THE CONSTITUTIONAL DUTY TO SUPERVISE

Gillian E. Metzger

The Internal Revenue Service targets applications for nonprofit tax-exempt status by organizations using the name “Tea Party” for special scrutiny. The National Security Agency repeatedly violates governing privacy requirements and oversteps its authority in conducting surveillance. Newly opened online federal health exchanges fail to function, preventing individuals from signing up for health insurance or determining their eligibility for benefits. Officials at some Veterans Administration hospitals falsify data to hide long delays in scheduling appointments, with allegations that some veterans have died while on waiting lists.

A key theme that links these examples—other than inclusion on any Republican top ten list of Obama Administration scandals—is that they all involve managerial and supervisory failure. Most commonly, the problem is too little supervision, but sometimes the concern is too much supervision or supervision of the wrong kind. The Obama Administration’s experience is hardly unique; similar lists of instances of failed oversight exist for prior administrations, and at all levels of government.

The central importance of supervision should not come as a surprise. Supervision and other systemic features of government administration with which it overlaps—planning, policysetting, monitoring, resource allocation, institutional

1 Stanley H. Fuld Professor of Law, Columbia Law School. Special thanks to Rob Jackson, John Manning, Jerry Mashaw, Jon Michaels, Henry Monaghan, Trevor Morrison, Jeff Powell, Bill Simon, Richard Squire, Kevin Stack, Adrian Vermeule, David Zaring, and participants at faculty workshops at American, Columbia, and Northwestern law schools and Wharton. Perrin Cooke and Evan Ezray provided outstanding research assistance.


6 See Pear, LaFraniere & Austen, supra note 4, at A1 (noting limited capacity of agency overseeing development of federal health); Carol D. Leonnig, Court: Ability to police U.S. spying program limited, Wash. Post, Aug. 15, 2013 (discussin limits on the oversight capacity of the Foreign Intelligence and Surveillance Court); Oppel & Shear, supra note 5, at A1 (noting that investigation revealed VA hospital administrators were responsible for manipulating waiting lists); Weisman, supra note 2 (reporting that a Treasury inspector general blamed the IRS’S inappropriate tea party targeting on ineffective IRS management)

7 See Pear, LaFraniere & Austen, supra note 4, at A1 (identifying impact of White House political considerations and last minute decisions on the flawed rollout of the exchanges); see also Robert J. Delahunty & John C. Yoo, Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause, 91 Texas L. Rev. 781, 784-85 (2013) (faulting President Obama for initiating policy that granted immunity to large group of young illegal aliens).
structures, personnel systems, and the like—are fundamental in shaping how an agency operates and its success in meeting its statutorily-imposed responsibilities. These systemic features are also precisely what distinguish administrative government. Agencies not only adjudicate individual cases, take specific enforcement actions, or issue discrete rules. They do all these activities on a massive scale as part of a broader project of law implementation that requires coordination, investigation, and prioritization. Moreover, if anything the importance of administration is only more acute today, with new approaches to program implementation and regulation meaning that a broader array of actors are wielding broader discretionary authority, often in contexts lacking external controls such as judicial review. As a result, systemic features of administration, in particular internal supervision through planning and ongoing monitoring, are increasingly the linchpin for achieving accountability of federal government programs and actions.

Multiple avenues exist for addressing management and supervisory failures. The recent IRS, NSA, VA, and HHS debacles have triggered extensive media coverage, internal and independent investigations, resignations, proposed legislation and lawsuits, and possibly criminal prosecutions. One route of response that comes much less quickly to mind, however, is constitutional law. Indeed, the centrality of systemic administration in practice contrasts starkly with its virtual exclusion from contemporary U.S. constitutional law. This exclusion of administration takes a variety of doctrinal guises, such as restrictive standing requirements, individualistic mens rea requirements, and limitations on respondeat superior and supervisory liability in suits against government officers. To be sure, there are exceptions: procedural due process challenges and institutional reform litigation represent two instances in which administrative and systemic functioning play a more central role in assessing whether constitutional requirements are violated. But in many ways these exceptions prove the rule, as judicial resistance to engaging with administration has led courts to view them quite narrowly.

