whether people ensconced in the criminal legal system have been illegally held by the government”²²¹; immigration enforcement, however, is a similarly harsh punishment for merely a civil offense. Mandatory immigration detention policies under the current Administration have “led to a deluge of emergency lawsuits brought by individual detainees, thousands of whom have challenged their detention as illegal and unconstitutional.”²²²

The administrative state also engages in deportation without due process of law.²²³ In one instance, due to an “administrative error,”²²⁴ the Administration mistakenly deported Kilmar Armando Ábrego García, a resident of Maryland, to a notorious high-security prison in El Salvador.²²⁵ A district court required the Trump Administration to effectuate his

²¹⁸ See *infra* notes 287-288 and accompanying text.

²¹⁹ Lindsay Nash, *Resurrecting Immigration Releases*, 135 YALE L.J. 1533, 1536 (2026).

²²⁰ See Pratheek Rebala, Jeff Ernsthause & Perla Trevizo, *Immigrants Who Say Their Detention Is Illegal Have Filed More Than 18,000 Cases. It’s a Historic High*, PROPUBLICA (Feb. 10, 2026, 5:00 AM), <https://www.propublica.org/article/habeas-petitions-immigrant-detentions-trump> [https://perma.cc/9963-ZN6K].

²²¹ Shah, *supra* note 75.

²²² Kyle Cheney, *Our Running List of Judges Who Have Ruled on ICE’s Mass Detention Policy*, POLITICO (Feb. 18, 2026), <https://www.politico.com/news/2026/02/18/trump-judges-immigration-detention-00784614?nid=0000014f-1646-d88f-a1cf-5f46b7bd0000&name=playbook&nrid=0000014c-2414-d9dd-a5ec-34bc52a40001>.

²²³ See *Inside the Trump Administration’s Secret Deportation Deals*, SENATE FOREIGN RELATIONS COMMITTEE MINORITY REPORT (Feb. 2026), [https://www.foreign.senate.gov/imo/media/doc/\(FINAL%20-%20web\)%20At%20What%20Cost%20-%20Inside%20the%20Trump%20Administration%27s%20Secret%20Deportation%20Deals_2.17.26.pdf](https://www.foreign.senate.gov/imo/media/doc/(FINAL%20-%20web)%20At%20What%20Cost%20-%20Inside%20the%20Trump%20Administration%27s%20Secret%20Deportation%20Deals_2.17.26.pdf); see also Pranav Baskar & Hamed Aleaziz, *U.S. Deports Nine Migrants in Secret, Ignoring Legal Protections*, N.Y. TIMES, <https://www.nytimes.com/2026/02/14/world/africa/us-secret-deportation-cameroon.html> [https://perma.cc/7T2J-KTNG] (Feb. 16, 2026) (describing President Trump’s “global deportation effort” and increasing reliance on third country deportation).

²²⁴ Noem v. Abrego Garcia, 145 S. Ct. 1017, 1018 (2025).

²²⁵ Myah Ward, *White House Ramps Up Defense of Abrego Garcia’s Deportation*, POLITICO (Apr. 17, 2025, 9:59 PM), <https://www.politico.com/news/2025/04/17/white-house-defense-abrego-garcia-deportation-00298118> [https://perma.cc/6GBX-B36Z]; see also *supra* note 1 and accompanying text (describing the prison as a place “where detainees suffer egregious human rights abuses”).

immediate return back to the U.S.²²⁶ The Supreme Court affirmed this decision by holding that the government must comply with obligations to provide due process of law, including notice and an opportunity to be heard.²²⁷ Nonetheless, the White House vehemently²²⁸ failed to comply²²⁹ until recently, and then only in order to impose unsubstantiated human smuggling charges on Mr. Ábrego García.²³⁰

The judiciary has drawn on constitutional law to check the Trump Administration's aggressive immigration detention and deportation efforts. Notably, these actions stem from administrative agencies.²³¹ Therefore, the APA should complement constitutional tools for protecting liberty by helping to ensure that noncitizens are not wrongfully detained or unlawfully deported. At least in immigration matters, which are civil—not criminal—and administrative in nature, the APA offers an appropriate and complementary form of judicial review. The need for tools beyond habeas is particularly dire vis-à-vis a President and immigration machine that increasingly transgress the law to inhumane ends while defying federal court orders along the way.²³²

Recently, the Supreme Court said that people who are detained and deported under the Alien Enemies Act²³³ have no recourse under the APA, stating instead that “[c]hallenges to removal under the [Alien Enemies Act], a statute which largely ‘preclude[s] judicial review,’ must be brought in habeas.”²³⁴ However, by isolating habeas as the main or only approach

²²⁶ See *Abrego Garcia*, 145 S. Ct. at 1018.

