THE ADMINISTRATIVE STATE'S SECOND FACE

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We often assume that there is one administrative state, with one body of administrative law that governs it. In fact, the administrative state has two distinct faces: one turned toward regulation and benefits distribution, and one turned toward physical force and surveillance. The two faces are growing further apart under the Roberts Court, which has hemmed in the first face with decisions like Loper Bright *while showing solicitude for national security and law enforcement agencies.*

This Article delineates the two faces of the administrative state. It provides a descriptive account of the second face and the distinctive administrative law that governs it. While first-face administrative law demands delegated authority, transparent justification, and democratic collaboration, second-face administrative law allows agencies to operate without specific grants of power, to process knowledge in secret, and to control populations. Second-face administrative law inverts the ordinary norms of first-face administrative law. And where the first face drives legal and political conflict, the second face enjoys relative consensus.

Bringing the second face into view qualifies talk of an ongoing "attack" on the administrative state. It calls attention to neglected issues of enforcement, allows us to analyze how administrative law supports an interrelated set of violent state structures, and reveals that consensus support for second-face agencies is misguided. Those who seek to combat government overreach and to protect liberty and popular self-governance should turn their attention to the administrative state's second face.

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Introduction

The administrative state is in a moment of paradox. Significant "anti-administrative attacks"[1] have succeeded. The recent insistence on presidential control, overruling of *Chevron*, and widespread reductions in force threaten the ability of federal agencies like the Environmental Protection Agency (EPA), the Department of Health and Human Services (HHS), and the Consumer Financial Protection Board (CFPB) to regulate.

Yet other agencies find themselves more powerful, and less constrained, than ever. Despite increasing attention to abuses they perpetrate, law enforcement agencies, prisons, and intelligence agencies work unimpeded by the anti-administrative turn. Today, they enjoy few legal checks and historic levels of government funding. Prominent calls to "[d]ismantle the administrative state and return self-governance to the American people"[2] are conjoined with advocacy to expand U.S. military capacity,[3] develop industrial policy to support defense

1 Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 4 (2017).

2 Heritage Found., Mandate for Leadership: The Conservative Promise 3 (2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf [https://perma.cc/TW3X-AZXD]; *see* Heritage Found., *Presidential Administration Academy*, Project 2025: Presidential Transition Project (2024), https://www.project2025.org/training/presidential-administration-academy [https://perma.cc/6JEW-MKLQ] (recruiting and training "future political appointees" to a conservative administration "to immediately begin rolling back destructive policy" and "to recogniz[e] and address[] the dangers of the administrative state").

3 *See* Heritage Found., Mandate for Leadership, *supra* note 2, at 108, 111, 113–14 (calling for increased spending and procurement in the Army, Navy, and Air Force); *id.* at 126 (calling for increased spending on missile defense).

contractors,[4] devolve power to FBI and CIA field offices,[5] and increase the number of Immigration and Customs Enforcement (ICE) officers.[6] Rather than a slimmed-down administrative state under the control of a unitary executive, the administrative state comprising the Department of Defense (DOD), the CIA, and ICE is a muscular, diffuse institution.

This simultaneous weakness and strength, jeopardy and robustness, belies the common assumption that there is one administrative state—or one administrative law that governs it. Despite widespread insistence on transsubstantivity,[7] a closer look reveals two very different faces of administrative law: one turned toward the benefits and regulatory state, and one toward agencies that govern through physical force and surveillance.[8] The first face of administrative law fills most space in textbooks. This law expects agencies to derive authority from democratic delegation, to transparently process information using expertise, and to exercise power in collaboration with the people. It is the law that governs the EPA, HHS, and CFPB. The second face of administrative law allows agencies to operate without a clear delegation of power, to

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4 *See id.* at 95–98 (calling to "[s]trengthen America's defense industrial base" by allowing procurement authorities to "engage in multiyear procurements and block buys," "[h]elp small [defense contractors] to become medium-size and large vendors," and decentralize authority for acquisitions); *id.* at 100–02 (calling for policy interventions "that incentivize partners and allies to procure U.S. defense systems").

5 *Id.* at 551 (proposing emphasizing and routing work through FBI field offices); *id.* at 209 (suggesting opening CIA offices outside of Virginia and relocating directorates).

6 *Id.* at 143.

7 *See, e.g.*, Kenneth Culp Davis, Administrative Law Text § 1.01 (3d ed. 1972); Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 Tex. L. Rev. 499, 500 (2011) ("[A]dministrative law assumes the existence of core statutes and principles that apply consistently across agencies.").

8 We borrow the metaphor of two faces from political science literature describing some of these institutions. *See* Ira Katznelson, Fear Itself: The New Deal and the Origins of Our Time 18–20, 484–86 (2013) (arguing that the post-New Deal American state "possessed two distinctive faces"—one "of procedural government" and the other "of a crusader"); Jeremy K. Kessler, *The Last Lost Cause*, Jacobin (Apr. 21, 2013), https://jacobin.com/2013/04/the-last-lost-cause [https://perma.cc/ZXD6-DUAM] (reviewing Katznelson, *supra*) ("Born in the 'southern cage,' the modern United States is strangely schizophrenic: it is both a 'state of procedures,' in which public institutions are too weak to check private economic power, and a 'crusading state,' in which public institutions dole out overwhelming violence with little democratic oversight."); Joe Soss & Vesla Weaver, *Police Are Our Government: Politics, Political Science, and the Policing of Race-Class Subjugated Communities*, 20 Ann. Rev. Pol. Sci. 565, 567 (2017) (defining the "second face" in functional terms as "the activities of governing institutions and officials that exercise social control and encompass various modes of coercion, containment, repression, surveillance, regulation, predation, discipline, and violence"); *cf.* Aziz Rana, The Two Faces of American Freedom 313–29 (2010) (suggesting that the American constitutional tradition has legitimized the coercive treatment of marginalized groups to promote rights and equality for insiders, including through the New Deal's state-building); *infra* Part III (proposing greater dialogue between administrative law and social science literatures).

process knowledge in secret to identify threats, and to exercise control over populations. It is the law that governs the DOD, CIA, and ICE.

In calling attention to these two faces, this Article seeks, most simply, to delineate our different administrative laws. We provide a descriptive account of the relatively neglected second face and the law that governs it. This face includes the DOD; agencies of the Department of Homeland Security (DHS) and Department of Justice (DOJ) that engage in law enforcement or carceral work; and the Intelligence Community, a group of eighteen agencies or components that collect information relevant to foreign relations and national security.[9] Personnel, facilities, and material resources circulate among these agencies, they carry out similar activities of law enforcement and execution, and their operations raise related legal questions. Although scholars have illuminated the workings of some of these institutions, we lack an account of the interrelated development and operations of the administrative state's second face to match our understanding of the first. This Article begins that descriptive project.

Second, the Article parses the much-discussed attack on the administrative state, revealing that it is really an attack on only one face. Today, critics oppose broad delegations from Congress to agencies. Their condemnations of *Chevron* deference recently culminated in its overruling.[10] Even staunch defenders of the administrative state call for greater democratic accountability through ex ante public participation and ex post monitoring. These judicial and scholarly arguments focused on delegation, deference, and democracy concern the administrative state's first face. But it is the second face that enjoys expansive delegations, judicial deference, and sweeping exemptions from public accountability mechanisms. Second-face agencies act without specific grants of authority, as claims about presidential authority empower a cadre of low-level agency officials. They receive deference from invocations of plenary power and other permissive frameworks. And they largely set policy without either the public engagement of notice-and-comment rulemaking or the monitory processes established by transparency statutes. They have an administrative law all their own.

Finally, the Article offers some preliminary thoughts on what taking the second face seriously might mean for the adminsitrative state's defenders and detractors alike. It would illuminate tensions

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[9] *Members of the IC*, Off. Dir. Nat'l Intel., https://www.dni.gov/index.php/what-we-do/members-of-the-ic [https://perma.cc/YQQ5-7MM4].

[10] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) ("*Chevron* is overruled. Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires.").

in the intellectual commitments of both skeptical conservatives and progressive proponents of administration. It would prompt greater attention to enforcement, a tool wielded principally by second-face agencies that grows ever more important as the Trump Administration seeks to carry out mass deportations. And it would underscore that consensus support for the second face is misguided. Those who seek to combat government overreach and to protect liberty and popular self-governance should turn their attention to the administrative state's second face.

I
The Second Face

According to the conventional narrative, the modern administrative state arose in response to the Great Depression, as the Roosevelt Administration expanded regulatory and welfare governance. Conservatives fought back and left their mark on the Administrative Procedure Act (APA) but largely lost the wider conflict over the New Deal.[11] Conservative forces quickly began to regroup for an assault on the administrative state, however. By Ronald Reagan's inauguration, the New Deal settlement had collapsed and a new neoliberal political order superseded it.[12] Seeking deregulation, political actors pushed legal tools ranging from presidential administration and cost-benefit analysis to searching judicial scrutiny of agency structure and agency decisions.[13]

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[11] *See, e.g.*, George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1560–61 (1996) (describing the APA as "a hard-fought compromise" that "ended the New Deal war on terms that favored New Deal proponents").

[12] *See* Gary Gerstle, The Rise and Fall of the Neoliberal Order 1–2 (2022).

[13] *See infra* notes 91–95 (surveying actions taken by the Reagan White House to further goals of deregulation and small government). Of course, many existing accounts have complicated this received wisdom about the birth and retrenchment of the modern administrative state. While the conventional account has focused on regulatory agencies and functions, some scholars have brought histories of functions besides regulation into the frame. *See, e.g.*, Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 Wash. U. L. Rev. 377 (2021); Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 Admin. L. Rev. 673 (2010). Others have persuasively argued that much of what we consider modern administration predates the New Deal. *See, e.g.*, Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy (2019) (tracing the intellectual history of the administrative state to pre-New Deal Progressivism); Daniel R. Ernst, Tocqueville's Nightmare: The Administrative State Emerges in America, 1900–1940 (2014) (describing the early development of the American administrative state in the early twentieth century); William J. Novak, New Democracy: The Creation of the Modern American State (2022) (exploring the transformation of American governance between the Civil War and New Deal); Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (2012) (recounting pre-twentieth century administrative

Though there is much truth in it, the narrative focuses almost entirely on the first face of the administrative state. Turning our gaze to second-face agencies—including immigration enforcement agencies, the federal prison system, the national security bureaucracy, and the military—complicates the story of progressive New Deal state-building, backlash, and retrenchment. The missing half of the developmental story reveals both that the twentieth century administrative state had an ambivalent character from the start and that perpetual assaults on the administrative state have targeted only one portion of it. This Part defines the second face and briefly sketches its twentieth century development.

A. Defining the Second Face

Before describing the administrative state's two faces, we acknowledge that our parsing—like any division of the administrative state—is contestable. One could, for example, disaggregate the administrative state further, distinguishing between benefits and regulatory agencies,[14] grouping together only those agencies that work across common subjects or have common organizational structures, or even considering each agency as a singular entity.[15] We appreciate that other divisions will illuminate different aspects of administrative law and encourage that scholarship, as well as more research looking beyond the formal bounds of federal administration to actors including states and private contractors.[16] But exploring these two faces can shed light on important, underappreciated features of administrative law.

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activities). Still others have suggested that the pro-administrative consensus purportedly represented by the New Deal has been overstated. *See, e.g.*, Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 725–26 (2016) (reviewing ERNST, *supra*) (citing, for example, disagreements between conservative anti-labor and pro-labor voices). And they have pointed out gaps between small-government, anti-administrative rhetoric and policy reality. *See, e.g.*, Metzger, *supra* note 1, at 4–5, 14–15; K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1695–96 (2018) (reviewing JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC (2017)).

[14] *See, e.g.*, Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1772–73 (2023) (describing the Roberts Court's different treatment of regulation and adjudication).

[15] *See, e.g.*, Levy & Glicksman, *supra* note 7, at 500.

[16] On the place of states in the federal administrative state, see, for example, Jessica Bulman-Pozen, *Administrative States: Beyond Presidential Administration*, 98 TEX. L. REV. 265 (2019); Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012); Bridget A. Fahey, *Coordinated Rulemaking and Cooperative Federalism's Administrative Law*, 132 YALE L.J. 1320 (2023). On privatization, see, for example, MICHAELS, *supra* note 13; Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

Even those who accept our conceptual distinction between the regulatory and benefits face and the physical violence and surveillance face, moreover, might debate the assignment of particular agencies. We categorize agencies by focusing on their primary activities (i.e., use of physical force, detention, and surveillance) and parallels in their historical development and doctrinal reception. In an attempt to draw a brighter line, we have excluded boundary cases,[17] so our list of second-face departments, agencies, and components is underinclusive if anything.

Reasoning from their roles and activities, their personnel, their historical development, and their doctrinal treatment—all of which we explore below—we place the following agencies in the administrative state's second face:

- The Department of Defense;[18]
- Agencies in the Department of Justice: Federal Bureau of Investigation; Bureau of Prisons; Bureau of Alcohol, Tobacco, and Firearms; Drug Enforcement Agency; and Federal Marshals;[19]

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[17] Agencies that focus on prosecutions in federal court, like the Criminal Division of the U.S. Department of Justice or U.S. Attorney's Offices, are perhaps the most important boundary cases. We do not place them in the second face because their enforcement work always relies on another agency to execute any necessary physical coercion. We note, though, that consistent with their boundary status, the administrative law that applies to immigration and criminal prosecutors' offices is often quite deferential, even insulating their decisions from judicial review. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464–65 (1996) (prosecutorial charging decisions); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489–91 (1999) (deportation decisions). Welfare agencies are another boundary case once their cooperative federalism dimensions are accounted for: state and local welfare agencies, including child-protective services, surveil recipients to determine whether to cut off benefits and take actions like removing children from their homes, although it is often police who deploy force. *See generally* Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World (2022); Lyra Walsh Fuchs, *The Carceral Logic of Child Welfare*, Dissent (Apr. 1, 2022), https://www.dissentmagazine.org/online_articles/carceral-logic-child-welfare-dorothy-roberts [https://perma.cc/6JEH-AVSJ] ("[C]ase workers bring police with them all the time when they go to investigate a family. The two working together intensifies the power of each. . . . [P]olice officers often do the actual act of removing children, who are terrified."). Because these are features of state and local, more than federal, administrative agencies, we reserve consideration of them for future work. *See supra* note 16 and accompanying text.

[18] Because the primary purpose of the Department of Defense is to allow the United States to fight armed conflicts, we include the Department as a whole in the second face. Yet to maintain a standing military, the Department of Defense also operates large welfare programs and has its own hospitals and schools. *See generally* Jennifer Mittelstadt, The Rise of the Military Welfare State 2–3 (2015) (identifying many of the social welfare components of the volunteer military system, such as medical, housing, and educational programs that at times have encompassed almost 50% of the Department's budget).

[19] The Office of Justice Services in the Department of Interior's Bureau of Indian Affairs, which works with tribes to carry out carceral and police services in Indian Country, likely also belongs in the second face but requires more scholarly attention. *See Office of*

- Agencies in the Department of Homeland Security: Immigration and Customs Enforcement; Customs and Border Protection; Secret Service; Federal Protective Service; Office of Intelligence and Analysis; and Coast Guard;
- Agencies and components outside of the DOD, DOJ, and DHS that also compose the Intelligence Community,[20] including two major independent agencies, the CIA and the Office of the Director of National Intelligence (ODNI).[21]

Borrowing a sociological definition, we can say that these agencies exercise the state's monopoly on violence to maintain external borders and internal public order.[22] They preserve the state's external integrity through military engagements, border patrolling, and gathering foreign intelligence, and its internal order through policing and incarceration. Physical coercion and control is not an ancillary but rather a significant part of their on-the-ground work. Over twenty percent of the staff of DOJ, DHS, and DOD, for instance, is authorized to use physical force to execute the laws.[23]

Justice Services, U.S. Bureau of Indian Affs., https://www.bia.gov/bia/ojs [https://perma.cc/528E-4ZHE]. Notably, criminal procedure provides a distinctive constraint on these law enforcement agencies that is not shared by other agencies in the second face.

[20] *See What is Intelligence?*, Off. of the Dir. of Nat'l Intel., https://www.dni.gov/index.php/what-we-do/what-is-intelligence [https://perma.cc/ZN92-S8PQ] (providing an overview of the Intelligence Community). Although intelligence agencies engage in activities that resemble adjudication, such as assessing intelligence, most of their work is best understood as enforcement; the CIA, for instance, has done an increasing amount of physically coercive work itself. *See* Matthew Johnson, *The Growing Relevance of Special Operations Forces in U.S. Military Strategy*, 25 Comp. Strategy 273 (2006) (describing the increasing use of special forces, including the Special Operations Group of the CIA, to respond to asymmetric threats after 9/11). And courts treat these intelligence agencies consistently with other second-face agencies. *See, e.g.*, Stephen I. Vladeck, *The Demise of Merits-Based Adjudication in Post-9/11 National Security Litigation*, 64 Drake L. Rev. 1035 (2016) (documenting courts' refusal to provide relief in numerous national security cases, including cases against intelligence agencies, since 2001); *infra* Part II.

[21] Other agencies in the Intelligence Community are the Department of Energy's Office of Intelligence and Counter-Intelligence, the Department of State's Bureau of Intelligence and Research, and the Department of the Treasury's Office of Intelligence and Analysis. *See Members of the IC*, Off. of the Dir. of Nat'l Intel., https://www.dni.gov/index.php/what-we-do/members-of-the-ic [https://perma.cc/YQQ5-7MM4].

[22] *See generally* Max Weber, *Politics as a Vocation*, *in* From Max Weber: Essays in Sociology 78 (H.H. Gerth & C. Wright Mills eds. 2009) ("[A] state is a human community that (successfully) claims *the monopoly of the legitimate use of physical force* within a given territory.").

[23] *See* Connor Brooks, U.S. Dep't of Just., NCJ No. 304752, Federal Law Enforcement Officers, 2020 – Statistical Tables 4–5 (2023), https://bjs.ojp.gov/document/fleo20st.pdf [https://perma.cc/52BF-KT8M] (documenting that law enforcement officers represent approximately 40% of DOJ personnel and 20% of DHS personnel); Emily R. Chertoff, *Violence in the Administrative State*, 112 Calif. L. Rev. 1941, 1941, 1945 n.11 (2024) (estimating based on statistics on law enforcement agents and military personnel that a fifth of all federal

To simplify a bit, while first-face agencies principally work through rulemaking or adjudication,[24] second-face agencies principally work through enforcement. This can be a fraught distinction. First, in administrative law terms, the APA bifurcates the full range of agency action into rulemaking and adjudication and does not mark enforcement as a distinct category.[25] As a result, enforcement is sometimes treated as a species of informal adjudication.[26] Second, in more colloquial terms, the sorts of activities commonly described as "enforcement" occur throughout the administrative state. For example, agencies that collect taxes (Internal Revenue Service), promulgate regulations (EPA, Food and Drug Administration), and award benefits (Social Security Administration, Department of Veterans Affairs) also enforce statutes and rules.[27]

But enforcement is a meaningfully different type of administrative activity than rulemaking and adjudication. And agencies assume a different character and orientation depending on whether enforcement activity is their primary or secondary role.[28] First-face agencies, which

employees work in roles where they are authorized to use force within agencies or agency components "that use force to execute the laws"). Although some first-face agencies have law enforcement components, these employees represent a very small proportion of the total—for example, 2.5% of employees at the Department of Energy, 2% of the Department of Interior, 1% of Veterans Affairs, and 0.5% of the Department of Agriculture. *See* Brooks, *supra*, at 4–5.