In short, constitutional law stands largely aloft from the reality of administrative governance, with the Supreme Court refusing to include systemic

---

8 See Patricia W. Ingraham, Philip G. Joyce, & Any Kneedler Donahue, GOVERNMENT PERFORMANCE: WHY MANAGEMENT MATTERS 2, 8 (2003); Jerry L. Mashaw, The American Model of Federal Administrative Law: Remembering the First One Hundred Years, 78 Geo. Wash. L. Rev. 975, 992 (2010) (noting that, “in many ways, it is the internal law of administration—the memos, guidelines, circulars, and customs within agencies—that mold most powerfully the behavior of federal officials.”); see also PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN 190-97 (“Sound management is essential to policy effectiveness.”).
9 Edward Rubin, It’s Time to Make the APA Administrative, 89 Cornell L Rev 95, 97, 100-137 (2001).
10 See infra Part I.B.
13 See infra Part I.C.
14 See infra TAN88-92, 116-122, 128-130.
features of government operations within the scope of constitutional scrutiny. Of course, constitutional doctrine represents only one dimension of constitutional law. It is judicially-enforced constitutional law, as opposed to forms of constitutional law that emerge from the actions of Congress and the President, or constitutional understandings generated by other actors such as administrative agencies, state and local governments, and social movements. Yet despite the scholarly attention paid to nonjudicial constitutional law of late, the courts continue to play a dominant role as expositors of constitutional meaning. And their willingness to defer to straightforward constitutional interpretation by other branches appears if anything to be dwindling. As a result, the courts’ resistance to incorporating administration serves to exclude it from our most recognized form of constitutional interpretation and perpetuates the view that general aspects of administration fall outside the Constitution’s ambit.

In this article, I argue that the exclusion of systemic administration from constitutional law is a mistake. This exclusion creates a deeply troubling disconnect between the realities of government and constitutional requirements imposed on exercises of governmental power. Although the growing centrality of supervision and oversight has intensified this disconnect, systemic administration’s constitutional importance is an enduring. Authorizing and controlling governmental action, along with constructing the federal government’s structure, are critical constitutional functions. Incorporating systemic administration is essential if the Constitution is to perform these functions in ways that are responsive to modern governance.

As significant, the current doctrinal exclusion of administration stands at odds with the Constitution. Few details of federal administrative government are specified in the Constitution, but its text and structure repeatedly emphasize one particular systemic administrative feature: supervision. This emphasis on

---

17 The same point is true of administrative law doctrines, as several scholars have recently argued. See Daniel A. Farber & Anne Joseph O’Connell, The Lost World of Administrative Law, 92 Tex. L. Rev. 1137, 1140 (2014); Sidney A. Shapiro, Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis, 53 Washburn L. J. 1 (2013); Simon, supra note 11. In addition, some scholars have criticized this divide from a public administration standpoint and offered accounts that assign public administration and public management a constitutional role. See Anthony M. Bertelli, & Laurence E. Lynn, Jr., Madison’s Managers: Public Administration and the Constitution 12, 103-66 (2006); John A. Rohr, To Run a Constitution 15-53 (1986).
supervision is most prominently manifest in Article II’s imposition on the President of a duty to “take Care that the Laws be faithfully executed,” but also surfaces more broadly as a constitutional prerequisite for delegation of governmental power rooted in separation of powers principles and due process. With such delegation comes responsibility to supervise so as to ensure that the transferred authority is used in a constitutional and accountable fashion. A central claim of this article is that the Constitution embodies a duty to supervise that current doctrine has simply failed to acknowledge. The precise contours of this duty vary somewhat with constitutional basis. The Article II version demands supervision by and within the executive branch, while the delegation version extends to the courts, Congress and potentially the states. But under both accounts a duty to supervise represents a basic precept of our federal constitutional structure.

Systemic features of administration thus carry huge practical import and substantial constitutional salience. What then explains their exclusion from constitutional law? The answer is separation of powers concerns and fears of overstepping the judicial role. The Court put the point bluntly in Lewis v. Casey, insisting that it is “not the role of courts, but that of the political branches, to shape the institutions of government in such a fashion as to comply with the laws and the Constitution.” It has elsewhere emphasized that “[t]he Constitution . . . assigns to the Executive branch, and not the Judicial Branch, ‘the duty to take care that the law be faithfully executed.’” Moreover, the concern is not just with respecting the purview of the political branches but also with protecting the courts, as overseeing administration and managing government institutions are not tasks for which the courts have much institutional competence. Courts not only lack political accountability, but they have little expertise in running administrative institutions or in the substantive policy areas at stake.

These concerns about judicial role and competency are real, but they do not justify the Supreme Court’s current refusal to engage with systemic administration. In particular, the challenges that courts would face in directly enforcing a constitutional duty to supervise do not support refusing to recognize that such a duty exists. Direct judicial enforcement sometimes may be appropriate, even if difficult, and recognizing that a supervisory duty exists may open up important avenues for indirect enforcement through subconstitutional law. In addition, recognition of a constitutional duty to supervise may actually serve to mitigate some concerns about courts illegitimately exceeding their proper role. Perhaps most importantly, given the current dominance of the courts in determining constitutional meaning, judicial recognition of a constitutional duty to supervise is critical even if responsibility for enforcing this duty falls entirely on the political branches.