²²⁷ See *id.* at 1019.

²²⁸ See Tony Dokoupil & Caitlin Yilek, *Kristi Noem Says if Kilmar Abrego Garcia Was Sent Back to U.S. “We Would Immediately Deport Him Again”*, CBS (Apr. 20, 2025, 8:38 AM), <https://www.cbsnews.com/news/kristi-noem-kilmar-abrego-garcia-trump-deport> [<https://perma.cc/G7VL-9B4D>].

²²⁹ *Garcia v. Noem*, No. 8:25-cv-00951-PX, 2025 U.S. Dist. LEXIS 70949 (D. Md. Apr. 11, 2025); Ward, *supra* note 225.

²³⁰ Maria Sacchetti, Perry Stein & Jeremy Roebuck, *Kilmar Abrego García returned to U.S., charged with human smuggling*, WASH. POST (June 6, 2025), <https://www.washingtonpost.com/national-security/2025/06/06/kilmar-abrego-garcia-return-human-trafficking> [<https://perma.cc/5EFU-EJY6>] (discussing the return of Kilmar Abrego García and the Attorney General subsequently charging him with human smuggling).

²³¹ See *supra* notes 1-9 and accompanying text (providing an example of an immigration detention scheme).

²³² See *Juan T.R. v. Noem*, No. 26-CV-0107, 2026 U.S. Dist. LEXIS 20363, at *2 (D. Minn. Jan. 28, 2026):

Attached to this order is an appendix that identifies 96 court orders that ICE has violated in 74 cases. The extent of ICE's noncompliance is almost certainly substantially understated This list should give pause to anyone—no matter his or her political beliefs—who cares about the rule of law. ICE has likely violated more court orders in January 2026 than some federal agencies have violated in their entire existence.

²³³ See, e.g., *supra* notes 1-4 and accompanying text (describing deportation under the dubious auspices of this law).

²³⁴ *Trump v. J.G.G.*, 604 U. S. 670, 672 (2025). A concurrence in this case declares that the question of whether a person has been lawfully detained for a civil immigration offense “turns on whether these transfer claims belong in habeas corpus proceedings or instead may be brought

to constraining ICE's unlawful behaviors, the Court "embarked on a new era of procedural variability" in a "casual, inequitable, and [] inappropriate manner."²³⁵

As a foundational matter, habeas corpus has several limitations in the immigration context. Overall, habeas is an individualized tool that seeks to free one individual at a time in the face of an onslaught of unlawful detentions and deportations by ICE²³⁶—what one commentator refers to as "emptying the ocean with a spoon."²³⁷ In addition, habeas petitions are poorly suited to support noncitizens, who may be at a disadvantage in many respects. As Justice Sotomayor observes, "[i]ndividuals who are unable to secure counsel, or who cannot timely appeal an adverse judgment rendered by a habeas court, face the prospect of removal directly into [] perilous conditions."²³⁸ Furthermore, the Administration can thwart habeas by detaining noncitizens in jurisdictions that are favorable to the Administration's goals.²³⁹ And noncitizens neither have the political power to fight these detentions and deportations as a collective, nor command the electoral influence required to sway these policies from the top down.

Furthermore, habeas corpus is the wrong tool to protect against hostile deportations,²⁴⁰ since it offers only a process to contest detention, rather than a pathway back to the U.S. after being unlawfully removed. To complicate matters further, the executive branch has asserted that an adjudication issued by the Executive Office for Immigration Review (EOIR) is superior to an order of the federal court and has drawn on this view to justify ICE's continued unlawful deportations.²⁴¹ More specifically:

ICE and EOIR are engaged in widespread defiance of a recent decision. . . . granting declaratory relief to a nationwide class comprising a significant portion of those targeted by the new mandatory detention policy—people who entered without inspection. ICE continues to subject people who entered without inspection to mandatory detention as though the judgment never happened.

under the Administrative Procedure Act. I agree with the Court's analysis that the claims must be brought in habeas." *Id.* at 673 (Kavanaugh, J., concurring).