[24] *See, e.g.*, Jerry L. Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims 17–19 (1983) (describing Social Security disability benefits determinations as a paradigmatic form of administrative adjudication); U.S. Env't Prot. Agency, FY 2022–2026 EPA Strategic Plan 5 (2022), https://www.epa.gov/system/files/documents/2022-03/fy-2022-2026-epa-strategic-plan.pdf [https://perma.cc/M79V-TPVB] (emphasizing the agency's work on rulemaking and permitting, a form of adjudication); Alan L. Hoeting, *The FDA's Enforcement Program*, 47 Food & Drug L.J. 405, 405–06 (1992) (describing FDA's focus on regulation, adjudication, and research); Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*, 63 Duke L.J. 1771, 1775–76 (2014) (describing "types of IRS adjudications"); *Veterans Benefits Administration Reports*, U.S. Dep't of Veterans Affs. (2024), https://www.benefits.va.gov/REPORTS/detailed_claims_data.asp [https://perma.cc/MZ6E-TPXF] (describing the adjudication processes for veterans' disability compensation and pension claims).

[25] 5 U.S.C. §§ 551, 553–55.

[26] *See, e.g.*, Christopher Slobogin, *Policing as Administration*, 165 U. Pa. L. Rev. 91, 96 (2016).

[27] *See, e.g.*, *Office of Fraud Enforcement at a Glance*, U.S. Internal Revenue Serv. (Oct. 21, 2024), https://www.irs.gov/about-irs/office-of-fraud-enforcement-at-a-glance [https://perma.cc/6VAR-2XBC]; *Enforcement*, U.S. Env't Prot. Agency (Aug. 19, 2024), https://www.epa.gov/enforcement [https://perma.cc/MSS3-U3TU]; *The History of FDA's Enforcement Work*, U.S. Food & Drug Admin. (Aug. 5, 2021), https://www.fda.gov/about-fda/histories-fda-regulated-products/history-fdas-enforcement-work [https://perma.cc/QU5W-8F8M]; *Enforcement Actions*, Off. of the Inspector Gen., U.S. Soc. Sec. Admin., https://oig.ssa.gov/fraud-reporting/enforcement-actions [https://perma.cc/6RG8-5ZLP].

[28] *See* Chertoff, *supra* note 23, at 119 n.41.

enforce as a secondary part of their work, tend to use mechanisms like demand or warning letters, recalls, investigations, civil administrative penalties, or referral to another agency for prosecution.[29] Second-face agencies, which principally enforce, physically coerce people—by arresting, detaining, and applying physical force—or surveil their bodies and activity. First-face agencies may turn to second-face agencies if their initial, non-physically coercive efforts fail to bring about the desired effect.[30]

Finally, these second-face agencies can most productively be studied together because they swap and aggregate their resources. Federal law enforcement and national security agencies share materiel, personnel, facilities, and budgets.[31] Military bases and criminal prisons come to serve as immigration detention facilities.[32] Weapons from foreign battlefields show up in the hands of law enforcement.[33] National-security and law-enforcement agencies exchange individuals' biometric information, criminal records, and electronic communications.[34] The material story is also a legal one. These agencies can more readily share

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[29] *See, e.g.*, U.S. Food & Drug Admin., Regulatory Procedures Manual, §§ 4-1-1, 6-5-10, 7-3 https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/compliance-manuals/regulatory-procedures-manual [https://perma.cc/DYC9-ZCGM] (describing enforcement tools including warning letters, referral for prosecution by DOJ, and product recalls); Div. of Enf't, U.S. Sec. & Exch. Comm'n, Enforcement Manual 4, 89, 91, 101 (2017), https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [https://perma.cc/UYD4-JLRJ] (referring to enforcement tools including investigations, referral to DOJ for criminal prosecution, and agreements for deferred prosecution); *Basic Information on Enforcement*, U.S. Env't Prot. Agency (Sept. 30, 2024), https://www.epa.gov/enforcement/basic-information-enforcement [https://perma.cc/XWE7-YK36] (describing investigations, civil administrative penalties, and referrals for enforcement).

[30] For example, FDA inspectors can order the detention of food and drugs, but often it is the U.S. Marshals Service or Customs and Border Protection (CBP) who actually seize the goods. *See* Kathryn B. Armstrong & Jennifer A. Staman, Cong. Rsch. Serv., R43609, Enforcement of the Food, Drug, and Cosmetic Act: Select Legal Issues 5–6 (2018) (noting that FDA must rely on components of DOJ and on CBP to enforce the Food, Drug, and Cosmetics Act). The SEC, IRS, and many other agencies can refer cases for criminal prosecution, but the FBI or another federal law enforcement agency within DOJ frequently makes arrests when they are needed. *See* Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 Stan. L. Rev. 1036, 1037 (1972) (noting that "[v]irtually all federal agencies authorized to mete out criminal penalties" rely on DOJ to carry out these penalties).

[31] *See, e.g.*, 50 U.S.C. § 3024 (authorizing the Director of National Intelligence to permit the transfer of funds among agencies in the Intelligence Community); *id.* § 3506 (authorizing the CIA to accept funds from any government agency).

[32] *See, e.g.*, Emily Ryo & Ian Peacock, The Landscape of Immigration Detention in the United States 10 (2018) (noting use of Federal Bureau of Prisons (BOP) facilities as immigrant detention facilities).

[33] *See, e.g.*, Montie Hess, The Role of the Military in the War on Drugs 2, 11–12 (1990).

[34] *See* Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 Hastings L.J. 1441, 1443–46 (2011) (noting the profusion of

resources because they have broad, vague, and overlapping statutory mandates[35] and judicial review of their activities tends to be permissive when it occurs at all.[36]

B. The Rise and Rise of the Second Face[37]

The standard account of the development of the modern administrative state tends to neglect the second face: immigration enforcement agencies, the federal prison system, the national security bureaucracy, and the military. Together with regulatory and benefits agencies, these second-face agencies burgeoned during the New Deal. Even as they have grown in number and responsibility in the century since, however, they have often been impliedly excluded from understandings of the administrative state. They have also been cut out of the late twentieth and early twenty-first century attack on agencies. Recovering the development of the second face complicates recent attempts both to salvage a progressive administrative tradition from the New Deal Era and to diagnose and respond to attacks on the administrative state. Synthesizing historical scholarship on second-face agencies, this Part charts their twentieth century development, focusing on two moments conventionally understood as pivotal: the New Deal and World War II period, and the presidency of Ronald Reagan.

1. New Deal State-Building

The New Deal has become central to the legal imagination of the administrative state. Assuming office during the Great Depression, President Franklin D. Roosevelt built a large and energetic regulatory and welfare state that lifted the United States out of an economic

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intelligence sharing measures among federal agencies and between federal, state, and local law enforcement agencies).

[35] *See, e.g.*, 28 U.S.C. § 533 (authorizing the FBI to "conduct . . . investigations" into "official matters under the control of the Department of Justice and the Department of State" if the Attorney General so orders); 40 U.S.C. § 1315 (authorizing the Secretary of DHS to deploy agents to protect federal buildings and providing that agents may "carry out such other activities for the promotion of homeland security as the Secretary may prescribe"); 8 U.S.C. § 1357(a) (authorizing CBP to search, question, and arrest people within a "reasonable distance" of the U.S. border); Katherine Hawkins, Project on Gov't Oversight, The Border Zone Next Door, and Its Out-of-Control Police Force (Jan. 10, 2023), https://www.pogo.org/reports/the-border-zone-next-door-and-its-out-of-control-police-force [https://perma.cc/9QFY-458P] (noting CBP involvement in routine criminal policing in New Hampshire and Vermont, as well as CBP's contested assertion that it can operate in Chicago despite the city not being within 100 miles of an international border).

[36] *See infra* Part II.

[37] *Cf.* Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).

crisis. This expansion of American government drove judicial and congressional responses including the APA, regarded as the "super-statute" still at the heart of administrative governance.[38] Many scholars treat this period as an inflection point in a longer shift from what Stephen Skowronek called a "state of courts and parties" to an executive-branch-centered regulatory state.[39] Some legal scholars, in particular, give it constitutional status. For conservative scholars, this moment eroded American democracy, with Congress's power to make laws usurped by an overweening regulatory bureaucracy.[40] Liberal and progressive scholars are more inclined to treat the New Deal moment as a "fundamental reworking of constitutional identity,"[41] a positive transformation in the democratic character of the American state,[42] or a touchstone in a constitutional tradition of economic democracy.[43]

Omitted from both constitutional assessments is the profoundly dual character of New Deal state expansion. The growth and centralization of agencies engaged in federal law enforcement, incarceration, border security, and later national security was an essential part of FDR's state-building project. If the New Deal can be criticized for vitiating the separation of powers and aggrandizing federal agencies, this charge cuts far deeper when it comes to the second-face agencies that contemporary critics of the administrative state tend to exempt from their challenges.[44]

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[38] *E.g.*, 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, 1894–95, nn.1–6 (2023) (compiling accounts viewing the New Deal and APA in this way).

[39] Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877–1920, at 226–28 (1982) ("The fate of courts and parties in the new American state was sealed during the New Deal.").

[40] *See, e.g.*, Lawson, *supra* note 37, at 1231; Steven G. Calabresi & Gary S. Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 Notre Dame L. Rev. 821 (2019).

[41] 2 Bruce Ackerman, We the People: Transformations 7–8 (1998) (marking 1935–1941 as a period of "constitutional legitimation of the activist welfare state").

[42] *See, e.g.*, Novak, *supra* note 13, at 1–2 (suggesting that the New Deal reflected "*new democratic* . . . conceptions of politics and administration [that] radically extended [the state's] reach into American social and economic life"); Emerson, *supra* note 13, at 15–16 (arguing that a New Deal model of "progressive democracy" can help overcome tensions between American constitutionalism and regulatory governance).

[43] *See, e.g.*, Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy 17 (2022) (suggesting that the New Deal advanced "a constitutional vision in the democracy-of-opportunity tradition").

[44] *See* Nicholas F. Jacobs, Desmond King & Sidney M. Milkis, *Building a Conservative State: Partisan Polarization and the Redeployment of Administrative Power*, 17 Perspectives on Pol. 453, 453 (2019) (arguing that conservative administrations should be associated not with administrative retraction but with the redirection of administrative capacity to national security and law enforcement activity).

At the same time, if the New Deal marked a shift in government's role in our constitutional order, it equally did so for the rapidly expanding coercion-and-control agencies, complicating positive associations of administrative power with democratic governance.

Taking office in 1933, the Roosevelt Administration confronted a crisis not just of economic but also of physical security, as internal and external threats called state efficacy into question at a time of nationwide panic.[45] Corruption and exposés by the press had brought police legitimacy to a low ebb, and economic dislocation and Prohibition had given rise to new and widely publicized forms of interstate organized crime, like kidnapping, that outstripped the capacities of local police forces.[46] As the conflict in Europe expanded in the late 1930s, American officials began to voice concerns that Axis saboteurs could simply walk across the United States' largely unpoliced border with Mexico.[47] By the end of the decade, the country seemed likely to go to war.[48] "[T]he threat of economic peril alongside perceived or real threats to basic security provided a shared rhetorical context that legitimized and extended the case for federal power in general."[49]

Administration was key to responding to all of these crises. Delegating power to administrative agencies helped Congress act more effectively, preserving the legitimacy of the American state. Rationalization of government policy through administrative law helped build state efficacy and capacity. Administration associated the new agencies with neutral professional expertise rather than political decision-making,[50] and with the scientific rationality coming into vogue in the broader culture.[51] There were practical benefits for management, too: The valorization of administration helped to professionalize and confer

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45 *See, e.g.*, Katznelson, *supra* note 8, at 30–57; Matthew G.T. Denney, *"To Wage a War": Crime, Race, and State Making in the Age of FDR*, 35 Stud. Am. Pol. Dev. 16, 21–22 (2021); Kathleen J. Frydl, *Kidnapping and State Development in the United States*, 20 Stud. Am. Pol. Dev. 18, 22–24 (2006).

46 *See* Brian Burrough, Public Enemies: America's Greatest Crime Wave and the Birth of the FBI, 1933–34, at 14–16 (2004); Denney, *supra* note 45, at 21–22; Frydl, *supra* note 45, at 21–24; Daniel C. Richman & Sarah A. Seo, *How Federalism Built the FBI, Sustained Local Police, and Left Out the States*, 17 Stan. J. C.R. & C.L. 421, 425–27 (2022); Mary M. Stolberg, *Policing the Twilight Zone: Federalizing Crime Fighting During the New Deal*, 7 J. Pol'y Hist. 393, 396–98 (1995).

47 *See* Kelly Lytle Hernández, Migra! A History of the U.S. Border Patrol 105–06 (2010).

48 *See* Katznelson, *supra* note 8, at 276–81.

49 Frydl, *supra* note 45, at 26; *see also* Katznelson, *supra* note 8, at 12–20.

50 *See* Ronen Shamir, Managing Legal Uncertainty: Elite Lawyers in the New Deal 168–69 (1995).

51 *See, e.g.*, Frydl, *supra* note 45, at 30.

prestige on the new administrative positions.[52] And at a more granular level, the internal policies and guidance these agencies generated made it easier to hire and train large numbers of administrators and to standardize and streamline their work.[53] These features were apparent across both faces of the administrative state. By allowing agencies to grow, efficiently use resources, gain public legitimacy, and standardize their work, administrative law and public administration permitted state expansion in the second face as well as the first.[54]

The growth of the second face during this period was first visible domestically. Soon after taking office, Roosevelt declared a "war on crime" requiring an "activist government"[55]—including, particularly, an empowered FBI.[56] Building on the legal and managerial reforms that FBI Director J. Edgar Hoover had implemented in the 1920s,[57] it aimed to "plan and construct with scientific care a constantly improving administrative structure—a structure which w[ould] tie together every crime preventing, law enforcing agency of every branch of government."[58] This structure required administrative law. New authorizing statutes expanded the FBI's powers,[59] and internal administrative law centralized and rationalized U.S. crime fighting.[60] Between 1933 and 1945, the agency's workforce grew fifteen times,[61] and its director began to consolidate such power that future Presidents

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[52] *See id.* at 32–33 (connecting the FBI's standardization and professionalization of recruitment throughout the 1920s—the period immediately preceding the New Deal—to the "image of an *uber*—professional agency anchored in science" that J. Edgar Hoover "aggressively cultivated" as its director).

[53] *See id.* at 32–34; *see also* James Q. Wilson, Bureaucracy: What Government Agencies Do and Why They Do It 159–62 (1989) (describing the FBI as a "production organization," where management systems allowed supervisors to measure administrators' performance as standardized outputs).

[54] For a detailed account of the connection between Roosevelt's law enforcement agenda and the legitimation of an expanded welfare state, see Anthony Gregory, New Deal Law and Order: How the War on Crime Built the Modern American State 203–04 (2024).

[55] Denney, *supra* note 45, at 17.

[56] *See* Rhodri Jeffreys-Jones, The FBI: A History 88–91 (2007).

[57] *See id.* at 85; Beverly Gage, G-Man: J. Edgar Hoover and the Making of the American Century 111–25 (2022).

[58] Frydl, *supra* note 45, at 27; *see also* William J. Vizzard, *The FBI: A Hundred-Year Retrospective*, 68 Pub. Admin. Rev. 1079, 1080 (2008).

[59] Jeffreys-Jones, *supra* note 56, at 91, 99.

[60] *See generally* Maria Ponomarenko, The Department of Justice and the Limits of the New Deal State, 1933–1945, at 129–84 (2010) (Ph.D. dissertation, Stanford University) (ProQuest) (noting Hoover's success in "establishing the agency as a powerful arm of the central state" and arguing that the FBI's emphasis on federal and local coordination, carried out through a combination of new authorizing statutes and various forms of internal administrative law, allowed it to "draw on the resources of state and local law enforcement" to acquire a disproportionate national reach).

[61] *Id.* at 6.

would find it difficult to discipline him.[62] The federal carceral system also grew, undergoing one of its fastest expansions in U.S. history between 1930 and 1940.[63] Alcatraz Island, designed to house the country's most notorious criminals, opened in 1934 as a highly visible emblem of the United States' federal crime-fighting efforts.[64]

By 1940, the second face of the administrative state was also expanding outwardly. In the late 1930s, officials had begun to express concerns that the nation's largely unpoliced borders posed a security risk in light of the war and the fact that enemy agents might cross disguised into the U.S.[65] Beginning in 1940, Congress significantly expanded funding for the Border Patrol to face these and other security threats at the border, doubling the number of personnel the agency could hire.[66] Administrative reorganization was also part of the story, as the agency developed a more centralized and hierarchical structure.[67] Meanwhile, Border Patrol responsibilities expanded: Agents began working in internment camps and patrolling for enemy submarines.[68] Cumulatively, its growing powers and ballooning staff "transformed the U.S. Border Patrol from a series of small and locally oriented outposts to a national organization with the resources to pursue immigration control on a much larger scale."[69]

Most significant, U.S. military capacity began to expand as the country prepared to enter the war in Europe. In the 1920s and 1930s, the United States had drawn down its military in response to isolationist sentiment and the economic imperatives of the Depression.[70] During the 1930s, peacetime New Deal economic programs nonetheless helped build capacity for the military. For instance, the Civilian Conservation Corps (CCC), an Army-run youth national service program founded in 1933, became a major source of non-commissioned officers when mobilization began in 1939.[71] With administration officials permitting the local Army officers who ran the program "latitude within the published

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62 *See* Herbert Kaufman, *Major Players: Bureaucracies in American Government*, 61 Pub. Admin. Rev. 18, 24–25 (2001).

63 *See* Dep't of Just. & Dep't of Def., Report to Congress: Conversion of Closed Military Installations into Federal Prison Facilities I-2 (1995).

64 Jeffreys-Jones, *supra* note 56, at 91; Stolberg, *supra* note 46, at 394–95.

65 *See* Hernández, *supra* note 47, at 105–06.

66 *Id.* at 104, 106.

67 *Id.* at 104–05.

68 *Id.* at 103.

69 *Id.* at 105.

70 *See* Katznelson, *supra* note 8, at 295–98.