Indeed, recognizing a constitutional duty to supervise is as central to the overall project of constitutional interpretation as it is to better keying constitutional

---

19 U.S.Const. art II, § 3.
law to the realities of contemporary governance. The judicial role concerns implicated by the duty to supervise underscore the need for greater attention to how courts can support constitutional enforcement by the political branches. Recognizing such a duty also highlights the porous boundary between constitutional and subconstitutional law, with statutory or administrative law disputes increasingly functioning as mechanisms for constitutional articulation. Acknowledging this constitutional-subconstitutional interplay and theorizing its proper bounds should be a central focus of contemporary constitutional law and scholarship.

This article aims to demonstrate the constitutional significance of systemic administration and justify recognition of a constitutional duty to supervise. Such recognition should come from all the branches, but is particularly needed from the courts, given their preeminent role in constitutional interpretation and current flawed rejection of administration’s constitutional relevance. Judicial recognition does not automatically translate into direct judicial enforcement, however. Although direct judicial enforcement is appropriate in some circumstances, the more common form of judicial enforcement will be indirect, through administrative law. Indeed, recognizing the constitutional duty to supervise will likely have its greatest import as a basis for reframing current administrative law doctrines and analysis, which—like current constitutional law—insistently exclude administration from their reach. Enforcement will also come from the President and Congress, where recognition of the duty should provoke greater attention to ensuring supervision is adequate to satisfy constitutional demands and not simply political goals.

In what follows, Part I begins by describing systemic administration and supervision as well as the variety of forms administration and supervision can take. It then demonstrates the increasingly critical role that both play by focusing on four major trends in contemporary federal government: privatization, devolution and reliance on the states, crisis governance, and presidential administration. In addition to representing developments that are transforming the shape of modern government, all four represent instances in which judicial review is limited and general administrative constraints like supervision provide critical protections against arbitrary and unaccountable government action. Part I then turns to identifying the numerous doctrinal contexts in which the Supreme Court has rejected or limited the constitutional relevance of systemic administration, with the net result that constitutional law has little to say about key features of modern administrative governance.

Part II turns to the reconstructive project, offering textual and structural justifications for inferring a constitutional duty to supervise and assessing the extent to which historical practice and precedent provide support for such an approach. It focuses on two central constitutional bases that support a duty to supervise: Article II and the Take Care Clause; and structural principles governing delegation. Article II signals the mandatory nature of internal supervision throughout the executive branch, a key feature unfortunately obscured by the ongoing debate about the scope
of the President’s own power over administrative decisionmaking. Supervision’s constitutional importance is also evident by the emphasis elsewhere in the Constitution on hierarchial oversight in connection to delegation, as well as by the necessity of supervision to achieve political and legal accountability.

This part next turns to articulating the scope of the duty to supervise. Although the Article II and delegation bases yield somewhat different accounts, under both bases the duty requires, at its core, systems and structures of internal supervision adequate to preserve the overall hierarchial control and accountability of governmental power. Critically, a variety of different supervisory arrangements ranging from traditional bureaucratic rule-bound oversight to more open-ended performance and monitoring based regimes will often suffice. The critical question then becomes whether such a duty to supervise could be incorporated into constitutional doctrine without exceeding the limits of judicial competence or unduly interfering with the political branches. That question requires a more nuanced assessment than the Court has so far provided. While the barriers to direct judicial enforcement of a duty to supervise are quite substantial in some contexts, that is not true across-the-board. In addition, indirect enforcement through subconstitutional means such as administrative law is often a possibility. And judicial recognition of a constitutional duty to supervise, even one entrusted to the political branches to enforce, could yield significant benefits. These include not only better alignment of constitutional doctrine to the realities of administrative government, but also expanding the standard judicial account of how constitutional demands are addressed in the modern administrative state.

Part III takes up the task of describing what a constitutional duty to supervise might look like in practice. It first examines the possibility of direct judicial enforcement, focusing on enforcement in the contexts of privatization and institutional reform litigation. It then explores the possibility of indirect and subconstitutional judicial enforcement of a duty to supervise through administrative law. Such an administrative law approach could prove particularly important in cooperative federalism and crisis governance contexts, but will entail substantial changes in existing doctrine. This part concludes by examining nonjudicial enforcement, considering what recognizing a duty to supervise might mean for presidential administration and congressional oversight.

I. THE MISMATCH OF CONSTITUTIONAL LAW AND GOVERNMENTAL REALITY

Administration and supervision encompass a wide range of phenomena. Two features merit particular emphasis: the systemic cast of administration, and the broad and diverse forms that supervision can take in practice. A third key point is that systemic administration and internal oversight are becoming increasingly central mechanisms for ensuring accountability in government operations and programs. Yet notwithstanding this growing centrality, a number of doctrines serve to exclude systematic featuriness of administration from constitutional analysis. The
net result is a troubling and expanding mismatch between current constitutional doctrine and contemporary governmental reality.