²³⁵ *Id.* at 692 (Jackson, J., dissenting); see also Shah, *supra* note 75.

²³⁶ See IMMIGRATION DETENTION EXPANSION IN TRUMP'S SECOND TERM (AMERICAN IMMIGRATION COUNCIL 2026), <https://www.americanimmigrationcouncil.org/wp-content/uploads/2026/01/immigration-detention-report.pdf>.

²³⁷ Yaffe, *supra* note 105; see also Kyle Cheney, *Hundreds of judges reject Trump's mandatory detention policy, with no end in sight*, POLITICO (Jan. 5, 2026), <https://www.politico.com/news/2026/01/05/trump-administration-immigrants-mandatory-detention-00709494>.

²³⁸ *J.G.G.*, 604 U.S. at 689 (Sotomayor, J., dissenting).

²³⁹ See *id.* at 688.

²⁴⁰ *Id.* (noting that "[t]he plaintiffs in this case sued not to challenge their detention, but to protect themselves from summary deportation").

²⁴¹ See Maria Sacchetti & Carol D. Leonnig, *ICE declares millions of undocumented immigrants ineligible for bond hearings*, WASH. POST (July 15, 2025), <https://www.washingtonpost.com/immigration/2025/07/14/ice-trump-undocumented-immigrants-bond-hearings/> [<https://perma.cc/AQ5X-FSUX>].

Meanwhile, immigration judges confronted with the judgment have devised a variety of facially implausible arguments to resist its holding.²⁴²

Remarkably, it is also unclear whether the Trump Administration respects the constitutional protection offered by habeas review at all. When questioned at a Senate hearing, the Secretary of DHS at the time defined habeas corpus as “‘a constitutional right that the President has to be able to remove people from this country.’”²⁴³ She also asserted “that the President of the United States has the authority under the Constitution to decide if [habeas corpus protections] should be suspended or not.”²⁴⁴ “Even those whose habeas petitions succeed face agency resistance.”²⁴⁵ This suggests that habeas review will have only a limited prophylactic effect and a diminished corrective impact on DHS.

By relegating judicial review of a consequential pathway of immigration enforcement to the limited domain of habeas corpus claims,²⁴⁶ the Roberts Court has neglected the APA’s role as an important instrument for overseeing the Trump Administration’s deportation crackdown. The APA’s “central purpose” is to “provid[e] a broad spectrum of judicial review of agency action.”²⁴⁷ Therefore, the judiciary should reclaim use of the APA for protective purposes in the immigration detention and deportation contexts.

Concurrently with the passage of the APA, the Court held that the statute’s judicial review provisions²⁴⁸ should be used concurrently with habeas review to determine whether immigration detention and deportation are unlawful.²⁴⁹ Subsequent legislation limited district court review of

²⁴² Yaffe, *supra* note 105; *see also EOIR Issues Nationwide Guidance on Maldonado Bautista*, AILA Doc. No. 26011404 (Jan. 14, 2026), <https://www.aila.org/library/practice-alert-eoir-issues-nationwide-guidance-on-maldonado-bautista> (“Chief Immigration Judge Teresa L. Riley issued nationwide guidance instructing all immigration judges that: ‘*Maldonado Bautista* is not a nationwide injunction and does not purport to vacate, stay or enjoin’” the EOIR decision allowing for mandatory detention of this expanded community of noncitizens).

²⁴³ Amanda Friedman, *Noem defends potentially suspending habeas corpus, flubs definition as Trump’s right to ‘remove people’*, POLITICO, <https://www.politico.com/live-updates/2025/05/20/congress/kristi-noem-habeas-corpus-00358829> [<https://perma.cc/9BXL-FBVX>] (May 20, 2025).