71 *See* Charles E. Heller, *The U.S. Army, the Civilian Conservation Corps, and Leadership for World War II, 1933–1942*, 36 Armed Forces & Soc'y 439, 439–42 (2010).

regulations," CCC work camps came to display the "paramilitary" regimentation of military bases.[72]

By 1940, the United States had begun to directly increase its military capacity, first manufacturing arms for Britain and later mobilizing men for combat.[73] Defense production and mobilization became essential drivers of economic recovery, lifting the United States definitively out of the Depression.[74] Indeed, in this period, first-face economic regulation and second-face military mobilization became deeply intertwined, as the Roosevelt Administration moved the country to what was effectively a planned economy.[75] The growth of second-face administrative capacity was also part of the backdrop for the APA.[76] As Kati Kovacs has shown, for example, members of Congress kept the War Department, as well as first-face agencies, in mind as they deliberated on successive versions of the bill.[77]

Just as much as the New Deal empowered the regulatory state, and so embedded principles of economic democracy in the American political order, it equally reimagined the U.S. as a powerful security state with the legal and administrative tools to project coercion-and-control power at home and abroad.[78] Indeed, there is a strong case that World War II, and not the New Deal, created the modern welfare state given how greatly wartime programs dwarfed those of the earlier era.[79] So conceived, what we typically think of as the New Deal settlement

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[72] *See id.* at 443–44.

[73] *See generally* Maury Klein, A Call to Arms: Mobilizing America for World War II (2013).

[74] Some historians and economists describe this phenomenon as a form of "military Keynesianism" insofar as it relied on state subsidies to the defense industry to boost employment and economic growth. *See* Patrick Renshaw, *Was There a Keynesian Economy in the USA Between 1933 and 1945?*, 34 J. Contemp. Hist. 337, 356–60 (1999); *see also* Byrd L. Jones, *The Role of Keynesians in Wartime Policy and Postwar Planning, 1940–1946*, 62 Am. Econ. Rev. 125, 125–32 (1972) (documenting the influence of Keynesian ideas on Roosevelt advisors).

[75] *See* Mark R. Wilson, Destructive Creation: American Business and the Winning of World War II 9–12 (2016).

[76] *See, e.g.*, Kovacs, *supra* note 13, at 696; Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, *in* Total War and the Law 185 (Daniel R. Ernst & Victor Jew eds., 2002).

[77] *See* Kovacs, *supra* note 13, at 710. While early drafts of the APA contained capacious exceptions from judicial review for the military, these narrowed after World War II, perhaps (Kovacs suggests) as Americans absorbed the destruction wrought by fascist armies in Europe. *See id.* at 696; *see also* Shepherd, *supra* note 11, at 1661.

[78] *See* Michael J. Hogan, A Cross of Iron: Harry S. Truman and the Origins of the National Security State, 1945–1954, at 266 (1998).

[79] *See* James T. Sparrow, Warfare State: World War II Americans and the Age of Big Government 5–7 (2011).

is actually a "World War II order," in which the development of the second face facilitated the growth of the first face.

The intertwined growth of the first and second faces continued across the middle of the twentieth century. If administrative accounts of the 1940s–1970s tend to focus on the entrenchment of an expanded regulatory and welfare state,[80] this period also witnessed the consolidation of the expanded second face. Even as the U.S. military shed personnel in peacetime, the rise of national security thinking replaced "the distinction between war and peace" with a new ethos of "permanent preparedness."[81] The immediate postwar period saw the growth of a foreign intelligence bureaucracy with no analogue in the nation's history. The 1947 National Security Act and later bills unified the military agencies within a single Department of Defense and created the CIA, White House National Security Council, and NSA.[82] While an early goal of the reorganization for at least some members of Congress was to cut costs, this quickly proved illusory.[83] By the 1940s, the United States had adopted a policy of containment of Soviet Russia that ultimately led to the U.S. invasion of Korea in 1950 and its involvement in Vietnam in the 1960s, which underwrote the further growth of the national security state, albeit on contested terms.[84] Domestically, through the 1960s and 1970s, Congress expanded federal law enforcement, created new federal mandatory minimums,

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[80] *See, e.g.*, Emerson, *supra* note 13, at 130–47.

[81] *See* Hogan, *supra* note 78, at 266–87; *see also* Gerstle, *supra* note 12, at 41–47 (arguing that the Eisenhower Administration largely accepted key terms of the New Deal settlement including an expanded federal government); Jeremy K. Kessler, *New Look Constitutionalism: The Cold War Critique of Military Manpower Administration*, 167 U. Pa. L. Rev. 1749, 1753–55 (2019) (describing Eisenhower administration plans for military personnel cutbacks and reallocation to nuclear armament and other national security programs).

[82] The 1947 National Security Act authorized the creation of the CIA and the White House National Security Council. *See* Hogan, *supra* note 78, at 65. It also unified the Army, Navy, and other military agencies under the umbrella of the National Military Establishment, later renamed the Department of Defense. *See* Douglas T. Stuart, Creating the National Security State: A History of the Law That Transformed America 106, 199 (2008). This security bureaucracy expanded further in 1952 with the creation of the National Security Agency. Previously, U.S. foreign intelligence had been housed within military agencies as they conducted wars, including World War II. *See* Comm'n on the Roles & Capabilities of the U.S. Intel. Cmty., *The Evolution of the U.S. Intelligence Community: An Historical Overview*, *in* Preparing for the 21st Century: An Appraisal of U.S. Intelligence app. at A-1, A-6 (1996), https://www.govinfo.gov/app/details/GPO-INTELLIGENCE/summary [https://perma.cc/B73M-MPR9].

[83] *See* Stuart, *supra* note 82, at 75, 182–83.

[84] *See* Jeremy K. Kessler, Conscription and Constitutional Change in Twentieth Century America (forthcoming 2025) (ch. 6 at 4) (on file with authors).

and instituted other crime control measures, all of which poised the carceral state for dramatic expansion.[85]

2. *The Revolution That Wasn't*

If accounts of the modern administrative state's development focus on the New Deal as the critical generative moment, they tend to seize on the 1980s, specifically Ronald Reagan's election, as a turning point.[86] Reagan famously attacked both welfare recipients and agencies from the beginning of his political career,[87] proclaiming as he was inaugurated to lead the government that "government is the problem."[88] Once in office, he staffed his administration with proponents of supply-side economics and small government; "regulatory relief" and the retraction of the administrative state became key policy priorities.[89] In pursuit of this agenda, the Reagan White House undertook numerous purportedly deregulatory actions[90]: promoting presidential administration,[91] establishing White House regulatory review,[92] mandating cost-benefit analysis,[93] slashing agency budgets,[94] and nominating officials who were hostile to the agencies they led.[95]

Focusing on the first face, this narrative suggests that Reagan's presidency launched a powerful assault on the administrative state, one that continues to this day. Again, however, attending to the second face complicates the picture. The Reagan White House was

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[85] *See, e.g.*, Naomi Murakawa, The First Civil Right: How Liberals Built Prison America 69–112 (2005); Jonathan Simon, Governing Through Crime 75–101 (2007).

[86] *See, e.g.*, Sean Wilentz, The Age of Reagan: A History, 1974–2008, at 15–16 (2008); Shepherd, *supra* note 11, at 1560–61.

[87] *See* William Crafton, *The Incremental Revolution: Ronald Reagan and Welfare Reform in the 1970s*, 26 J. Pol'y Hist. 27, 27 (2014).

[88] Inaugural Address, 1 Pub. Papers 1 (Jan. 20, 1981).

[89] *See* Jefferson Decker, The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government 125 (2016); Tom McGarity, *Regulatory Reform in the Reagan Era*, 45 Md. L. Rev. 253, 261 (1983).

[90] On the questionable efficacy of such measures, see George C. Eads & Michael Fix, The Reagan Regulatory Strategy: An Assessment 6–7 (1984). Significant deregulatory steps preceded Reagan, though he made it a centerpiece of his policy platform in a way Ford and Carter had not. *See, e.g.*, Martha Derthick & Paul J. Quirk, The Politics of Deregulation 5–6 (1985).

[91] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2277 (2001); Ashraf Ahmed, Lev Menand & Noah A. Rosenblum, *The Making of Presidential Administration*, 137 Harv. L. Rev. 2131, 2153–54 (2024); Bijal Shah, *Statute-Focused Presidential Administration*, 90 Geo. Wash. L. Rev. 1165, 1184 (2022).

[92] *See, e.g.*, Kathryn A. Watts, *Controlling Presidential Control*, 114 Mich. L. Rev. 683, 689–90 (2016).

[93] *See, e.g.*, McGarity, *supra* note 89, at 263–64.

[94] *See, e.g.*, Wilentz, *supra* note 86, at 141.

[95] *See, e.g.*, McGarity, *supra* note 89, at 262.

also engaged in an ambitious state-building project. In contrast to the Roosevelt Administration, its project embraced only the second face, but its investment in a coercion-and-control administrative apparatus complicates any simple suggestion that victories of the conservative movement beginning in 1980 have vindicated libertarian critics of the state. The fate of the second face during the Reagan Administration qualifies talk of the collapse of the New Deal settlement: The second face is equally the fruit of that settlement, and its basic terms have not yet been superseded.

Facing an economic recession, the Reagan Administration echoed the Roosevelt Administration in turning to military Keynesianism.[96] This was superficially ironic, given Reagan's ostensible commitment to supply-side economics,[97] yet even contemporary observers perceived his administration to be acting in a bifurcated way. Rather than shrink the state, one welfare researcher wrote, the Reagan Administration had decided to build up one part of the state at the expense of the other, effecting an "unprecedented transfer of federal funds from the social to the military sectors."[98] Economic goals as well as the perceived Cold-War imperative of catching up with the Soviet military drove a vast expansion of U.S. military capacity and a muscular national security state.[99] Spending on defense increased forty percent in Reagan's first five years in office, with many appropriations ultimately flowing to contractors and arms manufacturers.[100]

President Reagan also expanded the domestic coercion-and-control state. His administration began to build the first nationwide network

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[96] *See, e.g.*, Tim Sablik, *Recession of 1981–82*, Fed. Rsrv. Hist. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/recession-of-1981-82 [https://perma.cc/YAM2-DG8A]; Samuel Bowles, *Keynes Is Back, Thanks to Reagan*, N.Y. Times (July 8, 1984), https://www.nytimes.com/1984/07/08/opinion/keynes-is-back-thanks-to-reagan.html [https://perma.cc/X3XP-T6TZ]; *supra* note 74 and accompanying text.

[97] *See* J. Craig Jenkins & Craig M. Eckert, *The Right Turn in Economic Policy: Business Elites and the New Conservative Economics*, 15 Socio. F. 307, 312–13 (2000); John Cassidy, *Reagan and Keynes: The Love that Dare Not Speak Its Name*, New Yorker (Apr. 30, 2014), https://www.newyorker.com/news/john-cassidy/reagan-and-keynes-the-love-that-dare-not-speak-its-name [https://perma.cc/H2MB-Z9UQ].

[98] Vicente Navarro, *The Welfare State and its Distributive Effects: Part of the Problem or Part of the Solution?*, 17 Int'l J. Health Servs. 543, 555 (1987).

[99] *See* Gerstle, *supra* note 12, at 129–30; Daniel Wirls, Irrational Security: The Politics of Defense from Reagan to Obama 24–25 (2010); Barry R. Posen & Stephen Van Evera, *Defense Policy and the Reagan Administration: Departure from Containment*, 8 Int'l Sec. 3, 6–7 (1983).

[100] *See* Larry M. Bartels, *Constituency Opinion and Congressional Policy Making: The Reagan Defense Buildup*, 85 Am. Pol. Sci. Rev. 457, 457 (1991); Greg Schneider & Renae Merle, *Reagan's Defense Buildup Bridged Military Eras*, Wash. Post (June 8, 2004), https://www.washingtonpost.com/archive/business/2004/06/09/reagans-defense-buildup-bridged-military-eras/ec621466-b78e-4a2e-9f8a-50654e3f95fa [https://perma.cc/A9VY-GEP6].

of immigration detention facilities.[101] Congressional appropriations for the federal prison system increased nearly fivefold during his presidency, the federal inmate population doubled, and the number of federal prisons increased by about fifty percent.[102] Meanwhile, the Reagan Administration embraced interagency cooperation, substantial cash grants to states and localities, and police militarization to further the war on drugs.[103]

The foreign and domestic aspects of Reagan's state-building project were intertwined. Seeking to swiftly increase immigration detention capacity, for example, the Administration repurposed military installations.[104] These installations also served as sites for the growth of the penal system: By the mid-1990s, nearly half of the seventy-nine federal prisons were located on current or former military installations.[105] At the same time, the military became increasingly entangled in local anti-drug enforcement. In 1989, the government created the first program to transfer excess weapons and materiel to local police,[106] a policy decision that would militarize routine policing.[107] Funds, personnel, and other resources were readily shifted among second-face agencies. As the Reagan Administration and its successors recognized, because these

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101 *See* Jenna M. Loyd & Alison Mountz, Boats, Borders, and Bases: Race, the Cold War, and the Rise of Migration Detention in the United States 55–82 (2018).

102 *See* Nathan James, Cong. Rsch. Serv., R42937, The Federal Prison Population Buildup: Options for Congress 19 tbl.A-I (May 20, 2016), https://sgp.fas.org/crs/misc/R42937.pdf [https://perma.cc/PDD9-Z579].

103 *See* Elizabeth Hinton, From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America 310–14 (2016); *see also* David Pozen, The Constitution of the War on Drugs 12 (2024) (noting alternative origin points for the war on drugs between the 1940s and 1970s).

104 Loyd & Mountz, *supra* note 101, at 54–87.

105 *See* Dep't of Just. & Dep't of Def. *supra* note 63, at I-2; *cf.* Anna Betts, *U.S. Military Allows Colorado Base to Hold Detainees in Immigrant Roundup*, Guardian (Jan. 29, 2025), https://www.theguardian.com/us-news/2025/jan/29/colorado-aurora-military-base-immigration-detention [https://perma.cc/68BA-AQPV] (discussing projected use of military bases for ICE detention).

106 *See, e.g.*, Daniel H. Else, Cong. Rsch. Serv., R43701, The "1033 Program," Department of Defense Support to Law Enforcement 1 (Aug. 28, 2014), https://sgp.fas.org/crs/natsec/R43701.pdf [https://perma.cc/U3Z7-S3Q8]; Steven M. Radil, Raymond J. Dezzani & Lanny D. McAden, *Geographies of United States Police Militarization and the Role of the 1033 Program*, 69 Pro. Geographer 203, 207 (2015).

107 *See generally* Wendy M. Koslicki, Dale W. Willits & Rachael Brooks, *Fatal Outcomes of Militarization: Re-examining the Relationship Between the 1033 Program and Police Deadly Force*, 72 J. Crim. Just. 101781 (2021); *see also* Casey Delehanty, Jack Mewhirter, Ryan Welch & Jason Wilks, *Militarization and Police Violence: The Case of the 1033 Program*, 4 Rsch. & Pol'y (June 14, 2017), https://journals.sagepub.com/doi/epub/10.1177/2053168017712885 [https://perma.cc/VZR8-HZLJ].

agencies engage in similar coercive law-execution activities, excess capacity from one can be readily assigned to another.[108]

As bitter debates about the size of government, the relationship between freedom and the state, the role of regulation, and the legacies of American liberalism have continued to play out in recent decades, they have largely ignored the administrative state's second face. Mostly excised from popular and scholarly conceptions of the administrative state, second-face agencies continue to grow, with support from Republican and Democratic administrations alike. The budgets of second-face agencies have increased substantially over time, outstripping their first-face counterparts. Since 1980, the size of this country's standing military force has grown, and the defense budget has gone through repeated buildups.[109] Spending on the Federal Bureau of Prisons has increased more than seven-fold.[110] Spending on the U.S. Border Patrol has increased nearly twenty-fold since 1994,[111] while ICE's budget has tripled since its creation in 2003.[112] Meanwhile, a powerful political and judicial attack on the administrative state has proven to be an attack only on the first face.

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108 This fungibility remains even as U.S. security policy has shifted, with the Cold War replaced by transnational terrorism and more recently by border security and China containment. *See, e.g.*, Bryan Mabee, *Re-imagining the Borders of US Security After 9/11: Securitization, Risk and the Creation of the Department of Homeland Security*, 4 Globalizations 385, 386 (2007); *see also* Wadie E. Said, *Law Enforcement in the American Security State*, 2019 Wis. L. Rev. 819, 820 (2019) (describing the "symbiotic nature of the relationship between government actors across the three sectors of national security, domestic policing, and immigration enforcement"). *See generally* Alice Ristroph, *Just Violence*, 56 Ariz. L. Rev. 1017, 1022 (2014) (encouraging "greater recognition of the continuities across different types of state violence," including war and criminal punishment).

109 Military budgets tend to be cyclical, but the country's posture of permanent readiness has led to repeated buildups during recent administrations. *See* Wirls, *supra* note 99, at 83, 85–86, 139 (documenting buildups during the Reagan, late Clinton, and Bush II administrations); *SIPRI Military Expenditure Database*, SIPRI, https://milex.sipri.org/sipri [https://perma.cc/6KJL-6JWH] (documenting general trend of increasing military spending, in current U.S. dollars, beginning in 2000).

110 *See Federal Prison System Shows Dramatic Long-Term Growth*, Pew Charitable Trs. (Feb. 2015), https://www.pewtrusts.org/~/media/assets/2015/02/pew_federal_prison_growth.pdf [https://perma.cc/LM82-FC6U].

111 *See The Cost of Immigration Enforcement and Border Security*, Am. Immigr. Council (Aug. 14, 2024), https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security [https://perma.cc/G3Q4-NHVB]; Deborah Waller Meyers, *From Horseback to High-Tech: U.S. Border Enforcement*, Migration Pol'y Inst. (Feb. 1, 2006), https://www.migrationpolicy.org/article/horseback-high-tech-us-border-enforcement [https://perma.cc/LH8U-HA34].

112 *See* Am. Immigr. Council, *supra* note 111.

II
Doctrine and Theory

The contemporary administrative state is widely reported to be "under attack."[113] Critics challenge broad grants of authority from Congress to administrative agencies and insist on tighter presidential control. They lambast judicial deference to agency statutory interpretation and policymaking. Even defenders of the administrative state propose reforms to reconcile agencies' work with constitutional and democratic values; they advocate greater public engagement in notice-and-comment rulemaking, for example, as well as disclosure requirements to facilitate public monitoring of agency decisions.

These judicial and scholarly arguments concerning delegation, deference, and democracy focus on the first face of the administrative state. But this face is quite constrained in relevant respects. Meanwhile, second-face agencies enjoy far-reaching delegations, sweeping judicial deference, and exemptions from public accountability mechanisms that tend to go unchallenged.

A. Delegation

Begin with one of the most basic questions of administrative law: the relationship between agencies and the political branches of the federal government. Courts have insisted that first-face agencies' activity be closely tied to Congress and the President. Invoking formal conceptions of the legislative power, courts have questioned when and to what extent Congress can authorize agency action and called for tethering agency policymaking to specific statutory grants. Invoking unitary conceptions of executive power, courts have increasingly demanded that agencies perform their work subject to presidential control.