A. Administration and Supervision

Administration is a very familiar concept. It is used in a variety of contexts, not just in connection to government, and to describe both generic phenomena—household or business administration, for example—as well as specific entities, such as the Obama Administration or Social Security Administration. Yet across these diverse settings the core meaning of administration remains similar: it refers to the running or managing of an organization or activity. As this suggests, administration has a basic systemic character. Though given substance through specific acts and decisions, administration refers more to the overarching operations that underlie and frame these discrete phenomena than the phenomena themselves. Key components of administration are activities such as planning and prioritization, policy creation, program design and evaluation, budgeting and resource allocation, internal organization and structure, intra-agency and inter-agency coordination, networking and collaboration, personnel systems, technology, and — of particular relevance here — supervision.

Supervision, in turn, entails direction and oversight, but it too can take a variety of forms. Supervisors may specify in detail how subordinates are to act or the tasks to be undertaken, and then review closely for compliance. Or they may stipulate certain performance goals, but grant subordinates or organizational units they oversee broad discretion in determining how to achieve those goals. Supervision can also take any number of forms between these poles. It can occur either ex ante, ex post, or on a continuous basis, and be more top-down or collaborative, for example through peer review. The mechanisms of supervision are similarly varied, spanning formal complaint and appeals procedures for challenging specific decisions, ad hoc review, or general monitoring through audits and performance assessment. Agency managers adopt rules and requirements that bind agency personnel and also oversee lower-level decisionmaking through more informal guidance or revisable plans. Supervision involves not simply internal oversight of the agency, but also oversight of private contractors and other


governments implementing federal programs, as well as of interagency undertakings and in some instances review of other agencies’ actions. Supervision most frequently occurs within an agency, but sometimes one agency is given power to supervise actions of another agency or its employees, and there are also federal agencies which undertake supervision across the government as a whole.

Bureaucracy represents the traditional model for modern public administration. In Max Weber’s seminal account, “bureaucracy consists of a hierarchically structured, professional, rule-bound, impersonal, meritocratic, appointed, and disciplined body of public servants with a specific set of competencies.” Supervision in a Weberian bureaucracy takes a decidedly hierarchial and rule-bound form, with a “a clearly established system of super- and subordination in which there is a supervision of the lower offices by higher ones … [and] the possibility of appealing, in a precisely regulated manner, the decision of a lower office to the correspondingly superior authority.”

Federal administrative agencies, along with many other organizations, display many of the characteristics that for Weber typified bureaucracy: major federal agencies are generally hierarchically organized, staffed substantially by career public servants with removal protection; and agency modes of operation are frequently governed by detailed rules. Yet the reality of power in modern government bureaucracies is much messier and complex that the Weberian ideal, with lower level staff and street level employees often exercising substantial discretion over day-to-day implementation of government programs. In any event, federal agencies have always been an amalgam, subject to sometimes dueling political principals and fragmented leadership, containing many more political

29 MAX WEBER, ECONOMY AND SOCIETY 956-63 (Guenther Roth & Claus Wittich eds., 1978).
31 See, e.g., Wilson, supra note 28, at 33-49; MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 13-18 (1980); see also NORMA M. RISTUCCI, HOW MANAGEMENT MATTERS: STREET-LEVEL BUREAUCRATS AND WELFARE REFORM 59-76, 115-17 (2005) (describing role of managers and the greater importance of work cultures and professional norms in determining actions by street-level officials).
appointees than their European counterparts, and heavily dependent on independent state and local governments for program implementation.32

Over the last few decades, moreover, new forms of public administration and oversight have risen to the fore. Brought to prominence at the federal level in the 1990s by the Clinton Administration’s National Performance Review and often falling under the “new governance” or experimentalist labels, these approaches involve greater flexibility and discretion for lower level officials, more decentralized implementation, and greater reliance on private actors.33 Supervision in such arrangements also takes a different guise, one characterized more by planning, audits, ongoing monitoring, performance assessment, and peer review than rule-bound appeals to superior officials or review of specific decisions.34 Evidence suggests that these new approaches have not displaced overarching hierarchial arrangements so much as supplemented them, with the net effect being that multiple forms of supervision occur simultaneously.35

B. Administration’s Contemporary Centrality

Systemic administration and supervision have long been central features of executive branch functioning.36 But they are becoming even more important in contemporary regulatory and administrative contexts, with supervision in particular increasingly critical to preserving the rule of law and governmental accountability. This enhanced importance is evident by considering four recent administrative developments: increasing privatization; expanding federal-state cooperation; crisis governance; and the growth in presidential administration.