²⁴⁴ *Id.*

²⁴⁵ Yaffe, *supra* note 105; *see also* Kyle Cheney, *Judges keep ordering immigration hearings — but say the results are often a sham*, POLITICO (March 6, 2026), <https://www.politico.com/news/2026/03/06/immigration-case-hearings-judges-00815660>; Yaffe, *supra* note 105:

[For example,] ICE is massively expanding use of something called the “auto-stay,” a (plainly *ultra vires*) regulation that purports to give it the authority to unilaterally override an immigration judge’s decision to grant bond if they appeal within 24 hours. And when it does release people, it often drags its feet, or, upon release, unilaterally imposes GPS ankle shackles and onerous reporting requirements despite receiving an order to grant unconditional release.

²⁴⁶ *See supra* notes 233-235 and accompanying text.

²⁴⁷ *J.G.G.*, 604 U.S. at 687 (Sotomayor, J., dissenting).

²⁴⁸ APA §10, 5 U.S.C. §§ 701-706.

²⁴⁹ *Brownell v. Tom We Shung*, 352 U.S. 180, 181 (1956) (holding that the APA provides a right to judicial review of exclusion or deportation orders); *Shaughnessy v. Pedreiro*, 349 U.S.

deportations to some extent and set time limits for those seeking judicial review,²⁵⁰ but this legislation did not overturn precedent indicating that the APA's provisions for judicial review apply to deportation proceedings. Today, courts of appeals and the Supreme Court could more intentionally employ the APA to oversee the immigration apparatus.

Moving forward, the judiciary should consider whether each instance of the rapid and aggressive detention and deportation of noncitizens in fact passes muster under APA requirements. As an initial matter, courts have recently found that agency detention decisions are subject to the APA because they constitute "final" action and are not committed to agency discretion.²⁵¹ One form of judicial review would be to determine whether deportation is arbitrary and capricious,²⁵² similar to courts' reproach of unjustified policies illustrated in the previous section.²⁵³ A fruitful line of cases that applies this standard has found that the termination of a student visa is arbitrary and capricious when neither foreign policy nor other proffered reasons justify the revocation.²⁵⁴ Moreover, this APA violation has provided a basis to grant a noncitizen's habeas petition challenging his detention in ICE custody.²⁵⁵

Another judicial consideration could be whether violent and intrusive apprehensions and long detentions in poor conditions²⁵⁶ are contrary to constitutional rights²⁵⁷ such as the Fourth and Eighth Amendments.

48, 49 (1955) (holding that noncitizens could obtain judicial review of deportation orders under §10 of the APA rather than being limited solely to habeas corpus).

²⁵⁰ See Jill E. Family, *A Lack of Uniformity, Compounded*, in *Immigration Law*, 98 NOTRE DAME L. REV. 2115, 2124-26 (2023).

²⁵¹ See *Luna Gutierrez v. Noem*, 811 F.Supp.3d 133, *153-59 (2025); *Las Americas Immigrant Advocacy Center v. Wolf*, 507 F.Supp.3d 1, *34-36 (2020); *but see Raspoutny v. Decker*, 708 F.Supp.3d 371, 381 (2023).

²⁵² 5 U.S.C. § 704(2)(A); see *ImmDef v. Noem*, 781 F.Supp.3d 1011 (C.D. Cal. Apr. 16, 2025) (staying DHS's implementation of the "Migrant Protection Protocols, which requires non-Mexican citizens seeking asylum at the U.S.-Mexico border to return to Mexico during their U.S. immigration proceedings, and finding a substantial likelihood of success on the claim that the action was arbitrary and capricious under APA); *Las Americas Immigrant Advocacy Center*, 507 F.Supp.3d at *33-37 (2020) (finding that an agency policy of detaining asylum seekers in Customs and Border Control (CBP) facilities instead of ICE facilities is subject to the arbitrary and capricious standard, while declining to find that government violated the APA in doing so).

²⁵³ See *supra* Part II.B.

²⁵⁴ See *Mohammed H. v. Trump* 786 F.Supp.3d 1149, 1159-60 (2025) ("The record shows that DHS's reason for terminating Petitioner's [Student and Exchange Visitor Information System] record was a shifting sand, changing weeks after he was detained."). There are a number of other cases that follow *Mohammed H.* on this issue. See, e.g., *Öztürk v. Trump* 2025 WL 3514320 (2025); *Doe 1 v. Bondi* 785 F.Supp.3d 1268 (2025); *Doe #1 v. Trump* 785 F.Supp.3d 575 (2025); *Doe 4 v. Lyons* 783 F.Supp.3d 1281 (2025); *Doe #1 v. Noem* 2025 WL 1555382 (2025). One of these decisions concerns Rümeyşa Öztürk's case. See *Shah*, *supra* note 75; see also, ASSOCIATED PRESS, *supra* note 16.