When we turn to the second face, however, these concerns about constitutional structure largely disappear. Even as courts impose nondelegation constraints on first-face agencies, they routinely bless exercises of second-face agency power that are neither congressionally authorized nor within Article II.[114] And while unitary executive theory

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[113] Metzger, *supra* note 1, at 3, 8; *see, e.g.*, Philip Hamburger, Is Administrative Law Unlawful? 1 (2014) (attacking the administrative state); Calabresi & Lawson, *supra* note 40 (attacking the administrative state); Blake Emerson, *The Existential Challenge to the Administrative State*, 113 Geo. L.J. 1, 3 (forthcoming 2025) (describing the attack and its partial embrace by recent Supreme Court decisions).

[114] Although some second-face activities relate to the Commander-in-Chief Clause or the Vesting Clause, only a stretched interpretation of Article II would cover many national-security and immigration powers exercised today. *See, e.g.*, Saikrishna Bangalore Prakash, *Deciphering the Commander-in-Chief Clause*, 133 Yale L.J. 1, 8–9 (2023); Julian Davis

has gained force for the first face, courts do not inquire into presidential control in the second face. To the contrary, they sometimes invoke presidential authority over national security and law enforcement to empower low-level agency administrators. In the second face, references to "Congress" and the "President" rhetorically, and often ironically, mark certain types of decisions as matters of agency discretion rather than actions that must be attributable to the legislature or chief executive.

1. Congress

In a series of recent high-profile administrative law cases concerning first-face agency action, courts have insisted that Congress, not agencies, must make policy choices for the nation. They have begun to revive the nondelegation doctrine, which prohibits Congress from conferring its legislative power on other actors, and have sharply constrained agency policymaking through the subconstitutional major questions doctrine. The judicial approach to congressional control in second-face agencies departs markedly from courts' skeptical and formalist approach to the first face. Whereas first-face cases draw bright lines around Congress's legislative authority, second-face cases invoke the conjoined powers of the "political branches" to uphold agency action.

The Supreme Court's recent decision in *Gundy v. United States* may betoken a revival of the long-dormant nondelegation doctrine.[115] Although *Gundy* upheld a statutory provision against nondelegation challenge, five members of the Supreme Court indicated a desire to revisit the doctrine. Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, argued that Congress should be able to entrust agencies only with "fill[ing] up the details" and engaging in factfinding, not setting policy.[116] Meanwhile, Justice Alito's concurrence called on the Court "to reconsider the approach we have taken for the past 84 years," and Justice Kavanaugh separately argued that the *Gundy* dissent's analysis of nondelegation doctrine warranted "further consideration in future cases."[117]

Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169, 1173 (2019); *cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646–47 (1952) (discussing, and rejecting, invocations of "'inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers" held by the President).

115 588 U.S. 128 (2019); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000) ("We might say that the conventional [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).").

116 *Gundy*, 588 U.S. at 157–61 (Gorsuch, J., dissenting).

117 *Id.* at 149 (Alito, J., concurring in the judgment); Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) ("Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.").

Perhaps more notable here, Justices' views about the case seemed to turn on whether they assigned the relevant agency activity to the administrative state's first face or second face. *Gundy* involved Congress's charge to the Attorney General to make rules concerning the registration of individuals convicted before the Sex Offender Registration and Notification Act (SORNA) was enacted.[118] The case therefore sat at the boundary of the two faces: It involved rulemaking, a core tool of the first face, but to regulate convicted and incarcerated individuals, a population generally controlled by the second face. This ambivalent character underlies the divided opinion. For most Justices, the Attorney General's rulemaking coded as first-face agency activity. The plurality accordingly understood the nondelegation challenge to be a challenge to "most of Government."[119] The dissent likewise seemed to process SORNA rulemaking as first-face activity. Even as it departed from the plurality in finding the delegation constitutionally objectionable, it distinguished SORNA from second-face domains of foreign affairs and military activity against which nondelegation challenges would not lie.[120] Most notably, Justice Alito cast the deciding vote to uphold SORNA—seemingly because he understood *Gundy* as a second-face rather than first-face case. In a short concurrence in the judgment, he wrote that he was amenable to reviving the nondelegation doctrine and overruling the Court's precedents upholding "provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards."[121] But he found it "freakish to single out the provision at issue here for special treatment."[122] For Alito, the nondelegation doctrine should be revived to invalidate the EPA's regulation of emissions, not the DOJ's regulation of sex offenders.

Although the Roberts Court has yet to invalidate a statutory provision on nondelegation grounds, it has constrained first-face agency policymaking through the subconstitutional major questions doctrine. Justices and scholars debate the character of this doctrine,[123] but its most

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118 34 U.S.C. § 20913(d).

119 *Gundy*, 588 U.S. at 130–31.

120 *See id.* at 159 (Gorsuch, J., dissenting) (determining that, in contrast to SORNA, a foreign affairs statute would be "an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II").

121 *Id.* at 149 (Alito, J., concurring in the judgment).

122 *Id.*

123 *Compare, e.g.*, West Virginia v. Env't Prot. Agency, 597 U.S. 697, 737 (2022) (Gorsuch, J., concurring) ("The major questions doctrine works . . . to protect the Constitution's separation of powers . . . . [I]mportant subjects . . . must be entirely regulated by the legislature itself." (internal quotation marks omitted)), *with* Biden v. Nebraska, 600 U.S. 477, 508 (2023) (Barrett, J., concurring) (arguing that the doctrine is "a tool for discerning . . . the text's most natural interpretation").

ardent proponents understand it to further nondelegation principles. Justice Gorsuch, for instance, has described the doctrine as "rein[ing] in Congress's efforts to delegate legislative power," just under a "different name[]": "Although it is nominally a canon of statutory construction, we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."[124] In recent years, the major questions doctrine has proven a powerful cudgel, denying first-face agencies authority over politically and economically significant questions including responses to climate change,[125] COVID-19,[126] and student debt,[127] even when Congress has broadly articulated agency mandates.

Meanwhile, nondelegation principles, whether constitutional or subconstitutional in form, have little bite for second-face agencies. To the contrary, second-face agency activity has been an important but little appreciated part of the nondelegation doctrine's long dormancy. One year after the nondelegation doctrine's "one good year,"[128] its brief career appeared to end with a second-face decision. The Curtiss-Wright Export Corporation challenged a federal statute that allowed the President to embargo arms shipments to Bolivia and Paraguay, arguing that it violated the nondelegation doctrine. In its decision upholding the statute, the Court assumed "that the challenged delegation, if it were confined to internal affairs, would be invalid," but held that it could "nevertheless be sustained" because it fell "within the category of foreign affairs."[129] Considering congressional and presidential powers together, the Court upheld the delegation.[130]

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124 *Gundy*, 588 U.S. at 167 (Gorsuch, J., dissenting).

125 *West Virginia*, 597 U.S. at 732–35 (majority opinion) (determining that generation shifting to renewable energy sources is a "decision of such magnitude and consequence" that it must rest "with Congress itself, or an agency acting pursuant to a clear delegation from that representative body").

126 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 594 U.S. 758, 763–64 (2021) (per curiam) ("Reading both sentences together, . . . it is a stretch to maintain that § 361(a) gives the CDC the authority to impose this eviction moratorium."); Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109, 119 (2022) (per curiam) (concluding that OSHA's COVID-19 Vaccination and Testing "mandate extends beyond the agency's legitimate reach").

127 *Nebraska*, 600 U.S. at 506 ("[T]he basic and consequential tradeoffs inherent in a mass debt cancellation program are ones that Congress would likely have intended for itself.").

128 Sunstein, *supra* note 115, at 322; *see* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–38 (1935) (finding an unlawful delegation of legislative power).

129 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 315 (1936); *see also id.* at 320 (discussing the need to "accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved").

130 *Curtiss-Wright*, like *Knauff* and other decisions we discuss below, is generally described as an instantiation of an affirmative "plenary power" doctrine, but understanding the case as a rejection of the nondelegation doctrine in the national security space—as the Court

Across the twentieth century, the Court continued to hold out foreign affairs, national security, and immigration as domains warranting particularly broad grants of authority and little attention to the distinction between legislative and executive power. In *United States ex rel. Knauff v. Shaughnessy*, the Court rejected a nondelegation challenge to immigration laws, allowing the executive wide authority to exclude noncitizens. The Court reasoned, in terms similar to *Curtiss-Wright*, that a sharp boundary between Article I and II did not exist in this area: Regulating the "exclusion of aliens is a fundamental act of sovereignty" and "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation" so "there is no question of inappropriate delegation of legislative power involved."[131] Considering a nondelegation argument in *Zemel v. Rusk*, the Court likewise stated that "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."[132] More recently, in *Loving v. United States*, the Court rejected a nondelegation challenge to a statute authorizing the President to specify when a military court martial can impose the death penalty.[133] Courts have similarly rejected nondelegation challenges to death penalty procedures imposed by prison authorities.[134]

Today, as the Court revives nondelegation principles for the first face, it has maintained its permissive approach to the second face.[135] The most

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also understood it to be—helps draw out a distinction between first-face and second-face administrative law that has been obscured by the profusion of different labels for second-face doctrines.

131 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

132 381 U.S. 1, 17 (1965). *See generally* William H. Rehnquist, *The Constitutional Issues—Administration Position*, 45 N.Y.U. L. Rev. 628, 636–37 (1970) ("I think it is plain from [*Curtiss-Wright*] . . . that the principle of unlawful delegation of powers does not apply in the field of external affairs.").

133 517 U.S. 748, 772 (1996) (recognizing that "more explicit" congressional guidance might have been required if the executive did not have "independent authority in the area," but holding that this "delegated duty" was "interlinked with duties already assigned to the President"); *see also* Chi. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 109 (1948) ("Congress may of course delegate very large grants of its power over foreign commerce to the President. The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." (citation omitted)).

134 *See, e.g.*, McGautha v. California, 402 U.S. 183, 271–83 (1971) (Brennan, J., dissenting) (raising a nondelegation objection); *see also* Alexandra L. Klein, *Nondelegating Death*, 81 Ohio St. L.J. 923, 958 (2020).

135 Commenters have not missed this. *See, e.g.*, Robert Knowles, *Delegating National Security*, 98 Wash. U. L. Rev. 1117, 1118–19 (2021) ("The United States government's national security activities should raise profound delegation concerns. Congress gives agencies in that realm maximal discretion and minimal scrutiny. On this permissive legal armature has grown the world's largest bureaucracy." (citations omitted)); Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 Harv. L. Rev. 1132, 1134, 1159 (2021) ("[N]ondelegation

enthusiastic proponents of a robust nondelegation doctrine, including Justices Gorsuch and Thomas, have expressly carved out portions of the second face from their arguments. The *Gundy* dissent, described above, would exempt from nondelegation objection foreign affairs questions and other "matters already within the scope of executive power."[136] Justice Thomas has similarly distinguished presidential discretion with respect to foreign affairs, including immigration matters, when insisting that certain domestically oriented statutory provisions are unconstitutional.[137] Circuit courts have likewise recognized the domain of second-face agencies as distinctive when it comes to delegation.[138]

Moreover, recent decisions by the Roberts Court have continued to accept broad congressional delegations to the executive around immigration, national security, and foreign affairs. These cases do not explicitly discuss the nondelegation doctrine, perhaps partly because litigators in this area do not invoke it,[139] but the analytical moves are familiar. One year before *Gundy*, for example, *Trump v. Hawaii* upheld a presidential proclamation issued pursuant to statutory authority to restrict the entry of aliens when the President finds their entry "would be detrimental to the interests of the United States."[140] The challenged proclamation barred residents of seven Muslim-majority countries from entering the United States; its scope, together with statements by Administration officials, led observers to call it a "Muslim [b]an."[141] Noting that the proclamation fell well within the statute's

advocates' efforts are unprincipled. Their theory cannot sustain their exceptionalism, as the Constitution offers no formal basis for the categorical treatment they wish to advance.").

136 Gundy v. United States, 588 U.S. 128, 159 (2019) (Gorsuch, J., dissenting) (citing *Curtiss-Wright* and *Loving*).

137 Sessions v. Dimaya, 584 U.S. 148, 217 (2018) (Thomas, J., dissenting) (arguing that a statute delegating deportation authority might not raise any issues under the nondelegation doctrine because of "founding-era evidence that 'the executive Power' . . . includes the power to deport aliens" and "Congress does not 'delegate' when it merely authorizes the Executive Branch to exercise a power that it already has"); Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 80 & n.5 (2015) (Thomas, J., concurring) ("It is thus likely the Constitution grants the President a greater measure of discretion in the realm of foreign relations, and the conditional tariff Acts must be understood accordingly.").

138 *See, e.g.*, United States v. Henry, 888 F.3d 589, 596 (2d Cir. 2018) ("[A] delegation of legislative authority to the executive is accorded special deference if it concerns foreign affairs."); *see also In re* Nat'l Sec. Agency Telecomm. Recs. Litig., 671 F.3d 881, 897 (9th Cir. 2011) ("The fact that § 802 arises within the realm of national security—a concern traditionally designated to the Executive as part of his Commander-in-Chief power—further suggests that the intelligible principle standard need not be overly rigid.").

139 *See also supra* note 130 (discussing different labels for similar doctrinal principles).

140 Trump v. Hawaii, 585 U.S. 667, 674–75 (2018) (quoting 8 U.S.C. § 1182(f)).

141 *See* Zainab Ramahi, Note, *The Muslim Ban Cases: A Lost Opportunity for the Court and a Lesson for the Future*, 108 Calif. L. Rev. 557, 562–63 (2020) (recounting an interview with Rudy Giuliani on Fox News about how President Trump decided to restrict entry to

"comprehensive delegation," the Court emphasized "the deference traditionally accorded the President in this sphere."[142] As in prior cases lumping together the powers of the "political branches," the *Hawaii* Court described "the admission and exclusion of foreign nationals" as a "fundamental sovereign attribute exercised by the Government's political departments."[143] Because such decisions involved foreign relations and delicate political calculations, the Court concluded, they are "of a character more appropriate to either the Legislature or the Executive."[144]

The lack of concern to distinguish legislative from executive power and instead to group both together as "political" stands in contrast to the Court's insistence on demarcating legislative and executive power in the realm of first-face agencies. And it is particularly striking when we unpack the court's conception of the "Executive" in the second face.

2. The President

As recent case law has limited Congress's ability to delegate regulatory authority to first-face agencies, it has also insisted on a simplified vision of presidential control over those agencies. Unitary executive principles loom large in recent challenges. Meanwhile, as courts rely on presidential power—or, often, "political branch"[145] power—to authorize broad delegations in the second face, they show little concern for actual presidential control. Ironically, given judicial invocations of Article II, courts elide the difference between the President and other executive branch actors, effectively assigning to lower-level officials the broad executive power they understand to be the President's.

The Supreme Court's embrace of unitary executive principles in the first face appears most prominently in recent cases concerning appointment and removal. From *Seila Law*'s invalidation of the CFPB's for-cause removal provision for its single director[146] and *Free Enterprise Fund*'s invalidation of double-for-cause removal protection[147] to *Arthrex*'s broad insistence on presidential control

individuals from the seven Muslim-majority countries and sought Giuliani's help to do so "legally").

142 *Hawaii*, 585 U.S. at 685–86; *see also id.* at 712 (Thomas, J., concurring) ("Section 1182(f) does not set forth any judicially enforceable limits that constrain the President. Nor could it, since the President has *inherent* authority to exclude aliens from the country." (citation omitted)).

143 *Id.* at 702 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)); *see also id.* at 703 (citing Kerry v. Din, 576 U.S. 86, 106 (2015)).

144 *Id.* at 702 (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)).

145 *See id.* at 703.

146 Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 231 (2020).

147 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505–06 (2010).

over appointments,[148] the Supreme Court has increasingly required presidential superintendence of first-face agencies.

The unitary executive principle is particularly significant because the Supreme Court has come to describe all legitimate first-face agency action as executive in nature. Although the Court long recognized "quasi-legislative" or "quasi-judicial" agency decisions,[149] recent cases insist that agency activity is categorically "executive."[150] If the Constitution grants the President not "*some* of the executive power, but *all* of the executive power," and "*all* the activities of agencies [are] exercises of 'the executive power,'"[151] the Court's understanding of the separation of powers rationalizes a nondelegation doctrine that limits agency authority in the first instance and demands presidential control over the shrunken domain that remains.[152]

In the second face, the situation is very different. At the same time as first-face decisions insist on a unitary executive, second-face decisions continue to lump together executive branch actors. They treat front-line administrators as legitimate wielders of the executive power and do not insist on presidential control while blessing an expanded domain of executive activity.

In the national security domain, for instance, courts invoke presidential power to uphold administrative policymaking by military and intelligence agencies that does not involve the President.[153] Decisions about targeted killings are made by an interagency group,

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148 United States v. Arthrex, Inc., 594 U.S. 1, 27 (2021). *See generally* Emerson, *supra* note 113, at 22–26 (describing the rise of unitary executive theory in recent administrative law cases).

149 *E.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935).

150 *Seila L.*, 591 U.S. at 278 n.7 (Kagan, J., concurring in part) (quoting Arlington v. FCC, 569 U.S. 290, 305 n.4 (2013) (quoting U.S. Const. art. II, § 1, cl. 1)). *But see, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 489–90 (2001) (Stevens, J., concurring) ("It seems clear that an executive agency's exercise of rulemaking authority pursuant to a valid delegation from Congress is 'legislative.' As long as the delegation provides a sufficiently intelligible principle, there is nothing inherently unconstitutional about it."); INS v. Chadha, 462 U.S. 919, 985 (1983) (White, J., dissenting) ("[L]egislative power can be exercised by independent agencies and Executive departments . . . .").

151 *Seila L.*, 591 U.S. at 278 n.7 (Kagan, J., concurring in part) (emphasis added).

152 *See* Bulman-Pozen, *Administrative States*, *supra* note 16, at 281–85 (describing how the Court's doctrine leverages presidential power to shrink the regulatory domain).