1. Privatization. Privatization in the United States involves the government contracting with private entities and individuals for services or in other ways transferring responsibility for performance of governmental functions to private


34 See Noonan, Sabel, & Simon, supra note 24, at 535-48; Simon, supra note 9, at 3, 11-12.


Privatization is perhaps the most prominent manifestation of the broader trend towards more decentralized, collaborative, and discretionary administrative arrangements associated with new governance. As Jon Michaels has noted, private “service contracting is now ubiquitous in military combat, municipal policing, rule promulgation, environmental policymaking, prison administration, and public-benefits determinations.”  Although current hard data on federal service contracting are difficult to come by, the Office of Management and Budget estimated that “$320 billion—or about 60 percent of all federal dollars spent on contracts for goods and services—went to support the contract workforce in fiscal 2010.”

Privatization has many important effects on government programs and institutions. It can inject innovation, flexibility, and improved governmental performance. At the same time, private contractors gain day-to-day control over program implementation, institutional operation, and service delivery. But private contractors are largely exempt from the statutory or regulatory controls applicable to governmental employees and are rarely subject to constitutional demands under the state action doctrine. Political oversight is often lacking, and information on how contractors operate can be difficult to obtain, due in part to the
inapplicability of freedom of information laws.\textsuperscript{42} The result is that privatization poses a serious risk to principles of public accountability and constitutionally constrained governmental power.\textsuperscript{43} The national security context provides a prominent recent example, with the government able to persuade private companies to provide access to massive data on calls and emails outside of the ordinarily applicable legal constraints—ironically, with the extent of such data collection ultimately revealed by a private government contractor.\textsuperscript{44} But similar concerns of avoiding legal constraints exist in more mundane privatization arrangements, such as welfare privatization or other instances of privatized governmental benefits.\textsuperscript{45}

Although traditional governmental controls are limited in privatization contexts, alternative accountability mechanisms may exist, particularly in the guise of contractually-imposed remedies and requirements.\textsuperscript{46} Critically, however, the effectiveness of these contractual mechanisms largely depends on the extent of supervision and contract oversight undertaken by government agencies.\textsuperscript{47} As the botched rollout of federal health care exchanges revealed, poor government oversight can fundamentally undermine government programs by allowing private contractor failures to go unidentified and unaddressed.\textsuperscript{48} Equally important are other systemic features of contracting relationships, such as the degree to which program participants can choose among private service providers or the level and structure of contract payments.\textsuperscript{49} Indeed, viewing privatization systemically is crucial for assessing its full impact on governmental structure, including gauging the extent to which it operates to aggrandize the executive branch and presidential power.\textsuperscript{50} Hence, the tremendous growth in privatized institutions and programs serves to make systemic features of administration especially important as mechanisms for controlling private contractors and as the main point of entry for assessing how privatized programs are operating.

\textsuperscript{42} See Nina Mendelson, Six Simple Steps to Increase Contractor Accountability, in Freeman & Minow, supra note 37, at 241, 244-53; Metzger, Privatization As Delegation, supra note 95, at 1411-37.
\textsuperscript{43} See Verkuil, supra note 38, at 1-6; Metzger, Privatization As Delegation, supra note 95, at 1400-10; Minow, supra note 40, at 1246-55.
\textsuperscript{45} See Metzger, Privatization As Delegation, supra note 95, at 1396-1403.
\textsuperscript{46} See Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 664-66 (2000). An additional check that has arisen in the national security context is private businesses’ reputational concerns. See Nick Wingfield, Microsoft’s top lawyer holds sway in the company and the tech industry, Wall St. J. July, 22, 2014 at 17. A third potential check is the competitive pressure of the market, but only a few companies may have the capacity to bid for government contracts and program participants frequently lack a choice about which contractor to use. See Freeman & Minow, supra note 37, at 2-5; Super, supra note 40, at 407-41.
\textsuperscript{47} See SCHUCK, supra note 8, at 196-97; Freeman, supra note 46, at 608, 623-25, 634-36; Steven L. Schooner, Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced, Government, 16 Stanford L. & Pol’y Rev. 561, 557-60 (2005).
\textsuperscript{48} See Pear, LaFraniere & Austen, supra note 4, at A1.
\textsuperscript{49} See Metzger, Privatization As Delegation, supra note 95, at 1470-80.
2. Cooperative Federalism. Cooperative federalism is an even more familiar aspect of modern government than privatization—one that some have traced back to the nation’s early administrative arrangements, but became particularly prominent first with the New Deal and then with federal health and environmental regulatory initiatives in the 1960s. Cooperative federalism denotes instances in which primary responsibility for implementing federal programs or enforcing federal law is undertaken by state and local governments, under the supervision and oversight of federal agencies. Although the federal government imposes program requirements and conditions that states must meet in order to receive funds, many scholars contend that “the real authority under such regimes often rests with the states which ultimately exercise considerable discretion in making and implementing policy.”