²⁵⁵ *Mohammed H.*, 786 F.Supp.3d at 1161 ("To the extent that [Student and Exchange Visitor Information System] termination provides a basis for Petitioner's detention, the detention is unlawful.").

²⁵⁶ See *supra* notes 15, 40-42 and accompanying text.

²⁵⁷ 5 U.S.C. §704(2)(B).

Courts could also examine whether unlawful deportations²⁵⁸ are in excess of ICE's statutory jurisdiction or authority²⁵⁹ to enforce immigration law. And furthermore, the judiciary should limit the extent to which detentions and deportations are occurring without observance of important (or any) procedure.²⁶⁰

Detention could also be found unwarranted by the underlying facts.²⁶¹ This provision generally applies to formal APA processes.²⁶² However, while immigration decisions do not usually constitute formal adjudication under the APA,²⁶³ there is precedent for formalizing some of them.²⁶⁴ Also during the time the APA was enacted, the Supreme Court decided in *Wong Yang Sung v. McGrath* that immigration agencies were required to conduct formal adjudication procedures.²⁶⁵ While there was initial legislative backlash to this decision,²⁶⁶ Congress repealed this rebuke in 1952²⁶⁷ and enacted a law that specified immigration procedure²⁶⁸ patterned on the APA.²⁶⁹ While recognizing that this legislation may have superseded the Court's decision,²⁷⁰ "the Court nowhere suggested that *Wong* had been wrongly decided or that the broader holding—that the APA governs whenever a full and fair hearing is required by statute or due process—was no longer valid."²⁷¹

²⁵⁸ See *supra* notes 16-23 and accompanying text.

²⁵⁹ 5 U.S.C. §704(2)(C).

²⁶⁰ 5 U.S.C. §704(2)(D); cf. Robert M. Cannon, *A Reevaluation of the Relationship of the Administrative Procedure Act to Asylum Hearings: The Ramifications of the American Baptist Churches' Settlement*, 5 ADMIN. L.J. 713 (1991) (arguing that the APA should apply to asylum hearings).

²⁶¹ 5 U.S.C. § 704(2)(F).

²⁶² *Id.*

²⁶³ See Shah, *supra* note 33.

²⁶⁴ Cf. *Escobar Ruiz v. INS*, 838 F.2d 1020 (9th Cir. 1988) (holding that deportation proceedings qualify as formal adjudication under the APA for the purpose of recovering attorney fees under the Equal Access to Justice Act).

²⁶⁵ 339 U.S. 33, 33-34 (1950) (holding that immigration adjudications are required to abide by the APA's requirements for formal adjudication, even though "the Immigration Act contains no express requirement for hearings in deportation proceedings"). This holding was based in part on concerns that "a deportation hearing at which the presiding inspector functioned both as 'prosecutor' and as 'judge' violated the APA." *Deportation and Exclusion: A Continuing Dialogue between Congress and the Courts*, 71 YALE L.J. 760, 769 (1962).

²⁶⁶ See Supplemental Appropriation Act, 1951, 64 Stat. 1044, 1048 (1950) ("Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of sections 5, 7, and 8 of the Administrative Procedure Act.").

²⁶⁷ *Deportation and Exclusion*, *supra* note 265, at 771.

²⁶⁸ See Immigration and Nationality Act, ch. 477, 66 Stat. 166 (codified as amended at 8 U.S.C. § 1101 (1952)).

²⁶⁹ *Deportation and Exclusion*, *supra* note 265, at 771.

²⁷⁰ *Marcello v. Bonds*, 349 U.S. 302, 314 (1955).

²⁷¹ William Funk, *The Rise and Purported Demise of Wong Yang Sung*, 58 ADMIN. L. REV. 881, 886 (2006); see generally *id.* (arguing that *Wong Yang Sung* is still good law); see also *Deportation and Exclusion*, *supra* note 265, at 772-73.