153 *See* Elena Chachko, *Administrative National Security*, 108 Geo. L.J. 1063, 1068 (2020) ("The President has delegated significant elements of his foreign relations powers as chief executive and commander-in-chief to the administrative state. He has gradually reduced his personal involvement in their exercise. The administrative state has in turn established independent mechanisms to effectuate those powers."); Knowles, *supra* note 135, at 1156 ("The lion's share of national security decisionmaking—including decisions concerning fundamental liberty interests, and life and death—must occur at lower levels."). *See generally* Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. Rev. 2, 59–66 (2021) (describing the relatively unconstrained role

and the CIA and the Joint Special Operations Command (JSOC) share operational responsibility.[154] Decisions about military detention are reviewed by Periodic Review Boards comprising officials from DOD, DHS, DOJ, State, the Joint Chiefs, and ODNI.[155] Decisions about watchlists and no-fly lists are made in the FBI's Terrorism Screening Center, created by a memorandum of understanding by DHS, ODNI, DOJ, and the Department of State.[156] For decades, the intelligence community operated by design under weak presidential supervision.[157] Prominent examples of White House direction of the national security state, like Obama's involvement in covert targeted killings or Bush-era surveillance programs, stand out for being the exceptions.[158] Every day, bureaucrats make thousands of consequential decisions about policies for targeting, detention, and force.[159]

As Elena Chachko concludes, across numerous areas where national security agencies make decisions involving individuals, "there appears to be limited presidential direction. There is little presidential involvement in the policy process and scant presidential ownership of the measures that the bureaucracy produces."[160] The courts continue to justify broad delegations of power from Congress to administrative agencies under *Curtiss-Wright* and other invocations of presidential control over foreign affairs and national security—even where the President "plays a marginal role and exercises limited control, while the administrative state has a substantial degree of independence."[161]

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of national security lawyers, especially "the Lawyers Group," in making executive branch decisions concerning national security).

154 Chachko, *supra* note 153, at 1082.

155 *Id.* at 1091–92.

156 *Id.* at 1103–04.

157 *See* Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 651–52 (2016).

158 *See, e.g.*, *id.* at 647–48 (suggesting that covert action is relatively presidentialized, among intelligence activities, but simultaneously acknowledging that "public debate about recent covert action programs paints a complex picture, with the Senate Select Committee on Intelligence report suggesting that the CIA misled the White House on aspects of its detention and interrogation program"); *see also* Chachko, *supra* note 153, at 1082–85 (arguing that President Obama's involvement in targeted killings marked a high water mark of supervision, and that "minimal presidential input" characterized targeted killings during the Trump Administration).

159 *See, e.g.*, Azmat Khan, *Hidden Pentagon Records Reveal Pattern of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html [https://perma.cc/RHB7-QDAD] (describing extensive policy, oversight, and implementation failures in Department of Defense air targeting policy that led to expansion of civilian targeting and higher casualty levels in Syria and Iraq).

160 Chachko, *supra* note 153, at 1118.

161 *Id.* at 1130.

This tension between justifications sounding in presidential authority and the exercise of power by agency officials appears in *Trump v. Hawaii*, a case at the nexus of national security and immigration law. As described above, the Court's acceptance of a "comprehensive delegation" that "exudes deference to the President" hinged on the President's Article II powers.[162] And yet, when faced with the argument that President Trump's discriminatory statements demonstrated that the proclamation reflected animus toward Muslims, the Court rejected the claim in part because the proclamation "reflect[ed] the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies."[163] Though presidential power over national security was a basis for upholding the statutory delegation, the independence of the review process from the President himself was key to legitimating the proclamation.

Trump v. Hawaii is far from the only recent immigration-related decision to uphold policymaking by front-line administrators under the guise of presidential power. For example, from 2017 to 2020, a mid-level DHS official launched various ICE deportation efforts and CBP detentions without presidential involvement.[164] And the execution of such policies—where critical decisions about arrest, detention, and more are made—operates at even lower levels of the bureaucracy.[165] Cristina Rodríguez and Adam Cox have described how field-level administrators have sometimes declined, with impunity, to implement immigration policy set by headquarters.[166] And Robert Koulish and Kate Evans have documented how thousands of field-level decisions at ICE gradually altered an algorithm designed in Washington so it would recommend detention in more cases.[167]

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162 Trump v. Hawaii, 585 U.S. 667, 684–85 (2018).

163 *Id.* at 707.

164 Knowles, *supra* note 135, at 1166; *see id.* at 1149 ("Although the plenary power doctrine is often articulated in ways that conflate the political branches' authority, long stretches of congressional silence on the substance of immigration law have enabled the President and . . . the bureaucracy to benefit the most from the plenary power doctrine and other forms of immigration exceptionalism."); Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. Rev. 77, 101 (2017) ("[T]he power to promulgate national immigration policy is increasingly exercised less by Congress, and more by the officials populating our nation's administrative agencies.").

165 *See, e.g.*, U.S. Customs & Border Protection, CBP Directive No. 3340-049A, Border Search of Electronic Devices ¶ 5.4 (Jan. 4, 2018) (providing agents with discretion over border searches).

166 *See* Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law 172–73 (2020).

167 *See* Kate Evans & Robert Koulish, *Manipulating Risk: Immigration Detention Through Automation*, 24 Lewis & Clark L. Rev. 789, 817, 833–34 (2020).

In some cases, courts not only have declined to police presidential control but also have insisted that immigration agency officials *must* delegate policymaking power to line employees. Since 2016, for example, the Fifth Circuit and some lower courts have issued a series of decisions invalidating immigration enforcement policies for precisely this reason.[168] In a rare instance of courts finding that a second-face agency had exceeded its statutory authority, these courts reasoned that the agency acted beyond its powers precisely because it centralized enforcement policymaking instead of allowing front-line ICE agents to interpret and apply the immigration laws.

B. Deference

The differential treatment of the administrative state's first and second faces also extends to deference doctrines. In the 2023–2024 term, for example, the Supreme Court overruled *Chevron*, holding that judicial deference to agency statutory interpretation was unwarranted. But *Chevron*, which largely attended first-face agencies, was far from the most deferential form of administrative review. In the second face of the administrative state, distinctive doctrines for national security, immigration, and prison administration provide much more sweeping deference, insulating these second-face agencies from the current wave of attacks on the administrative state.

1. Judicial Review

The least visible but most potent form of deference is unreviewability. When first-face agencies regulate, their actions are presumptively reviewable. So strong is the presumption in favor of judicial review that "federal courts often invoke the presumption to contort statutes that appear to preclude judicial review to nonetheless permit it."[169]

In contrast, second-face agency activity frequently escapes judicial review altogether. A range of doctrines, including the political question

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168 *See, e.g.*, Texas v. United States, 50 F.4th 498, 524 (5th Cir. 2022) (suggesting that DACA would not have violated the APA if ICE agents had the discretion to reject DACA applicants); Texas v. United States, 40 F.4th 205, 221–22 (5th Cir. 2022) (holding that an agency rule limiting individual ICE agents' determinations was not a matter "committed to agency discretion by law"); Arizona v. Biden, 593 F. Supp. 3d 676, 730 (S.D. Ohio 2022) (determining that ICE's compliance with a presidential memo was not optional, and thus that the memo violated the APA), *rev'd*, 40 F.4th 375 (6th Cir. 2022).

169 Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1287 (2014); *see also* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & MATTHEW L. SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY 986 (5th ed. 2002) ("[C]ourts frequently interpret language that, on its face, seems explicitly to preclude review not to do so. Implicit preclusion is rare.").

doctrine,[170] standing doctrine,[171] state secrets privilege,[172] and the APA's "committed to agency discretion by law" test[173] sharply curtail the number of disputes courts hear in the first instance. As Oona Hathaway concludes, for the last fifty years there has been "little chance that a court will review an executive branch decision on a national security issue on its merits."[174] Even when members of Congress—the ostensible object of the Court's solicitude in delegation and deference challenges—have tried to enlist judicial assistance in requiring executive branch

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170 *See, e.g.*, Schneider v. Kissinger, 310 F. Supp. 2d 251, 254 (D.D.C. 2004) ("[T]his case is non-justiciable because the plaintiffs' claims present a political question committed to the Executive and Legislative Branches."), *aff'd*, 412 F.3d 190, 194 (D.C. Cir. 2005) ("[D]ecision-making in the fields of foreign policy and national security is textually committed to the political branches of government."); Aktepe v. United States, 105 F.3d 1400, 1404 (11th Cir. 1997) (holding that a case brought by Turkish sailors struck by missiles during a NATO training exercise presents a nonjusticiable political question that "would require a court to interject itself into military decisionmaking and foreign policy, areas the Constitution has committed to coordinate branches of government"). *See generally* Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 Stan. L. Rev. 1031, 1078 (2023) (emphasizing the force of the political question doctrine in foreign-affairs cases, including for claims brought under federal statutes).

171 *E.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013) ("[W]e have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs . . . ."); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) (denying standing).

172 Amanda Frost, *The State Secrets Privilege and Separation of Powers*, 75 Fordham L. Rev. 1931 (2007). The state secrets privilege has been relied on to dismiss cases entirely, and not only to exclude national-security evidence. *E.g.*, Tenet v. Doe, 544 U.S. 1, 11 (2005) ("The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable . . . ."); *see also* Al-Haramain Islamic Found. Inc. v. Bush, 507 F.3d 1190, 1197 (9th Cir. 2007) (noting that this form of the privilege functions as a "rule of non-justiciability, akin to a political question"). Recent years have seen its expansion. *See* United States v. Zubaydah, 595 U.S. 195, 212 (2022) (recognizing the state secrets privilege to deny discovery regarding an alleged post-9/11 military facility in Poland); Fed. Bureau of Investigation v. Fazaga, 595 U.S. 344, 348 (2022) (holding that FISA does not displace the state secrets privilege); *see also* Robert Chesney, *No Appetite for Change: The Supreme Court Buttresses the State Secrets Privilege, Twice*, 136 Harv. L. Rev. 170, 171–72 (2022) (criticizing the Supreme Court's decisions in *Fazaga* and *Zubaydah*); Shirin Sinnar, *A Label Covering a "Multitude of Sins": The Harm of National Security Deference*, 136 Harv. L. Rev. F. 59, 69 (2022) ("The increasing deference toward national security conduct [shown in state secrets cases] especially matters because of the Court's selectively expansive interpretation of what constitutes national security and its increasing willingness to limit executive power outside the national security domain as defined by the Court.").

173 *E.g.*, Webster v. Doe, 486 U.S. 592, 601 (1988) (holding that the termination of a CIA employee because of his sexual orientation was unreviewable under the APA); Merida Delgado v. Gonzales, 428 F.3d 916, 919–20 (10th Cir. 2005) (holding that statutory claims of an individual the Attorney General had designated as a threat to national security were barred under the "committed to agency discretion by law" exception).

174 Hathaway, *supra* note 153, at 15; *see also* Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 Fordham L. Rev. 827, 829 (2013) ("In most cases, courts use abstention doctrines and other tools to decline to hear such cases on the merits.").

compliance with the War Powers Resolution, courts have dismissed their suits out of hand.[175] A similar dynamic is at play with immigration enforcement.[176] And the prison and punishment context has generated both foundational administrative law doctrine on unreviewability[177] and a swath of prison-specific cases counseling deference to prison authorities.[178] As with *Gundy*, much may turn on whether courts understand a decision as implicating first- or second-face action. For instance, *Heckler v. Chaney*, the canonical unreviewability case, involved a decision by the FDA not to regulate lethal injection drugs. The Court's decision foreclosing review fits better with other case law when we see that the first-face agency was making decisions about a domain typically governed by second-face agencies.[179]

For cases that proceed to the merits, first-face and second-face review again looks different. First-face regulations are typically taken up under the APA, including through arbitrary and capricious review.[180] Although the intensity of arbitrary and capricious review can vary, the shift of the "hard look" moniker from describing the agency's review of relevant evidence to the court's review of the agency's decision is suggestive of the scrutiny first-face agencies receive.[181] Courts tend to describe their review as narrow and limited—ensuring only that the agency examined the relevant data and provided a satisfactory explanation for its decision—but in practice, arbitrary and capricious review not infrequently invalidates first-face agency decisions.[182] The

175 Hathaway, *supra* note 153, at 17–18.

176 For example, the doctrine of consular nonreviewability holds that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950); *see also* Baan Rao Thai Rest. v. Pompeo, 985 F.3d 1020, 1024 (D.C. Cir. 2021) ("Consular nonreviewability shields a consular official's decision to issue or withhold a visa from judicial review, at least unless Congress says otherwise.").

177 Heckler v. Chaney, 470 U.S. 821, 823, 838 (1985).

178 *See* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 Fed. Sent'g Rep. 245, 246 (2012) (discussing cases such as *Whitey v. Albers*, 475 U.S. 312 (1986), and *Farmer v. Brennan*, 511 U.S. 825 (1994), which applied highly deferential, almost unsurmountable, standards of review to prison litigation cases). Many of these cases involve constitutional review, as prison litigation at the Supreme Court has only more recently turned to questions of statutory interpretation. *See* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 Harv. L. Rev. 515, 534–37 (2021).

179 The Court began its analysis by describing how the FDA Commissioner had declined to regulate the drugs so as not to interfere with state death penalty administration. *Heckler*, 470 U.S. at 824–25.

180 5 U.S.C. § 706(2)(A).

181 Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 761–62 (2008).

182 *Id.* at 768–69. Agencies' loss rate was much higher during the Trump Administration. Bethany A. Davis Noll, *"Tired of Winning": Judicial Review of Regulatory Policy in the Trump Era*, 73 Admin. L. Rev. 353, 356–57 (2021).

Supreme Court's most recent word on the standard suggests that it is prepared to deem many first-face regulations arbitrary and capricious. The day before it handed down *Loper Bright*, the Court enjoined the enforcement of a Clean Air Act regulation, finding that the EPA did not respond sufficiently to comments or adequately explain its approach.[183] As Justice Barrett argued in dissent, however, the EPA had responded to the comments that were actually raised and offered a thorough explanation, so demanding more risked "'unwarranted judicial examination of perceived procedural shortcomings.'"[184]

When it comes to second-face agencies, courts do not apply a similarly searching APA review. First, as Kathryn Kovacs has found, the APA carve-out for actions taken pursuant to "military authority exercised in the field in time of war"[185] has effectively mutated into a grant of "'super-deference,' even for actions that are reviewed under the APA."[186] Instead of applying the arbitrary and capricious standard, courts often apply more deferential common-law doctrines.[187] Even when they do apply ostensibly normal APA review, moreover, courts frequently defer to second-face agencies' factual conclusions and policy determinations.[188] Judges insist that they have "limited competence in the area of national security, and therefore our role in reviewing factual determinations in this context is 'highly deferential,'"[189] or they note that in the context of national security, "'conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government.'"[190] Courts similarly defer to the judgments of front-line immigration agents[191] and

183 Ohio v. EPA, 603 U.S. 279, 293 (2024).

184 *Id.* at 318 (Barrett, J., dissenting) (quoting Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 548 (1978)).

185 5 U.S.C. § 701(b)(1)(G).

186 Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 Or. L. Rev. 583, 585 (2011).

187 *See id.* at 592.

188 *See* Robert M. Chesney, *National Security Fact Deference*, 95 Va. L. Rev. 1361, 1366–85 (2009); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 Hastings L.J. 441, 446 (2005).

189 Busic v. Transp. Sec. Admin., 62 F.4th 547, 550 (D.C. Cir. 2023) (quoting Olivares v. Transp. Sec. Admin., 819 F.3d 454, 462 (D.C. Cir. 2016)).

190 *Olivares*, 819 F.3d at 466 (quoting Holder v. Humanitarian L. Project, 561 U.S. 1, 34–35 (2010)); *see also* Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007) ("[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena."); El-Masri v. United States, 479 F.3d 296, 312 (4th Cir. 2007) ("In assessing the risk that such a disclosure might pose to national security, a court is obliged to accord the 'utmost deference' to the responsibilities of the executive branch.").

191 *See, e.g.*, Arizona v. United States, 567 U.S. 387, 396 (2012) ("A principal feature of the removal system is the broad discretion entrusted to immigration officials."); Reno v.

prison administrators.[192] As Sharon Dolovich has explained, deference to prison officials both informs the construction of legal doctrine and "frames the interpretation and assessment of relevant facts."[193]

2. *Beyond* Chevron

Distinct forms of judicial review also attend agencies' legal interpretations, and the Roberts Court has widened the gap between the two faces. Its recent decision overturning *Chevron*[194] does not reach the second face, where a variety of permissive doctrines continue to underpin deference. Judicial deference is so ingrained for second-face agencies that the question of statutory authorization often goes unmentioned.

In June 2024, the Supreme Court overruled *Chevron*, which for forty years had instructed judges to uphold agencies' permissible statutory constructions when Congress had not addressed the issue in question. The Court had already eroded and constrained *Chevron* deference,[195] but in *Loper Bright*, it jettisoned the doctrine altogether. Proclaiming

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Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 490 (1999) (articulating reasons to defer to deportation decisions).

192 *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 132 (2003) (according "substantial deference to the professional judgment of prison administrators").

193 Dolovich, *supra* note 178, at 245; *see also* Jones v. North Carolina Prisoners' Lab. Union, 433 U.S. 119 (1977) (upholding prison regulations that prohibited union members from holding meetings and soliciting new members despite a district court finding that there was "not one scintilla of evidence" that union organizing interfered with prison operations because courts should defer to the "expert judgment" of prison administrators about "institutional operations").

194 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024).

195 The *Chevron* regime already included many hurdles to deference. *See id.* at 2268 ("[W]e have spent the better part of four decades imposing one limitation on *Chevron* after another."). At "step zero," the agency was required to have used sufficient procedures—generally notice-and-comment rulemaking or formal adjudication—for the *Chevron* framework to apply. *See* United States v. Mead Corp., 533 U.S. 218, 230–31 (2001). And a defective adherence to these processes would also thwart deference. *See* Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 220 (2016). At "step one," the court applied "traditional tools of statutory construction," without deference to the agency, to ascertain whether Congress had spoken to the question at issue; if the court concluded that Congress had addressed the question, there would be no deference. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n.9 (1984); *see also* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 Mich. L. Rev. 1, 33–34 (2017) (finding that courts of appeals resolved cases at step one approximately 30% of the time). Sometimes an intermediate "step one-and-a-half" asked "whether the agency itself recognized that it was dealing with an ambiguous statute" or statutory gap. Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. Chi. L. Rev. 757, 760–61 (2017). Even at "step two," the requirement that the agency's construction be "permissible" was not toothless; for example, the Supreme Court suggested folding the arbitrary-and-capricious test into this step. *See, e.g.*, Judulang v. Holder, 565 U.S. 42, 52 n.7 (2011); *see also* Michigan v. EPA, 576 U.S. 743, 751 (2015) (holding an EPA interpretation unreasonable because it did not consider cost).

that courts must "exercise independent judgment in construing statutes,"[196] *Loper Bright* invites the judiciary to more stringently police how agencies wield their power. In the dissent's formulation, courts are now "the country's administrative czar."[197]

Moreover, although *Loper Bright* overrules *Chevron*, it appears to leave undisturbed anti-deference rules the Court had articulated in recent years as carve-outs to *Chevron*. Most notably, the major questions doctrine means that normal principles of statutory interpretation do not govern questions of vast "economic and political significance."[198] Instead, a heavy thumb lies on the scale against the agency: Courts will presume that Congress does not intend the agency to act in the absence of "clear congressional authorization."[199]

Second-face agencies wield powers to kill, detain, and surveil that infringe on life and fundamental bodily autonomy and can only be understood as "major." Yet, they appear not to be subject to the major questions doctrine or similar judicial constraints. Indeed, it would be more apt to say that an inverse major questions doctrine applies to the second face: Courts assume that statutory silence indicates that questions of great significance have been entrusted by Congress to the executive branch, as they bestow sweeping deference on national security, immigration enforcement, and prison agencies. In part, this reflects the lumping of Congress and the President together into the "political branches" discussed above.[200] Contrasting these political actors to the judiciary—in a way that the Court has rejected for first-face major questions[201]—courts bless substantial delegation. The more significant the issue, the bigger the question, the more likely it seems the judiciary will believe it entrusted to the executive rather than open to judicial policing. As the Court described its approach in *Ziglar v. Abbasi*, "courts traditionally have been reluctant to intrude upon the

196 *Loper Bright*, 144 S. Ct. at 2269; *see also id.* at 2266 (arguing that "statutes, no matter how impenetrable, do—in fact, must—have a single, best meaning" and that courts, not agencies, have "special competence in resolving statutory ambiguities").