Major legislative and administrative initiatives of the last few years have significantly increased the scope of such federal-state cooperation. Not only are states being asked to play new roles in federal programs, but they often are being given broader discretion and control over the shape of their participation. The Affordable Care Act is a prime example. It relies on state-run health benefit exchanges, expanded federally-funded state Medicaid programs, and state enforcement of its insurance requirements. Under both the statute and governing federal regulations, states have substantial leeway in determining how these functions will be performed. Another manifestation is the recent expansion in the use and scope of administrative waivers in a number of cooperative federalism programs, with the federal government state implementation plans that operate under terms notably different from those set out in governing federal statutes.

At the same time as state discretion in implementing federal programs has increased, courts have restricted the availability of judicial review of state implementation decisions. The culprits here are many, including increased refusal

---

52 See Weiser, supra note 32, at 665, 671; Jessica Bulman-Pozen, Federalism as a Safeguard of the Separation of Powers, 112 Colum. 459, 472-75 (2012).
53 Weiser, supra note 32, at 671. For similar views, see JOHN D. NUGENT, SAFEGUARDING FEDERALISM 172-93 (2009); Bulman-Pozen, supra note 52, at 478-86; Krotoszynski, supra note 98, at 1639. But see NFIB v. Sebelius, 132 S. Ct. 2566, 2606-07 (2012) (invalidating funding conditions imposed under Medicaid, a leading example of cooperative federalism, as unduly coercive of states).
to find implied statutory rights of action, new restrictions on § 1983 suits to enforce federal statutes, heightened standing barriers, and pullbacks in institutional reform litigation.\textsuperscript{56} Indeed, these two trends are mutually reinforcing, as greater state implementation discretion heightens the risk that courts will find barriers to reviewing the substance of state decisionmaking.\textsuperscript{57} Meanwhile, congressional oversight tends to focus on the federal part of federal-state programs, with Congress more likely to intervene to question federal administrative requirements at the states’ behest than investigate state implementation directly.\textsuperscript{58}

Thus again, the net effect is to make federal administrative supervision an increasingly important means for ensuring accountability of state-implemented federal programs. To be sure, state administrative processes and state oversight mechanisms are also central in ensuring that state run programs adhere to governing federal requirements. Moreover, states play an important role in challenging requirements that they consider to be unlawful or excessive, and also in developing new programmatic approaches for the federal government to adopt.\textsuperscript{59} A danger of enhanced federal administrative oversight is that it may undercut these important state functions in national programs. But the costs of allowing states to operate federal programs in ways at odds with core federal policies also needs to be taken into account, and in any event and federal administrative engagement and oversight will be a prime mechanism for changing federal requirements in response to state protests.\textsuperscript{60} The Court’s recent decision in \textit{Douglas v. Independent Living Center}\textsuperscript{61} underscores the growing centrality of federal administrative oversight in the cooperative federalism realm, with the Court there emphasizing the importance to judicial review of federal agency approval of a challenged state policy.\textsuperscript{62}


\textsuperscript{57} See Alexander, 532 U.S. at 288-90; see also Suter v. Artist M., 503 U.S. 347, 358-63 (1992) (refusing to allow suit against state officials under 42 U.S.C. § 1983 to enforce the Adoption Assistance and Child Welfare Act’s requirement that states make “reasonable efforts” to prevent a child from being removed from home, and once removed to reunify the child with family).

\textsuperscript{58} See, e.g., GAO, Grants to State and Local Governments 15-29 (focusing on federal agencies’ ability to manage grant programs and monitor performance by state and local governments); see also Bulman-Pozen, supra note 52, at 496-98 (describing how states can monitor the executive branch for Congress).


\textsuperscript{60} See Gillian E. Metzger, To Tax, To Spend, To Regulate, 126 Harv. L. Rev. 83, 114-15 (2012).

\textsuperscript{61} 132 S. Ct. 1204 (2012).