The recognition of “the inter-relationship between the constitutional requirement of habeas corpus and the review required by the APA strongly indicates that. . . due process [should] be jointly expanded in future immigration cases.”²⁷² Certainly, “[t]he need for predictability and uniformity [and] the need for procedural safeguards for agency decisions affecting important liberty and property interests and the natural tendency of agencies to avoid procedures they perceive as burdensome are no less today than in” the 1940s or 50s.²⁷³ This suggests that the Court should revisit formalizing immigration procedures, including enforcement decisions, either as a best interpretation of the Immigration and Nationality Act or as required by due process, in the wake of the Trump Administration’s accelerated immigration detention and deportation scheme.

III. PARTING THOUGHTS

Issues of welfare, freedom, and force in administration are often, if not only, discussed in the language of civil rights and constitutional law. But there are limits to relying on civil rights legislation and constitutional paradigms to ensure that marginalized communities—meaning those in the minority, needy, and/or disempowered, broadly defined—are protected from harmful actions by administrative agencies. Administrative law offers an important framework for restricting administrative intrusions against liberty and bodily autonomy.

This Essay argues that the APA has potential, as a living and dynamic document,²⁷⁴ to complement civil rights statutes and limited opportunities to reinforce constitutional requirements on administration. If the APA were implemented as fulsomely as possible in response to immigration injustice, it could offer more opportunities for curtailing alarming governmental brutality. Such an approach could not only help hold agencies accountable for unlawful behavior, but also refine, improve, or even prevent the policies that impel the aforementioned aggressive agency behavior in the first instance.

Given the APA’s unique role in constraining the administrative state, this Essay argues that this statute could provide substantive protection for individual interests vis-à-vis the administrative state. This Essay seeks to establish that both the APA’s procedural protections and its provisions guaranteeing judicial oversight of administration should take on a substantive due process-like tenor,²⁷⁵ as a means to protect individuals subject to intrusive or subordinating forms of administrative behavior. More specifically,

²⁷² *Deportation and Exclusion*, *supra* note 265, at 791 (citing *Tom We Shung* and *Pedreiro*, *supra* note 249).

²⁷³ *Id.* at 898.

²⁷⁴ See Morrison, *supra* note 28, at 253; see also Ronald M. Levin, *The Evolving APA and the Originalist Challenge*, 97 CHI.-KENT L. REV. 7, 10-11 (2022).

²⁷⁵ See *supra* note 38 and accompanying text.

this Essay considers how the APA could help balance relationships between the federal immigration enforcement apparatus and the vulnerable public, and protect the latter's freedom and bodily integrity in doing so.

While this Essay's application of the APA is loosely modeled after a substantive due process approach, it does not eschew possibilities for a more affirmative, race-focused application of administrative law. As the evolution of constitutional law has shown, in broad strokes, a discriminatory or subordinating impetus for action requires a legal response that is protective of the rights of minorities treated unfairly or with force as a result. Complementarily, administrative law could have a role to play in constraining rights violations by the administrative state.

Constitutional equal protection claims tend to be losers for noncitizens.²⁷⁶ And yet, administrative actions have been motivated by racial and ethnic bias,²⁷⁷ including in the enforcement-oriented immigration and national security apparatus as driven by the current President.²⁷⁸ Executive agencies including DHS and the Department of State have come to espouse white nationalism.²⁷⁹ In this vein, the Trump Administration explicitly and

²⁷⁶ See *supra* notes 211-215 and accompanying text.

²⁷⁷ See generally Bijal Shah, *Deploying the Internal Separation of Powers Against Racial Tyranny*, 166 NW. U. L. REV. ONLINE 224, 253-59 (2021) (examining the ways in which the executive branch under President Trump has perpetrated racialized tyranny against American citizens).