197 *Id.* at 2295 (Kagan, J., dissenting).

198 King v. Burwell, 576 U.S. 473, 485–86 (2015). *But see* Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (arguing that the major questions doctrine is "a tool for discerning . . . the text's most natural interpretation").

199 West Virginia v. EPA, 597 U.S. 697, 723 (2022); *see, e.g.*, *Nebraska*, 143 S. Ct. at 2376 (Barrett, J., concurring); Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin., 595 U.S. 109, 117–18 (2022); *see also* Sackett v. EPA, 598 U.S. 651, 679–80 (2023) (applying the federalism clear statement rule to invalidate agency action).

200 *Supra* text accompanying note 143.

201 *See West Virginia*, 597 U.S. at 784 (Kagan, J., dissenting) ("The Court appoints itself—instead of Congress or the expert agency—the decisionmaker on climate policy.").

authority of the Executive in military and national security affairs" unless "Congress specifically has provided otherwise."[202]

Both the Supreme Court and lower courts have accordingly offered a form of "super deference" to agency interpretations in the domain of national security.[203] As the Fifth Circuit summarized governing case law, "[i]n matters like this, which involve foreign policy and national security, we are particularly obliged to defer to the discretion of executive agencies interpreting their governing law and regulations."[204] It is not only the deference that is expansive, moreover, but also the courts' construction of the domain of national security.[205] As Shirin Sinnar explains, for example, recent cases have characterized "all legal disputes involving border agents as related to national security," equating CBP's "mission of stopping the illegal entry of people and goods with national security" and applying "deference at the *wholesale* level to all the agency's activities, rather than the facts of any particular dispute."[206]

The recent decision in *Biden v. Texas* illustrates both the strong deference granted to second-face agencies and the assimilation of immigration regulation into a national-security framework.[207] In

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202 582 U.S. 120, 143 (2017); *cf.* Elena Chachko, *Toward Regulatory Isolationism? The International Elements of Agency Power*, 57 U.C. Davis L. Rev. 57, 112 (2023) ("[W]e now have a new form of non-delegation constraint on agency power in the major questions doctrine. But that constraint appears to have an exception of uncertain breadth for foreign affairs and national security matters."). *Compare Loper Bright*, 144 S. Ct. at 2257–58, 2260 (requiring courts to exercise "independent judgment" in reviewing executive interpretations of regulatory statutes), *with* Trump v. Hawaii, 585 U.S. 667, 686 (2018) (finding that "a searching inquiry" by the Court would be "inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere").

203 William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 Geo. L.J. 1083, 1094, 1098, 1099 tbl.1, 1102 (2008) (studying 1000 cases reviewing statutory interpretations and finding that the Supreme Court ruled for the agency 78.5% of the time when the subject matter involved foreign affairs and national security directly—and 100% of the time when it invoked *Curtiss-Wright*); *see also* Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 Sup. Ct. Rev. 269, 270–71 (2008) (finding that the circuit courts ruled for the executive 85% of the time in the seven years after 9/11, a rate higher than other areas of the law). Although *Curtiss-Wright* focused more on the question of inherent authority, *Dames & Moore v. Regan* imported its executive-friendly stance into the statutory interpretation context. 453 U.S. 654, 677 (1981) (concluding that no statute provided "specific authorization of the President's action suspending claims" but that Congress had accepted "broad scope for executive action in circumstances such as those presented in this case").

204 Paradissiotis v. Rubin, 171 F.3d 983, 988 (5th Cir. 1999).

205 Sinnar, *supra* note 172, at 69 (noting the Court's "selectively expansive interpretation of what constitutes national security" and arguing that the Court "has nearly always deferred to the executive branch when the latter invokes national security").

206 *Id.* at 71 (discussing Egbert v. Boule, 142 S. Ct. 1793, 1804–05 (2022), and noting that this case "involved neither terrorism, nor diplomatic conflicts, nor intelligence or military matters traditionally defined as national security").

207 597 U.S. 785 (2022).

this decision—handed down the same day as *West Virginia v. EPA*—the Court deferred to DHS's interpretation of the Immigration and Nationality Act concerning admissions at the United States' southern border. Reading the Act with an eye to foreign-affairs consequences, the Court stated that Article II entrusts diplomacy to the President and the Court has "declined to 'run interference in [the] delicate field of international relations' without 'the affirmative intention of the Congress clearly expressed.'"[208] The absence of a clear congressional statement is here reason for the courts to defer to the executive—in contrast to *West Virginia*, where the absence of a clear congressional statement was reason for the Court to deny deference. In addition to equating congressional silence or ambiguity with executive power despite the significance of the questions involved, the Court also equated the domain of immigration with that of foreign affairs and national security. Because the same considerations apply "in the context of immigration law, where '[t]he dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy,'"[209] the Court reasoned, it would assume that "Congress did not intend section 1225(b)(2)(C) to tie the hands of the Executive."[210]

A similarly pronounced deference applies to prison administration, portions of which have also been assimilated into a national-security framework.[211] In contrast to the multi-step review that has governed first-face regulations, for example, courts generally do not impose substantive or procedural prerequisites to deference in the prison context. They tend to treat prison regulations "as an undifferentiated monolith, according them deference without asking how they are formulated."[212] They often do not look to the underlying statutory authority at all but rather assume a broad scope of regulatory power;

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208 *Id.* at 805 (alteration in original) (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115–16 (2013)).

209 *Id.* at 805–06 (alteration in original) (quoting Arizona v. United States, 567 U.S. 387, 397 (2012)).

210 *Id.* at 806.

211 For example, foreigner-only prisons find part of the justification for their extraordinary race- and nationality-based administration in immigration law's sweeping plenary power doctrine. *See* Emma Kaufman, *Segregation by Citizenship*, 132 Harv. L. Rev. 1379, 1418 (2019) (noting that the plenary power doctrine empowers prison administrators and contributes to an equal protection jurisprudence largely silent on segregation by citizenship). And courts have deferred expansively to the executive as they consider the administration of the Guantanamo Bay prison, where officers have force-fed detainees and used restraint chairs. *See, e.g.*, Al-Adahi v. Obama, 596 F. Supp. 2d 111, 117–22 (D.D.C. 2009) (rejecting request for a preliminary injunction in part because prisoners could not establish the requisite "deliberate indifference" given judicial deference to the "penal and medical . . . expertise" of staff).

212 Giovanna Shay, *Ad Law Incarcerated*, 14 Berkeley J. Crim. L. 329, 339 (2009).

the question of penological interests displaces any inquiry into the law itself. And substantive review is extremely deferential, even when constitutional claims are at issue.[213]

Courts defend deference to prison administrators on grounds of expertise as well as executive power[214]—but unlike the skepticism about agency expertise that informed the attack on *Chevron*, prison administrator expertise is assumed (despite a weaker claim to specialized knowledge than most first-face agencies possess).[215] In the past few decades, such deference has led the Supreme Court "to uphold policies that radically restricted prison visits, denied reading materials to prisoners in solitary confinement, permitted involuntary administration of antipsychotic drugs, required an admission of guilt for participation in prison programs, and prevented Muslim prisoners from attending Jumu'ah," among other things.[216] As Justin Driver and Emma Kaufman underscore, moreover, "those are only cases that made it to the Supreme Court"; prison law is "so unfavorable" that most claims do not come close.[217]

C. Democracy

Challenges to and defenses of the administrative state often sound in democracy, considering the relationship of agencies not only to the political branches of government but also to the people themselves. Much recent scholarship has called for deeper and broader democratic engagement, especially in rulemaking. As with delegation and deference, however, this democracy critique focuses on the administrative state's

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213 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 89–91 (1987) (asking whether a prison regulation has a "valid, rational connection" to a legitimate governmental interest, whether alternative means are open to inmates to exercise the asserted right, what impact an accommodation of the right would have on guards and inmates and prison resources, and whether there are "ready alternatives" to the regulation).

214 *E.g.*, Overton v. Bazzetta, 539 U.S. 126, 132 (2003) ("We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.").

215 *Cf.* Anna Lvovsky, *Rethinking Police Expertise*, 131 YALE L.J. 370 (2021) (examining how claims of police expertise undercut police authority in court).

216 Driver & Kaufman, *supra* note 178, at 539 (citing *Overton*, 539 U.S. at 129–30, 132–37; Beard v. Banks, 548 U.S. 521, 524–25 (2006) (plurality opinion); Washington v. Harper, 494 U.S. 210, 226 (1990); McKune v. Lile, 536 U.S. 24, 37, 47–48 (2002) (plurality opinion); O'Lone v. Estate of Shabazz, 482 U.S. 342, 351–52 (1987)); *see also* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 302 (2022) ("[T]here is an unmistakable consistency in the overall orientation of the field [of prison law]: it is consistently and predictably pro-state, highly deferential to prison officials' decisionmaking, and largely insensitive to the harms people experience while incarcerated.").

217 Driver & Kaufman, *supra* note 178, at 539.

first face. Precisely because second-face agencies operate outside of the public processes that attend first-face rulemaking, popular engagement in their work is not only unexpected but often unthinkable. Meanwhile, as proposals for robust democratic engagement remain unrealized, public participation in first-face rulemaking is often dominated by private interests that undermine agency capacity and governance.

A similar problem attends transparency laws that are designed to facilitate "monitory democracy" in the administrative state.[218] Statutes like the Freedom of Information Act (FOIA) that contemplate disclosure in the service of public oversight operate unevenly. The activities of second-face agencies are largely exempt from disclosure requirements; secrecy is the currency of the realm. Meanwhile, FOIA and its cousins not only shine a public-minded light on first-face agencies but increasingly impede their work, as corporate interests and ideological organizations deploy these statutes for their own, anti-regulatory purposes.[219]

1. Public Participation

In recent years, the Supreme Court has reduced its account of democratic administration to presidentialism. Equating "the Executive's control" with "that of the people"[220] and describing the President as "the most democratic and politically accountable official in government,"[221] the Court associates democratic will with presidential control.[222] But a distinct account of democratic administration focuses on the people themselves, looking especially to popular participation in notice-and-comment rulemaking. As the D.C. Circuit put it decades ago, "[t]he essential purpose of according § 553 notice and comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies."[223] According to a recent ACUS study, "agencies have relied

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218 John Keane, Power and Humility: The Future of Monitory Democracy (2018).

219 *See* David E. Pozen, *Transparency's Ideological Drift*, 128 Yale L.J. 100, 126–27 (2018).

220 Free Enter. Fund v. Pub. Co. Accountability Oversight Bd., 561 U.S. 477, 499 (2010).

221 Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 224 (2020).

222 At least in the administrative state's first face. *See supra* notes 146–68 and accompanying text. *See generally* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 Hastings L.J. 371 (2022) (canvassing and critiquing the Court's invocations of "democracy"); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 Chi.-Kent L. Rev. 987, 988 (1997) ("Strong presidentialism . . . is premised upon a fundamentally untenable conception of the consent of the governed. The 'will of the people,' as invoked in that effort, is artificially bounded in time, homogenized, shorn of ambiguities—in short, fabricated.").

223 Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980); *see also* Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1027 (D.C. Cir. 1978) ("[I]f the [a]gency . . . has infused the

largely on the notice-and-comment procedures . . . to provide broad democratic accountability and legitimacy."[224]

A significant body of recent scholarship proposes reforms to the rulemaking lifecycle in an effort to enhance direct public engagement with agencies.[225] Drawing on their ACUS study, for example, Michael Sant'Ambrogio and Glen Staszewski argue for more substantial public engagement in the initial development of rules.[226] Blake Emerson endorses a variety of procedures to "provide for public participation by all affected parties," including efforts to "solicit and foster the participation of those groups who . . . are prevented by their social condition from full participation in administrative procedures."[227] Cynthia Farina and her coauthors recommend "online public learning and participation platform[s]" to improve deliberative public involvement in rulemaking.[228] Jim Rossi and Kevin Stack propose proxy representation in notice-and-comment rulemaking.[229]

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administrative process with the degree of openness, explanation, and participatory democracy required by the APA, it will thereby have 'negate[d] the dangers of arbitrariness and irrationality in the formulation of rules.'"); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 65–66 (1969) ("Rule-making procedure which allows all interested parties to participate is democratic procedure."); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1712 (1975) (discussing one model of administrative legitimacy in which "[a]gency decisions made after adequate consideration of all affected interests would have, in microcosm, legitimacy based on the same principle as legislation").

224 MICHAEL SANT'AMBROGIO & GLEN STASZEWSKI, ADMIN. CONF. OF THE U.S., PUBLIC ENGAGEMENT IN RULEMAKING 15–16 (2018); *see also id.* at 17 ("The most well-known tool for engaging the public in rulemaking is the notice-and-comment process required by the APA.").

225 Like the perpetual crisis of administrative legitimacy, JAMES FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS & AMERICAN GOVERNMENT 10 (1978), proposals to enhance participation in response to the crisis are recurring, *see, e.g.*, Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 359 (1972) ("[W]hen government agencies are challenged as being unresponsive to public needs and to the public interest, one 'solution' frequently suggested is to broaden citizen involvement and participation in administrative decision making.").

226 Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U.L. REV. 793, 831–55 (2021) (arguing that "public engagement early in the rulemaking process offers a normatively more satisfying way to democratize rulemaking").

227 EMERSON, *supra* note 13, at 173; *see also* Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. REV. 104, 133 (2021) (proposing a presidential directive requiring "that public engagement must be egalitarian and inclusive, ensuring that no major regulations are proposed without meaningful consultation with those for whom the laws and regulations are designed to protect").

228 Cynthia R. Farina, Mary J. Newhart, Claire Cardie & Dan Cosley, *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 396–97 (2011).

229 Jim Rossi & Kevin M. Stack, *Representative Rulemaking*, 109 IOWA L. REV. 1, 8, 45–49 (2023).

Mariano-Florentino Cuéllar suggests administrative juries made up of members of the public to comment on rules.[230] And more.[231]

Scholars committed to democratic administration are, in part, diagnosing a problem. Contemporary rulemaking invites "public participation," purportedly legitimating agency decisionmaking in the process. But it is often private interests that fill up the docket. For first-face agencies ranging from the EPA to FDA, the SEC to the CFPB, public participation frequently impedes public-interested regulation. When most agency meetings in the rule-development stage are with industry groups, when most comments on a proposed rule are from industry groups, and when courts then review agency rulemaking in light of the record created by industry groups, "well-heeled industry players [can] slow things down and build in exceptions to benefit themselves . . . [while tying] agencies in bureaucratic knots and bleed[ing] much-needed resources."[232] In the first face, "public participation" may not so much engage a broad public as sap administrative capacity in the service of private interests.

Meanwhile, proposals to democratize and deepen public participation in rulemaking processes do not extend to second-face agencies. Because they treat notice-and-comment regulation as the key site of democratic engagement, these proposals effectively apply only to the first face of the administrative state. While first-face agencies do much of their work through rulemaking, second-face agencies do

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230 Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 Admin. L. Rev. 411, 490–97 (2005).

231 *See, e.g.*, Christopher S. Havasy, *Relational Fairness in the Administrative State*, 109 Va. L. Rev. 749, 757 (2023) (arguing that "all persons potentially affected by an agency action must have the opportunity to deliberate with the agency during administrative decision-making"); Rahman, *supra* note 13, at 1707 (proposing various "footholds for affected constituencies to engage more directly, sharing in the exercise of regulatory power"); Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. Rev. 1300, 1307 (2016) (suggesting that "modes of participation that depend logically on [interest] groups' representativeness could require groups to show some markers of second-order participation").

232 Elizabeth Warren, *Corporate Capture of the Rulemaking Process*, Regul. Rev. (June 14, 2016), https://www.theregreview.org/2016/06/14/warren-corporate-capture-of-the-rulemaking-process [https://perma.cc/FXS6-4CFQ]; *see, e.g.*, Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the US. Bureaucracy*, 68 J. Pol. 128, 129 (2006) (finding that "business interests enjoy disproportionate influence over rulemaking outputs"); Nolan McCarty, *Complexity, Capacity, and Capture*, *in* Preventing Regulatory Capture 99, 102 (Daniel Carpenter & David A. Moss, eds., 2014) (noting that in complex policy domains, "regulators are highly dependent on the regulated industry for both policy relevant information and expertise"); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 Admin. L. Rev. 99 (2011) (finding imbalance in interest group engagement and influence for pollution control rules).

their most important work through enforcement.[233] To be sure, there is some second-face rulemaking—though it is particularly likely to be exempted from the APA's notice-and-comment requirements.[234] But most second-face activity does not involve public-facing rulemaking at all.[235] We do not mean to fault scholars for seeking to improve first-face regulatory process; theirs is a better response to anti-administrative objections than complacency.[236] The point is simply that the democratic participation they propose cannot redeem the second face despite its comparatively greater democratic deficit.[237]

The problem, moreover, is not simply that second-face agencies do not currently rely on notice-and-comment rulemaking. It is that participatory rulemaking is more deeply at odds with their work. Commentators have long proposed notice-and-comment processes for at least some second-face agencies,[238] recognizing that something is "seriously askew" when agencies must jump through APA hoops to protect health and welfare and yet face virtually no constraints when they surveil, coerce, or physically restrain individuals.[239] But as Maria Ponomarenko has argued, "administrative rulemaking is not a

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233 *See supra* notes 28–30 and accompanying text; *infra* Section III.A.

234 *See* 5 U.S.C. § 553(a)(1) (exempting from APA rulemaking requirements "military or foreign affairs function[s] of the United States"); *see also, e.g.*, Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 93 (2015) (noting that DOD frequently "avoided the notice-and-comment process"); Shay, *supra* note 212, at 345–56 (collecting cases exempting prison rules from APA requirements).

235 *See, e.g.*, Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U.L. REV. 1, 13–14 (2019) (noting that many police departments lack administrative rules on important aspects of policing).

236 *See* Christopher S. Havasy, *Radical Administrative Law*, 77 VAND. L. REV. 647, 649–50 (2024) (noting that many criticisms of the administrative state concern "the magnitude of agency powers to coerce citizens without proper democratic accountability" and arguing that we might accept the premise of the argument while offering different solutions to "reconcile agency powers with our democratic system of governance").