\textsuperscript{62} Id. at 1210-11 (remanding for reconsideration, emphasizing how the federal agency’s decision altered the posture of the case); id. at 1212-13, 1215 (Roberts, C.J., dissenting) (insisting that no right of action existed to challenge the state’s rate change in court, with the sole remedy available being federal administrative review); see also Horne v. Flores, 547 U.S. 433, 455 n. 6 (2009) (noting that “[No Child Left Behind] does not provide a private right of action” and is “enforceable only by the agency charged with administering it”).
3. Crisis Governance and Presidential Administration. A third development, crisis governance, refers to the expansive assertions of authority made by the executive branch in response to sudden emergencies.\textsuperscript{63} Evident in national security actions taken after the September 11\textsuperscript{th} attacks and more recently exemplified by the dramatic actions by the Federal Reserve and Department of Treasury during the financial crisis of 2008, crisis governance is less clearly a growing administrative phenomenon as opposed to one that is of great salience when it occurs. On the other hand, programs and initiatives adopted in response to crisis events often continue after the immediate urgency has passed, as recent disclosures about ongoing NSA surveillance demonstrate.\textsuperscript{64}

A prominent feature of crisis governance is limited contemporaneous scrutiny by entities outside of the executive branch, including the courts or Congress. To be sure, both the courts and Congress imposed constraints on executive branch national security and financial crisis initiatives.\textsuperscript{65} But as Eric Posner and Adrian Vermeule contend, the need for urgent action means that both congressional and judicial interventions largely occur after-the-fact and often involve substantial deference and delegation to the executive branch.\textsuperscript{66} Moreover, even after-the-fact judicial review is often quite limited, as a result of the types of actions agencies take, statutory exemptions, and justiciability barriers.\textsuperscript{67} \textit{Clapper v. Amnesty International Inc.} provides a prime example of these barriers. There the Supreme Court denied standing to individuals seeking to challenge a national security surveillance program on Fourth Amendment grounds because they could not show interception of their own communications was “certainly impending”—something it was extremely difficult for them to do given the clandestine nature of the program and its targets.\textsuperscript{68}

Crisis governance is itself one manifestation of the fourth trend: expanding presidential administration. Spurred by multiple causes — the birth of the modern


\textsuperscript{66} Posner & Vermeule, supra note 63, at 1643-50, 1654-59; see also Davidoff & Zaring, supra note 65, at 468, 534 (noting lack of judicial review of executive branch actions during the financial crisis).

\textsuperscript{67} See 5 U.S.C. §§ 553(a), 554(a); Clapper v. Amnesty Int’l, 133 S. Ct. 1138 (2013); David Zaring, Administration by Treasury, 95 Minn. L. Rev. 187, 190-94 (2010).

\textsuperscript{68} 133 S. Ct. 1138, 1147-48 (2013)
national administrative state; new economic, social, and global realities; divided government and changed political practices, to name a few — the President today plays a central lawmaking role. Acting through administrative agencies as well as more unilaterally by means of executive orders and presidential memoranda, Presidents wield broad power to set national policy on a wide range of issues. Recent examples include President Obama’s immigration enforcement policies and his directive to the EPA on greenhouse gases, but he is far from the only President to undertake major policy moves in this fashion.

To note the President’s de facto lawmaking role is not to contend that all such presidential assertions of authority accord with the Constitution. Indeed, in *NLRB v. Noel Canning*, the Supreme Court last Term rejected President Obama’s wielding of the recess appointment power in the face of pro forma Senate sessions. But realistically, presidential lawmaking and unilateralism represent a central feature of contemporary federal government. Expanded presidential authority is also a context in which administration and supervision are particularly relevant. This expansion has both spurred and been reinforced by a tremendous growth in distinctly presidential administrative capacity or what is often called the institutional presidency, such as White House staff, OMB, and the Executive Office of the President more broadly. Such increased capacity reflects two key dynamics that Terry Moe identified as accompanying increased popular expectations of presidential leadership: centralization of decisionmaking and politicization of agencies. Current manifestations of these dynamics are centralized regulatory review by OMB and OIRA pursuant to executive order, presidential directives, expanded use of political appointees, and White House policy czars.

External scrutiny of presidential administration occurs more frequently outside of the crisis governance context, but again is often quite limited. Executive orders and other presidential actions can be subject to judicial review if they affect rights or duties of individuals outside the executive branch. Often, however, these

---


70 See Howell, supra note 69, at 6-7, 16-19; Mayer, supra note 69, 4-7.


74 See Kagan, supra note 69, at 2246.

75 See Terry M. Moe, *The Politicized Presidency* in John E. Chubb & Paul Petersen, eds., *The New Direction in American Politics* 238, 244-63 (1985); see also Lewis, supra note 30, at 19- (discussing politicization techniques).


77 See, e.g., Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 583-89 (reviewing and overturning President Truman’s executive order seizing the steel mills)
measures escape judicial scrutiny—either because they are expressly not judicially enforceable, involve actions that are presumptively nonreviewable, or because courts tend to ignore presidential involvement when reviewing agency actions.78 Presidential unilateral actions often trigger congressional attention, but the obstacles built into the legislative process (including the President’s veto power) make enacting legislation overturning such actions quite difficult.79

These limits to congressional and judicial review do not mean that the executive branch operates essentially unconstrained in instances of crisis governance or presidential action. But the relevant constraints come largely from within the executive branch itself, through what are sometimes called the internal separation of powers: internal review structures, involvement of multiple agencies, inspector generals, agency-generated procedural and substantive limitations, professional commitments and reputational concerns, and executive branch adherence to governing law.80 In other words, systemic features of internal administration are again critical to ensuring accountable government.