²⁷⁸ See Amy Howe, *Supreme Court allows federal officers to more freely make immigration stops in LA*, SCOTUSBLOG (Sep. 8, 2025), <https://www.scotusblog.com/2025/09/supreme-court-allows-federal-officers-to-more-freely-make-immigration-stops-in-los-angeles/> [https://perma.cc/QBK5-JNKJ] ("Sotomayor described the court's action as 'yet another grave misuse of our emergency docket. We should not have to live in a country,' she wrote, 'where the Government can seize anyone who looks Latino, speaks Spanish, and appears to work a low wage job. Rather than stand idly by while our constitutional freedoms are lost,' she concluded, 'I dissent.'"); Camilo Montoya-Galvez, *Trump administration pauses immigration cases for people from another 20 countries*, CBS NEWS (Dec. 18, 2025), <https://www.cbsnews.com/news/trump-administration-pauses-immigration-cases-another-20-countries/> [https://perma.cc/DKJ9-A7VM]; Amy B. Wang, *Trump finally confirms using vulgar slur about several countries in 2018*, WASH. POST (Dec. 10, 2025), https://www.washingtonpost.com/politics/2025/12/10/trump-shithole-countries-comment-admission [https://perma.cc/2E7M-GXPB]; Jonathan J. Cooper, *Trump once denied using this slur about Haiti and African nations. Now he boasts about it*, ASSOCIATED PRESS (Dec. 9, 2025), <https://apnews.com/article/trump-slur-haiti-africa-immigration-28aa0785d6f3c68fd4d9e823b6397429> [https://perma.cc/D6VM-KYRJ]; Adam Server, *Why Doesn't Trump Pay a Political Price for His Racism?*, THE ATLANTIC (Dec. 4, 2025), <https://www.theatlantic.com/ideas/2025/12/trump-cabinet-meeting-racism/685129/> [https://perma.cc/TR58-LVPM].

²⁷⁹ One idea espoused by the Administration is "remigration." Chelsea Bailey, *DHS issued a call to 'remigrate.' Here's the history of the term often associated with far-right groups*, CNN (Oct. 19, 2025), <https://www.cnn.com/2025/10/19/us/remigrate-dhs-explained> [https://perma.cc/AUB9-X3ZE]; Homeland Security @DHSgov, X (Nov. 28, 2025, at 11:38 AM ET), <https://x.com/DHSgov/status/1994445836915253664> [https://perma.cc/CXR2-T7JP] (posting an imperative for "[r]emigration now"); Russell Contreras & Marc Caputo, *State Department seeks to create "Office of Remigration" in restructuring*, AXIOS (May 29, 2025), <https://www.axios.com/2025/05/30/state-department-office-of-remigration-restructure> [https://perma.cc/Z9MU-LSZ8] (noting that the State Department planned to "create an 'Office of Remigration' in a sweeping reorganization drive tied to the Trump administration's efforts to deport millions of immigrants."). "Remigration" is a European far-right concept of ethnic cleansing via the mass

“routinely cast[s] certain populations of migrants as belonging to cultures incompatible with the United States.”²⁸⁰ Furthermore, this Administration has explicitly favored white migrants over others and has sought both aggressive immigration enforcement and increasing restrictions on even those noncitizens of color seeking legal paths to the U.S.²⁸¹

The APA could be leveraged to protect racial minorities in a manner that is analogous to civil rights and constitutional equal rights protection. More specifically, immigration attorneys could evolve these approaches to transform the APA into a tool to restrict immigration enforcement policies that target or disproportionately impact racial minorities. Perhaps the “APA was not designed to advance racial justice,” but it may be drawn on for this purpose just the same.²⁸²

In the 1960s, racial justice advocates pioneered the use of rulemaking to encourage agencies’ advancement of equal employment opportunities.²⁸³ More specifically, they drew on APA rulemaking procedures to bolster Title VI (despite the fact that “large swaths” of the government were excepted from APA review, which insulated agencies from accountability to racial equality).²⁸⁴ Black, Latine, and women’s organizations used rulemaking “to diversify the workforces of broadcasters, many of whom were too small to be covered by other employment discrimination laws”²⁸⁵ and called out as well as shifted the derogatory broadcast representation of Black communities.²⁸⁶

Furthermore, the provision that allows courts to review most agency action to ensure that it is not “arbitrary” or “capricious” provides an opportunity for the APA to be deployed to protect or deliver recourse to individuals treated disparately by administrative agencies based on race or gender. More specifically, arbitrary and capricious review could be understood to protect

deportation of non-white minority populations to their place of racial ancestry. Johannes von Moltke, *Remigration, Reconquista, Regime Change: The Language of the New Right*, 53 NEW GERMAN CRITIQUE 161, 161-78 (2026). The idea of remigration stems from “replacement theory,” a backbone of European identitarian politics that argues that white populations and cultures in Western countries are being deliberately replaced by non-white immigrants, in part through mass migration. See Sam Adler-Bell, *How Did Great Replacement Theory Go Global?*, N.Y. TIMES (May 17, 2026), <https://www.nytimes.com/2026/03/17/books/review/chain-of-ideas-ibram-x-kendi.html?smid=nytcore-android-share>; Khaled A. Beydoun & Nura A. Sedique, *The Great Replacement: White Supremacy as Terrorism?*, 58 HARV. C.R.-C.L. L. REV. 69, 72 (2023).