237 *See, e.g.*, Rahman, *supra* note 13, at 1690–91 ("The problem of arbitrary administrative power is even more pronounced in context of the carceral state, the criminal justice system, the immigration system, and the post-9/11 surveillance apparatus."); *cf.* Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 91–92 (2022) (proposing an agonistic democratic theory for the administrative state, but suggesting that "protection of national security" might not be suited to the proposal).

238 Many have proposed rulemaking for law enforcement agencies, for example. *See, e.g.*, DAVIS, *supra* note 223, at 80; Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 L. & CONTEMP. PROBS. 500, 502–06 (1971); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1833 (2015); Slobogin, *supra* note 26, at 138–40.

239 Slobogin, *supra* note 26, at 133–34; *see* Friedman & Ponomarenko, *supra* note 238, at 1831 ("Of all the agencies of executive government, those that 'police'—*i.e.*, that engage in surveillance and employ force—are the most threatening to the liberties of the American people. Yet, from the standpoint of democratic governance, they are the least regulated.").

particularly apt solution to policing's various ills,"[240] an observation that holds equally true for federal law enforcement. In the national security context, Emily Berman likewise bemoans the democratic deficit while recognizing the insurmountable barrier secrecy poses to public participation,[241] and Robert Knowles concludes that "[s]ecret government activities, by their very nature, cannot involve the broad participation and corresponding accountability . . . that are frequently invoked to legitimize the administrative state."[242] Moreover, the marginalized groups most affected by the second face, like prisoners and migrants, will find it particularly difficult to participate in the regulatory process. Regulatory intermediaries and representatives might help a little,[243] but democratizing the second face through public participation appears a contradiction in terms. And this remains true for ex post monitoring as well as ex ante participation. Both participatory and transparency projects make the first face more permeable to anti-regulatory and democratic engagement alike without touching the second face.

2. Disclosure and Transparency

A commitment to democratic engagement and public accountability extends not only to participation in agency policymaking, but also to monitoring agency activity after the fact. Here, too, the first face comes in for attack while the second face operates in the shadows.

FOIA is the most significant transparency statute. Intended to facilitate the work of "the press and watchdog groups whose mission is to enhance external oversight of governmental activity and promote democratic governance,"[244] the statute requires agencies to furnish records in response to written requests. More specifically, following receipt of a written request, agencies generally must turn over "reasonably describe[d]" records that are not subject to an enumerated exemption within twenty working days.[245] Because it offers broad public access to the workings of government—any person may

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240 Ponomarenko, *supra* note 235, at 5.

241 Emily Berman, *Regulating Domestic Intelligence Collection*, 71 Wash. & Lee L. Rev. 3, 61 (2014) ("Devising rulemaking mechanisms that are inclusive and allow for meaningful input from interested stakeholders presents a challenge when it comes to the domestic-intelligence regime because secrecy presents a formidable barrier to inclusion.").

242 Knowles, *supra* note 135, at 1146.

243 *E.g.*, Berman, *supra* note 241, at 64–65 (proposing a representative role for the Privacy and Civil Liberties Oversight Board); Ponomarenko, *supra* note 235, at 45–59 (proposing regulatory intermediaries within government in lieu of direct public participation).

244 Margaret B. Kwoka, *FOIA, Inc.*, 65 Duke L.J. 1361, 1415 (2016).

245 5 U.S.C. § 552(a)-(b).

request information, for any reason—the law is often celebrated as "a means for citizens to know 'what the Government is up to.'"[246] In the Supreme Court's telling, moreover, such transparency "defines a structural necessity in a real democracy."[247] Associations of FOIA with participatory, democratic governance are legion.[248]

Notwithstanding genuine achievements of the law, FOIA's transparency regime has not been the boon to participatory democracy that its proponents hoped. As David Pozen has documented, for the first-face agencies governed by FOIA, disclosure requirements do more to hamstring regulatory activity than to facilitate public engagement.[249] Although the FOIA requester of popular imagination is an intrepid reporter, the modal one is a commercial firm. Commercial requesters submit more than two-thirds of the FOIA requests received by first-face agencies including the EPA, FDA, and SEC,[250] and these firms "routinely use the records they obtain from FOIA, as well as the threat of FOIA litigation, to slow down the work of, and gain leverage over, their agency overseers."[251] Close behind commercial actors in FOIA's requester ranks are people seeking information about themselves.[252] Commercial and first-person requesters have also been joined by ideological organizations seeking to leverage FOIA to undermine the regulatory authority of first-face agencies like the EPA and National Labor Relations Board (NLRB).[253] Other transparency statutes, including the Government in the Sunshine Act (GITSA), have likewise done more to compromise first-face agency decisionmaking and collegiality than to facilitate public accountability or democratic

246 Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 172 (2004) (quoting Dep't of Justice v. Reps. Comm. for Freedom of Press, 489 U.S. 749, 773 (1989)).

247 *Id.*

248 *See, e.g.*, *Critics Say New Rule Limits Access to Records*, N.Y. Times (Feb. 27, 2002), https://www.nytimes.com/2002/02/27/us/critics-say-new-rule-limits-access-to-records.html [https://perma.cc/34G3-WF5Q] (describing FOIA as "indispensable to the democratic process"); Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 Vand. L. Rev. 1389, 1445 (2000) (describing FOIA as a "quintessential piece of participatory policy-making").

249 *See* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1097, 1123–36 (2017).

250 *See id.* at 1112–23.

251 Pozen, *supra* note 219, at 125.

252 *See generally* Margaret B. Kwoka, *First-Person FOIA*, 127 Yale L.J. 2204 (2018) (arguing that such first-person requests compromise FOIA's ability to serve its public accountability function).

253 *See* Pozen, *supra* note 219, at 126; *see also* Mark Tapscott, *Taming the Nanny State Means Saving the FOIA*, Heritage Found. (Aug. 9, 2004), https://www.heritage.org/homeland-security/commentary/taming-the-nanny-state-means-saving-the-foia [https://perma.cc/6U44-2P24] ("FOIA can be the Nanny State's worst enemy.").

engagement.[254] In the first face, transparency requirements increasingly undermine agency capacity and regulatory agendas.[255]

Even as FOIA and other transparency laws hamstring first-face agencies, however, they barely touch second-face agencies. First, although no agency is exempt as such from FOIA, the statute does not reach the President or her immediate advisors. As in the delegation context, "president" often functions more as an ideological placeholder than an office[256]: Although the D.C. Circuit has concluded that certain first-face components of the Executive Office of the President, including the Council on Environmental Quality, the Office of Management and Budget, and the Office of Science and Technology, are nonetheless covered by FOIA, it has deemed the National Security Council outside FOIA's ambit because of this presidential connection.[257] Moreover, private prisons—including the vast majority of facilities ICE uses to detain immigrants—are not subject to FOIA as are public agencies.[258] For different reasons, second-face agencies generally also lie outside of GITSA's coverage.[259]

Second, FOIA's subject-matter exemptions effectively remove the bulk of second-face agency activity from its purview.[260] For example, intelligence agencies have read Exemption 3, which covers records

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254 *See* Steven J. Mulroy, *Sunlight's Glare: How Overbroad Open Government Laws Chill Free Speech and Hamper Effective Democracy*, 78 TENN. L. REV. 309, 360–67 (2011); David M. Welborn, William Lyons & Larry W. Thomas, *The Federal Government in the Sunshine Act and Agency Decision Making*, 20 ADMIN. & SOC'Y 465, 482 (1989) (concluding that GITSA led agencies to move "from collegial toward individualized, segmented, and fractionalized processes" of decisionmaking).

255 *See* Pozen, *supra* note 219, at 123 ("[T]ransparency has become increasingly associated with institutional incapacity and with agendas that seek to . . . shrink the state.").

256 *See supra* notes 152–68 and accompanying text.

257 *See* Armstrong v. Exec. Off. of the President, 90 F.3d 553, 565–67 (D.C. Cir. 1996) (National Security Council); Pac. Legal Found. v. Council on Env't Quality, 636 F.2d 1259, 1262–63 (D.C. Cir. 1980) (Council on Environmental Quality); Sierra Club v. Andrus, 581 F.2d 895, 902 (D.C. Cir. 1978) (Office of Management and Budget); Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971) (Office of Science and Technology).

258 *See, e.g.*, Private Prison Information Act of 2023, S. 1983, 118th Cong. (introduced June 14, 2023) (proposing requiring private prisons, jails, and detention facilities that detain or incarcerate people for the federal government to comply with FOIA requests). *See generally* Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 462–69 (2014) (discussing the lack of transparency in state and federal prisons).

259 GITSA does not apply to any cabinet departments, including DOD, DOJ, and DHS, though it does apply to all of the major independent regulatory agencies in the first face, such as the FCC, SEC, FTC, and NLRB. *See generally* William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 188 (2009).

260 *See* 5 U.S.C. § 552(b) (providing nine exemptions).

"specifically exempted from disclosure by statute,"[261] to exempt "almost any information about [their] activities."[262] Law enforcement agencies have likewise offered broad readings of Exemption 7, which covers records "compiled for law enforcement purposes,"[263] despite that exemption's qualifications.[264] And second-face agencies have welcomed the courts' recognition "that 'law enforcement' within the meaning of Exemption 7 extends beyond . . . traditional realms into the realms of national security and homeland security-related government activities as well."[265]

Most significant for second-face secrecy is Exemption 1, which covers records that are classified "in the interest of national defense or foreign policy."[266] This national security classification system is, in turn, a creature of executive order that has shielded billions, if not trillions, of pages of government documents from disclosure.[267] Although any agency may invoke Exemption 1, in practice only second-face agencies do. In 2022, for instance, the vast majority of first-face agencies did not invoke Exemption 1 a single time, while DOD invoked it 1,171 times, the CIA 901 times, and the FBI 396 times.[268] These numbers, moreover, represent only a fraction of non-disclosures because agencies frequently fail to respond to requests.[269] And although FOIA decisions may be

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261 *Id.* § 552(b)(3).

262 Elizabeth Goitein, Brennan Ctr. for Just., The New Era of Secret Law 45 (2016); *see* U.S. Dep't of Just., Off. of Info. Pol'y, Statutes Found to Qualify Under Exemption 3 of the FOIA (2016), https://www.justice.gov/d9/pages/attachments/2018/06/21/exemption_3_chart_statutes_litigated_and_found_to_qualify_-_2015.pdf [https://perma.cc/Q6RP-ZWH4].

263 5 U.S.C. § 552(b)(7).

264 *See, e.g.*, David E. McCraw, *The "Freedom from Information" Act: A Look Back at Nader, FOIA, and What Went Wrong*, 126 Yale L.J. F. 232, 239 (2016) ("The Department of Justice's *Guide to the Freedom of Information Act* catalogs one decision after another in which the application of Exemption 7 has spun free of both the statutory language and the exemption's rationale.").

265 U.S. Dep't of Just., Off. of Info. Pol'y, FOIA Guide, 2004 Edition: Exemption 7, (2021), https://www.justice.gov/archives/oip/foia-guide-2004-edition-exemption-7 [https://perma.cc/Z67Q-USXX] (collecting cases).

266 5 U.S.C. § 552(b)(1).

267 *See* Pozen, *supra* note 219, at 154–55. *See generally* Elizabeth Goitein & David M. Shapiro, Brennan Ctr. for Just., Reducing Overclassification Through Accountability 21 (2011), https://www.brennancenter.org/sites/default/files/legacy/Justice/LNS/Brennan_Overclassification_Final.pdf [https://perma.cc/6C88-2ZSW] (describing the problem of overclassification and noting that "[a] culture of secrecy has become a seemingly permanent feature of the national security establishment, even though the Cold War conditions and assumptions that arguably supported such a culture no longer obtain").

268 *See* U.S. Dep't of Just., Off. of Info. Pol'y, FOIA Exemption Claims (2022) (on file with authors).

269 *See, e.g.*, Staff of H. Comm. on Oversight & Gov't Reform, 114th Cong., FOIA Is Broken: A Report (2016) (noting that DHS is responsible for more than two-thirds of all backlogged requests and that DHS leadership imposed requirements that "corrupted the

reviewed, courts have "adopted a deferential posture to the executive branch on national security matters" and "almost never overturn agency classification decisions."[270]

Considering the first and second faces of the administrative state together, a perverse regime comes into view. Transparency laws increasingly incapacitate first-face agencies and undermine their regulatory projects. Meanwhile, FOIA and its cousins "fail to enforce disclosure requirements in the areas of federal governmental performance where they are most needed: to evaluate decisions regarding such key political issues as national security and foreign relations."[271] The more secret, the more coercive, the more violent agency activities are, the more likely transparency statutes will not reach them. As Pozen concludes, at the same time as transparency laws began to place ever-more "onerous demands on the domestic policy process, they grew increasingly detached from the state's most violent and least visible components. While the NLRB continually runs into the strictures of FOIA, FACA, GITSA, and the APA, the National Security Agency runs riot."[272]

III
Taking the Second Face Seriously

Recent case law and scholarship abound with claims that the administrative state infringes individual liberty and thwarts popular self-governance.[273] The Supreme Court worries about the threat to "liberty" posed by "the coercive power of the state."[274] Scholars ground

agency's FOIA compliance procedures, exerted political pressure on FOIA compliance officers, and undermined the federal government's accountability to the American people").

270 Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 Yale L. & Pol'y Rev. 399, 407 (2009); *see* Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. Rev. 185, 214 (2013) ("Despite two attempts by Congress to establish de novo judicial review of decisions to withhold records based on national security, courts acknowledge outright the deference they afford to claims of national security classification."); Pozen, *supra* note 249, at 1118 ("In most Exemption 1 cases, courts grant the government summary judgment without allowing discovery or performing in camera inspection of the requested records . . . ."). Outside of the FOIA context, the state secrets privilege has been broadly construed to shield national security information from disclosure in civil litigation. *See supra* note 172.

271 Mark Fenster, *The Opacity of Transparency*, 91 Iowa L. Rev. 885, 935 (2006).

272 Pozen, *supra* note 219, at 156.

273 *See, e.g.*, Emerson, *supra* note 222 (discussing conceptions of "liberty" and "democracy" in recent cases); Metzger, *supra* note 1, at 17–46 (canvassing judicial and scholarly attacks on the administrative state).

274 Seila L. LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197, 219 (2020); *see also, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring) (warning of "an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds

sweeping charges of administrative unconstitutionality in arguments about freedom and representative government.[275] Their bogeymen are the CFPB, EPA, DOT, and other first-face agencies. Although second-face agencies pose considerable threats to individual liberty and democratic self-government, they do not come in for the same criticism. To the contrary, mainstream case law and scholarship treat physical force, violence, and coercion not as core aspects of administration but as a sort of extra-administrative domain. But second-face administrative law is administrative law. Still more, as we have described above, it is privileged administrative law. As judicial decisions have increasingly constrained first-face agencies while blessing the power of the second face, administrative law has come to aggrandize the parts of the state that are most undemocratic, non-transparent, and unaccountable—the very things this law is supposed to preclude.

Prescriptions for addressing the asymmetry between the administrative law governing the first face and the second face must await future work. Among other things, a complete normative account will require engagement with constitutional theories of executive power and Article II that lie beyond the scope of this initial foray.[276] It will also require a deeper understanding of the distinctive tools used by second-face agencies that have been neglected by doctrine and scholarship. In particular, we need new studies of enforcement, a mainstay of second-face agencies that has fallen out of administrative law theory, as well as engagement with social science literatures that treat violent and coercive state structures as an interlinked whole.

In this Part, we simply suggest why the adminstrative state's self-styled detractors and defenders alike should attend more closely to the second face. Taking the second face seriously points to tensions in the intellectual commitments of both the pro- and anti-administrative camps, tensions that flow into doctrine, scholarship, and political debates. Most obviously, even as conservative critics have driven the project to

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no comfortable home in our constitutional structure" and arguing that the "cost is to our Constitution and the individual liberty it protects"); West Virginia v. EPA, 597 U.S. 697, 738 (2022) (Gorsuch, J., concurring) ("The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty."); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring) (criticizing agency action as "[a] form of Lawmaking Made Easy, one that permits all too easy intrusions on the liberty of the people").

275 *See, e.g.*, David E. Bernstein, Rehabilitating *Lochner* (2011); Hamburger, *supra* note 113; Douglas H. Ginsburg & Steven Menashi, *Our Illiberal Administrative Law*, 10 N.Y.U. J.L. & Liberty 475 (2016).

276 As we have suggested, the capacious national security and immigration powers claimed by the second face today lie beyond common understandings of Article II authority, *see supra* note 114, but we do not explore the constitutional bounds of executive power here.

retrench the administrative state, they have excised the second face from their attacks. But the second face poses significant challenges to the traditional conservative ideal of a minimal state, challenges that will only grow more apparent if the Trump Administration concentrates the conjoined power of second-face agencies on a massive deportation program or other domestic enforcement.

If conservative critics of the administrative state must take the second face more seriously, however, so too should liberal and progressive supporters consider whether a muscular defense of the administrative state necessarily sweeps in second-face as well as first-face agency activity. As administration shifts increasingly to enforcement, support for the administrative state as such may become harder to square with commitments to anti-violence and anti-subordination.

A. Anti-Administrativists and the Second Face

The conservative movement is rapidly changing, and its populist, nationalist strains may seek to defend an empowered second face with other logics—including openly autocratic and authoritarian ones.[277] But for the administrative-skeptic conservatives whose criticisms have long driven the project to retrench the administrative state, one thing is clear: Intellectual support for a libertarian, minimal state does not cohere with their simultaneous deference to the second face. Massive, bureaucratic, and in no way minimal, the administrative state's second face sweeps well beyond the scope of the night-watchman state of traditional conservative thought. An honest reckoning with the second face requires a very different approach to these agencies than conservative intellectuals and jurists have taken.

Although the conservative critique of administration is often framed as an account simply of what the Constitution requires and forbids,[278] we can discern in it a coherent normative vision of the state as a limited public authority that mostly provides for the common

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[277] Of note in this regard is the recent surge of interest among conservatives in Nazi jurist Carl Schmitt. *See, e.g.*, Ben R. Crenshaw, *Ancient Friends, Modern Enemies*, Am. Mind (Dec. 14, 2023), https://americanmind.org/salvo/ancient-friends-modern-enemies [https://perma.cc/M3V7-LLVD]; N.S. Lyons, *The Temptations of Carl Schmitt*, Substack (Feb. 14, 2023), https://theupheaval.substack.com/p/the-temptations-of-carl-schmitt [https://perma.cc/53NS-AGZQ]; *see also* Jennifer Szalai, *The Nazi Jurist Who Haunts Our Broken Politics*, N.Y. Times (July 15, 2024), https://www.nytimes.com/2024/07/13/books/review/carl-schmitt-jd-vance.html [https://perma.cc/ZX79-TNDH] (discussing J.D. Vance's invocation of Schmitt).

[278] Conservative critiques of the administrative state have often sounded in separation of powers formalism, *see supra* Sections II.A–B, and in originalism, *see, e.g.*, Gary S. Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002). Some scholars and judges, notably several Supreme Court Justices, have developed an approach that combines both. *See, e.g.*, Gundy v. United States, 588 U.S. 128, 152–67 (2019) (Gorsuch, J., dissenting); Dep't

defense and the non-violent legal resolution of disputes. This pedigreed intellectual vision of the state as guarantor of physical security[279] makes most sense of the doctrinal gulf between the two faces: The first face is to be feared, and fought, for its "easy intrusions on the liberty of the people,"[280] while intrusions on liberty by the second face are necessary for security and public order.

Many thinkers on the left have critiqued these normative commitments. We wish to emphasize a descriptive point. The vision of the security state underpinning these intellectual commitments is not the contemporary second face. Today, the administrative state's second face focuses increasingly on policing internal threats to government legitimacy and executive political projects, not just those that pose physical risks to the public. It collects data on an ongoing basis without regular judicial oversight or evidence of specific threats.[281] It also operates the most extensive welfare programs that exist in the modern American state,[282] and it has long used industrial policy and government subsidies to support the private firms with which it contracts.[283] Superficially, the

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of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 69–76 (2015) (Thomas, J., concurring in the judgment).

279 The leading modern philosophical argument for the minimal state is Robert Nozick, Anarchy, State, and Utopia 3–146 (1974).

280 Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).

281 *See, e.g.*, Charlie Savage, *C.I.A. Is Collecting in Bulk Certain Data Affecting Americans, Senators Warn*, N.Y. Times (Feb. 10, 2022), https://www.nytimes.com/2022/02/10/us/politics/cia-data-privacy.html [https://perma.cc/U36M-FMDZ].

282 The U.S. military welfare system, which over the past five decades has served about ten million personnel and tens of millions of family members with housing, medical care, child care, education, and dozens of other programs, expanded even as welfare programs for most Americans contracted in the 1980s. *See* Mittelstadt, *supra* note 18, at 2–5. And by law, prisons, jails, and immigration detention centers function as welfare providers, offering detained people housing, food, medical services, and sometimes education or training—that is, unless they fail to provide constitutionally adequate conditions of confinement. *See, e.g.*, Christian Henrichson, Joshua Rinaldi & Ruth Delaney, Vera Inst. of Just., The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration 4, 14–15 (2015).

283 It was this interpenetration of the U.S. defense establishment and its contractors after World War II that led Dwight Eisenhower to warn of the "military industrial complex." *President Dwight D. Eisenhower's Farewell Address*, Nat'l Archives (July 15, 2024), https://www.archives.gov/milestone-documents/president-dwight-d-eisenhowers-farewell-address [https://perma.cc/V6CL-6QM9]. The United States developed major defense industrial policy initiatives during World War II and the Cold War, and policymakers have recently championed another such initiative. *See* Gregory Michael Hooks, Forging the Military-Industrial Complex: World War II's Battle of the Potomac 125–62 (1991) (describing development of industrial policy by the Pentagon); Gregory Hooks, *The Rise of the Pentagon and U.S. State Building: The Defense Program as Industrial Policy*, 96 Am. J. of Socio. 358 (1990); *Rebuilding the Arsenal of Democracy: The Imperative to Strengthen Competition Between the U.S. and the Chinese Communist Party*, 118th Cong. (2024). *See also generally* Luke A. Nicastro, Cong. Rsch. Serv., R47751, The U.S. Defense Industrial Base: Background and Issues for Congress (2024) (describing the "network of organizations,

second face may seem to be a "night watchman"—but it is far from minimal, and it is not limited to preserving physical security.

Yet even as the scope, scale, and powers of the second face exceed any plausible vision of a minimal state, libertarian-leaning conservative jurists and scholars have remained reliable supporters of the second face. Their support has generated the gulf between first- and second-face doctrine we chart in Part II.[284] For many years now, the Roberts Court's encouragement of second-face agency enforcement has clashed with its professed solicitude for individual liberties. The Court's separation of powers formalism has placed enforcement at the heart of administrative practice. Its bright-line approach to the separation of powers treats all agency action as executive in nature. It has suggested that agencies are wielding executive power even when they engage in rulemaking (traditionally understood as quasi-legislative) and adjudication (traditionally understood as quasi-judicial). And it has further treated enforcement—the quintessential use of executive power—as a matter of unreviewable discretion. In one sense, the Roberts Court is instructing the executive branch on the appropriate focus of agency action: An administration that hopes to be effective will pursue the administrative activity traditionally understood as executive, enforcement, which is highly correlated with second-face activity.

For reasons other than the Court's suggestion, the Trump Administration has, indeed, concentrated its agenda on second-face enforcement.[285] At the same time as it fires tens of thousands of government employees from first-face agencies and eviscerates regulatory capacity, it has deployed increasing numbers of soldiers at the border[286] and arrogated agency resources for a mass deportation

facilities, and resources," including commercial for-profit firms, that supply the DOD "with defense-related materials, products, and services").

284 To the extent the Supreme Court's doctrine is often grounded in a commitment to a minimal state, the gap between theory and reality may explain subtle but important aspects of its rhetoric. The Court uses the term "administrative state" when talking about the first face only, and it is this "administrative state" that it describes as a threat to liberty. But the second face is part of the administrative state—and, as we have discussed, it is the greater threat to the individual liberties critics of the administrative state purport to prize.

285 *See generally* David Mednicoff, *Trump May Believe in the Rule of Law, Just Not the One Understood by Most American Lawyers*, Conversation (June 5, 2018), https://theconversation.com/trump-may-believe-in-the-rule-of-law-just-not-the-one-understood-by-most-american-lawyers-97757 [https://perma.cc/3DLZ-DRJP] ("Trump seems to view the rule of law as deference to political authority and efficient law enforcement. This includes institutions that execute laws, which might be summarized as 'cops, courts and clinks' (jails).").

286 *See* Lolita C. Baldor, *Pentagon Sends More Troops to U.S.-Mexico Border, Bringing Total to 3,600*, PBS (Feb. 7, 2025), https://www.pbs.org/newshour/politics/pentagon-sends-more-troops-to-u-s-mexico-border-bringing-total-to-3600 [https://perma.cc/DQM7-P8Q7].

plan that Trump aide Stephen Miller calls "an undertaking every bit as . . . ambitious as building the Panama Canal."[287] Some of its plans, still taking shape as of this writing, are only possible because resources and legal authorities in the second face are fungible and constraints are vague. Even as it attempts to purge FBI agents seen as insufficiently loyal,[288] the administration has detailed FBI and DEA officers and U.S. Marshals to interior enforcement work.[289] It has used military planes for removals and the Guantánamo military base for immigration detention, with plans to use domestic bases currently in progress.[290] And it has proposed shifting first-face capacity, such as IRS investigative teams, to immigration enforcement.[291] Readers no doubt will be able to identify further developments after this Article goes to press. By crafting an administrative law that understands the administrative state as fully executive, the Supreme Court has cleared a path for Trump to govern largely through the second face.

But as the courts begin to review a barrage of Trump Administration enforcement actions, the inconsistency between searching review of first-face administration and permissiveness concerning second-face enforcement may become unsustainable. Critics of the administrative state must account for enforcement as administration. More generally, jurists and scholars of all stripes should consider what the law has to say about enforcement activity as the executive branch's preferred policy lever. Despite excellent work

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287 Charlie Kirk, *Sweeping Raids, Mass Deportations: Donald Trump's 2025 Plan to Fix the Border*, Charlie Kirk Show, at 19:24 (2023), https://thecharliekirkshow.com/podcasts/the-charlie-kirk-show/sweeping-raids-mass-deportations-donald-trumps-202 [perma.cc/A6MR-WDYY] (discussing the "largest deportation force in history for Trump's second term" with Stephen Miller).

288 *See* Adam Goldman, William K. Rashbaum, Maggie Haberman & Glenn Thrush, *Top F.B.I. Agent in New York Vows to 'Dig In' After Removals at Agency*, N.Y. Times (Feb. 2, 2025), https://www.nytimes.com/2025/02/02/us/politics/fbi-new-york-email-trump.html [https://perma.cc/DED4-E3JV].

289 *See* Nick Miroff & Marianne LeVine, *ICE Struggles to Boost Arrest Numbers Despite Infusion of Resources*, Wash. Post (Feb. 15, 2025), https://www.washingtonpost.com/immigration/2025/02/15/ice-arrests-immigration-deportations [https://perma.cc/ECL2-2PGM].

290 *See* Zolan Kanno-Youngs, Hamed Aleaziz & Eric Schmitt, *Trump Plans to Use Military Sites Across the Country to Detain Undocumented Immigrants*, N.Y. Times (Feb. 21, 2025), https://www.nytimes.com/2025/02/21/us/politics/migrants-military-sites.html [https://perma.cc/76ZC-994K]; Hamed Aleaziz & Carol Rosenberg, *Trump Administration Moves More Migrants to Guantánamo Bay*, N.Y. Times (Feb. 23, 2025), https://www.nytimes.com/2025/02/23/us/politics/trump-migrants-guantanamo-bay.html [https://perma.cc/2AW8-MWFP]; Annie Correal, *What to Know About Trump's Military Deportation Flights*, N.Y. Times (Jan. 31, 2025), https://www.nytimes.com/2025/01/31/world/americas/trump-military-deportation-flights.html [https://perma.cc/2XX4-TW7E].

291 *See, e.g.*, Hamed Aleaziz & Andrew Duehren, *I.R.S. Agents Are Asked to Help With Immigration Crackdown*, N.Y. Times (Feb. 10, 2025), https://www.nytimes.com/2025/02/10/us/politics/irs-dhs-immigration.html [https://perma.cc/NPC5-PCUA].

focused on particular agency practices and questions of presidential control over enforcement decisions,[292] enforcement remains minimally described by the APA, difficult to challenge in court using existing legal strategies, and undertheorized in the literature.[293] Developing a full account of enforcement requires studying and conceptualizing administrative law with different tools.[294]

B. Administrative Champions and the Second Face

If conservative thought about the minimal state cannot justify support for the second face, liberal and progressive defenses of an empowered state may rationalize more second-face activity than these groups desire. The conservative attack on the administrative state has for decades found an answer on the left. Sympathetic jurists and scholars have described a robust administrative state as a vehicle for democratic will, a conduit for expertise in service of the public welfare, and a tool to promote communal interests threatened by powerful private actors.

But arguments for a robust administrative state rooted in democracy, welfarism, expertise, and communitarianism can vindicate second-face coercion even as they validate strong regulation and a generous safety

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[292] *See, e.g.*, Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. Rev. 1031, 1033–34 (2013) (considering presidential control over agency enforcement); Rachel E. Barkow, *Foreword: Overseeing Agency Enforcement*, 84 Geo. Wash. L. Rev. 1129, 1137 (2016) (seeking to "shine a spotlight on enforcement discretion as a standalone problem of agency oversight and to begin to catalog approaches for addressing it"); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L.J. 104 (2015) (analyzing immigration enforcement); Joy Milligan, Plessy *Preserved: Agencies and the Effective Constitution*, 129 Yale L.J. 924 (2020) (studying civil rights enforcement); Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 Yale L.J. 2182, 2207 (2016) (evaluating the budget as a source of control over enforcement).

[293] Even when enforcement is acknowledged, it is not given the same attention as rulemaking and adjudication. *See, e.g.*, Richard J. Pierce, Jr., Administrative Law: Concepts and Insights 2 (2025) ("Most agencies perform myriad functions, including investigating, enforcing, reporting, record-keeping, and publicizing. The two most important agency functions are adjudicating and rulemaking."). Rulemaking has received much more attention than adjudication in recent years, though this has begun to change. *See, e.g.*, Cox & Kaufman, *supra* note 14, at 1782, 1817–18; Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 Wis. L. Rev. 1351, 1353 (2019).

[294] Enforcement has not always been absent from the study of administration. It dropped out of the field only in the late twentieth century. In the late nineteenth and early twentieth centuries, "administrative law" referred to the study of public law in action—including constitutional, statutory, and regulatory law. The explicit goal of the field was to understand how agencies actually enforced the laws. Even in the 1960s, Kenneth Culp Davis's *Discretionary Justice: A Preliminary Inquiry* argued that the critical questions of administrative law lay not in more routinized and constrained adjudication or rulemaking but in enforcement decisions. *See* Davis, *supra* note 223, at 7. His words then remain timely today: We should study "what can be done that is not now done to minimize injustice from exercise of discretionary power." *Id.* at 3.

net. When democratically elected officials seek to ramp up immigration enforcement, does democracy require the administrative state to listen or to resist?[295] Where publics perceive crime and disorder, should a welfarist administrative state build prisons or protect the people who would be put inside them? For progressives who oppose state violence and subordination, a commitment to a muscular administrative state may not harmonize with their other values.

Although progressives have invoked the development of the administrative state in defending its legitimacy, this history holds some ambivalent lessons. The second face has grown together with the first. FDR's efforts to strengthen and rationalize national government—now celebrated as a vehicle for democratic constitutionalism—extended beyond regulation to embrace national security and crime control. Administrative "expertise" about race spawned an immigration bureaucracy that scrutinized immigrants' phenotypes[296] and state-run medical programs that sterilized "unfit" women.[297] Still today, first-face functions like tax collection are effective because the second face can exercise the state's power of violence if needed.[298] First-face and second-face functions are often intertwined.

This connection is especially stark when it comes to racial subordination. In recent years, American politics scholars have proposed a dualist framework to describe the United States, arguing that violent, illiberal activity continues to define a state generally understood as a liberal democracy. Joe Soss and Vesla Weaver argue that subordination of

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295 For two perspectives on the boundary problem in democratic theory that suggest different answers as to how the value of democracy would require the administrative state to answer this question, compare Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 Pol. Theory 37 (2008) (democracy requires that foreigners as well as citizens participate in setting immigration policy) with Sarah Song, *The Boundary Problem in Democratic Theory: Why the Demos Should Be Bounded by the State*, 4 Int'l Theory 39 (2012) (democracy requires that the demos be limited to the territorial state).

296 *See* Jay Timothy Dolmage, Disabled upon Arrival: Eugenics, Immigration, and the Construction of Race and Disability 14–21, 25–28 (2018); Thomas C. Leonard, Illiberal Reformers: Race, Eugenics, and American Economics in the Progressive Era 149–52, 154–55 (2016).

297 *See* Adam Cohen, Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck (2016).

298 *See* Charles Tilly, Coercion, Capital, and European States A.D. 990–1990, at 96–98 (1990). Tilly suggested that the coercive state had its own administrative apparatus and that its growth helped to generate growth in the parts of the state that provided services. On Tilly's "bellicist" theory of statebuilding, see, for example, Does War Make States? Investigations of Charles Tilly's Historical Sociology (Lars Bo Kaspersen & Jeppe Strandsbjerg eds. 2017) and Yuval Feinstein & Andreas Wimmer, *Consent and Legitimacy: A Revised Bellicose Theory of State-Building with Evidence from Around the World*, 1500–2000, 75 World Pol. 188 (2023).

race-class subjugated communities is "actively produced through modes of government," including surveillance and physical force,[299] and they call for attention to "the activities of governing institutions and officials that exercise social control and encompass various modes of coercion, containment, repression, surveillance, regulation, predation, discipline, and violence."[300] Related work by Weaver and Gwen Prowse describes such state practices of oppression as "racial authoritarianism."[301]

The administrative state's second face is the main institutional apparatus of racial authoritarianism. The government agencies that engage in surveillance, coercion, and state-sponsored violence are, almost entirely, second-face agencies: prisons and law enforcement, the national security surveillance apparatus, and the immigration bureaucracy. But as the racial authoritarianism literature underscores, these agencies and their functions are bound up with first-face welfare and regulatory activity because "police, courts, and welfare agencies work alongside one another as interconnected authorities and instruments of governance."[302]

If racial authoritarianism is a durable feature of the American state—and, related, if the second face is intertwined with the first face—then progressive support for the administrative state requires, at a minimum, more nuance and perhaps a more fundamental rethinking.[303] If administrative activity continues to shift to enforcement, moreover, support for the administrative state may become ever harder to square with commitments to anti-violence and anti-subordination.

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299 Soss & Weaver, *supra* note 8, at 567.

300 *Id.*

301 Vesla M. Weaver & Gwen Prowse, *Racial Authoritarianism in U.S. Democracy*, 369 Sci. 1176, 1176 (2020) ("[R]acial authoritarianism . . . describes state oppression such that groups of residents live under extremely divergent experiences of government . . . . Yet when police engage in excessive surveillance, incursions on civil liberties, and arbitrary force . . . many scholars of American politics . . . deem them aberrations in an otherwise functioning democracy."); *see also, e.g.*, Michael McCann & Filiz Kahraman, *On the Interdependence of Liberal and Illiberal/Authoritarian Legal Forms in Racial Capitalist Regimes . . . The Case of the United States*, 17 Ann. Rev. L. & Soc. Sci. 483, 485–86, 493 (2021) (arguing that marginalized populations "have been denied basic rights and liberal legal treatment as full citizens not because of oversight or incomplete inclusion" but because "they were, and remain, willfully, systematically subjected to repressive, violent legal rule" by administrative systems like prisons and law enforcement agencies that "routinize, rationalize, and normalize state-administered discriminatory violence").

302 Soss & Weaver, *supra* note 8, at 577; *see id.* ("Core functions of social provision—such as housing, employment, physical and mental health, and education—are carried out on a large scale by agencies of the carceral state."); *id.* at 578 ("The welfare and carceral capacities of the American state developed together and have always been entwined.").

303 *Cf.* Rana, *supra* note 8, at 3 (tracing the interconnection in American constitutional and political history of "the preservation and enhancement of [settler] democratic institutions" and "Indian dispossession and the coercive use of dependent groups").

Conclusion

Attacks abound on the contemporary administrative state. Judicial and academic critics have successfully challenged delegations of regulatory authority from Congress to agencies and demanded tighter presidential control. The Supreme Court recently overruled *Chevron* and the deference regime it had anchored for decades. Even defenders of the administrative state have proposed constraints on agencies in the service of greater democratic engagement and oversight.

These criticisms target only one face of the administrative state—the face turned toward regulation and benefits. Meanwhile, the administrative state's second face, which deploys physical force and surveillance, grows unimpeded. It enjoys open-ended authority, sweeping judicial deference, and exemption from public accountability mechanisms. Second-face agencies have an administrative law all their own.

Recognizing the administrative state's two faces should change our understanding of administrative law. It calls attention to distinctive tools and doctrines associated with second-face agencies that have been neglected in the field. It reveals that American administrative law has facilitated the development of a violent state that continues to expand. And it suggests that, while the Supreme Court purports to be focusing on threats to our constitutional structure, it has been looking in the wrong place. The administrative state's deepest threat to individual liberty and "control [of government by] the people"[304] comes from the overlooked second face.

304 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010).