²⁸⁰ Ishaan Tharoor, *Trump’s embrace of ‘remigration’ echoes Europe’s far right*, WASH. POST (Nov. 30, 2025), <https://www.washingtonpost.com/world/2025/11/30/remigration-trump-far-right-europe/> [https://perma.cc/8ZFQ-8GVBJ].

²⁸¹ Tharoor, *supra* note 280; Zolan Kanno-Youngs & Hamed Aleaziz, *Trump Cuts Refugee Admissions and Prioritizes White South Africans*, N.Y. TIMES (Oct. 30, 2025), <https://www.nytimes.com/2025/10/30/us/politics/trump-refugee-admissions-white-south-africans.html> [https://perma.cc/9N65-QYT7].

²⁸² Lee, *supra* note 32, at 167.

²⁸³ See generally Lee, *supra* note 5.

²⁸⁴ Lee, *supra* note 32, at 167-70.

²⁸⁵ *Id.* at 173-80.

²⁸⁶ See *id.* at 173-80.

minorities from discriminatory agency action.²⁸⁷ It is only an idiosyncratic interpretation of the APA that shifted doctrine away from this approach. More specifically, “the D.C. Circuit, in an opinion by then-Judge Ginsburg,” held that civil rights plaintiffs were barred from bringing an APA challenge because “Title VI provided an alternative ‘adequate remedy.’”²⁸⁸ However, this section of APA could be revitalized and deployed, like rulemaking, to provide a pathway for substantive rights protections.

In addition, the Court’s current indifference to cruel or excessive immigration detention may lie in the extent to which the Court sees civil detention as a legitimate way for agencies to manage the masses.²⁸⁹ “Immigration detention, at its inception, was part of a system of mass civil confinement of the poor—in workhouses, juvenile facilities, and mental asylums—that lacked meaningful constitutional limits.”²⁹⁰ Furthermore, “immigration detention was not exceptional for its lack of constitutional safeguards, which was an unremarkable feature of all civil confinement systems at the time.”²⁹¹ Advocates could feasibly draw on the APA to oblige judicial review that ensures the punishment of noncitizens is not contrary to constitutional rights,²⁹² which could include equal protection.²⁹³

Finally, this Essay invites conversation about how a protective administrative law toolkit could offer a corrective to administrative subordination and intrusion across regulatory contexts.²⁹⁴ Simply holding at bay the ever-growing, increasingly militarized immigration bureaucracy is a worthwhile enough pursuit. However, exploring the APA’s application for constraining the bureaucracy’s enforcement and detention power may be useful beyond immigration as well. The administrative state has been a major site for the subordination and coercion of many disenfranchised people, and civil rights and constitutional approaches have not yet accomplished enough.²⁹⁵ This Essay’s approaches could be developed into an interconnected framework of administrative law to support marginalized communities’ capacity to protect their interests, welfare, and benefits, as well as to mitigate the excesses of governmental intrusion and punishment against them—not only within the immigration context, but also outside of it.

²⁸⁷ Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370, 384-90 (2021).

²⁸⁸ *Id.* at 370 (referencing *Women’s Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990)); see also *id.* at 397-98 (discussing related cases).

²⁸⁹ Das, *supra* note 37, at 1189-91.

²⁹⁰ Paulina Arnold, *How Immigration Detention Became Exceptional*, 75 STANFORD L. REV. 261, 261 (2023).

²⁹¹ *Id.*

²⁹² 5 U.S.C. §704(2)(B).

²⁹³ See Arnold, *supra* note 290, at 289 (citing *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)).

²⁹⁴ See Shah, *supra* note 24, at 1663 (also introducing “a toolkit” for improving the subordination of vulnerable communities by administrative).

²⁹⁵ See, e.g., *supra* notes 6-11.