Moreover, it also bears emphasizing that presidential administration and supervision themselves can be key mechanisms for ensuring executive branch accountability. Justice Kagan famously emphasized the political accountability benefits of presidential administration, and others have focused on the ways that presidential or centralized review can check agency capture or excessive tunnel vision.81 In some instances, such as the Obama administration’s instructions to agencies to grant same sex couples equality rights in a range of contexts after United States v. Windsor, presidential direction helps enforce legal constraints.82 Hence, assessing the constitutionality of the President’s expanded role entails close

78 See, e.g., Franklin v. Massachusetts, 505 U.S. 708, 800-01 (1992) (holding presidential actions are not reviewable for abuse of discretion under the APA); Heckler v. Chaney, 470 U.S. 821, 831-33 (1985) (holding agency nonenforcement is presumptively not reviewable); Exec. Order 12866 §10 (stating executive order does not create rights or duties enforceable in court);
80 See Davidhoff & Zaring, supra note 65, at 537-38; Neal Katyal, Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within, 115 Yale L. J. 2314 (2006); Shiran Shinar, Protecting Rights from Within? Inspectors General and National Security Oversight, 65 Stan. L. Rev. 1027 (2013). Whether, and to what extent these internal mechanisms exert any constraining force is a matter of substantial debate. Compare ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 15 (2010) (constraints come from politics and public opinion, not law) and BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010) (arguing that internal legal offices impose little constraint) with Richard H. Pildes, Law and the President, 125 Harv. L. Rev. 1381, 1403-09, 2014 (arguing that that Presidents have strategic reasons to comply with law and there is little empirical support for the claim they don’t).
attention to systemic administrative features and their full impact on how the government operates.

C. Constitutional Law’s Exclusion of Administration

Administration and supervision’s centrality to the functioning of modern government contrasts mightily with constitutional law, where systemic administration is rendered doctrinally irrelevant. The judicial separation of administration from constitutional law is of long duration, articulated in *Marbury v. Madison*’s famous statement that “the province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.” This separation takes a multitude of doctrinal guises, but they combine to make resistance to incorporating systemic administration an indelible feature of current constitutional law.

1. Structural Constitutional Law: Standing Doctrine and the Separation of Powers. Standing doctrine serves as the frontline in precluding judicial consideration of systemic administration, with its requirement of individualized injury and connected prohibition on suits raising generalized grievances. True, individuals able to demonstrate the requisite individualized injury can challenge government administration, and the determination of what constitutes a generalized grievance is highly malleable. Thus, the generalized grievance prohibition does not operate as a categorical bar to considering challenges to administrative structures. But the Court’s insistence on an individualized focus, along with the high threshold it imposes for proving injury, suggests that the instances in which an individual is able to challenge systemic features of administration will be few and far between. As the Court put the point in *Allen v. Wright*, “suits challenging not specifically identifiable governmental violations of law, but the particular programs agencies establish to carry out their legal obligations …. are rarely if ever appropriate for federal-court adjudication.”

Institutional reform litigation might seem at first a significant exception. The primary aim of institutional reform litigation is to use discrete instances of individual right violations to justify broad remedial measures that reengineer how the institutions or programs at issue are administered. Nonetheless, courts allow

---

85 See id, at 563; e.g., Massachusetts v. EPA, 549 U.S. 497 (2007)
87 468 U.S. 737, 759-60 (1984); see also Clapper v. Amnesty Intl, Inc., 133 S. Ct. 1138, 1147-48 (2013); Lujan, 504 U.S. at 564; Summers v. Earth Island Inst., 129 S. Ct. 1142, 1149-53 (2009) (denying an organization standing to challenge a Forest Service regulation on timber sales as unlawfully promulgated absent identification of a specific timber sale authorized by the regulation that injured its members.)
88 See Charles F. Sabel & William H. Simon, Destabilization Rights, 117 Harv. L. Rev. 1015, 1018-19 (2004). Institutional or structural reform litigation thus one of the most prominent
institutional reform litigation to proceed despite its systemic edge. A recent striking example is Brown v. Plata, involving class actions on behalf of California prisoners with serious medical and mental health disorders. The plaintiffs did not challenge specific “deficiencies in care” to which they were individually subject, but instead alleged that “systemwide deficiencies in the provision of medical and mental health care . . ., taken as a whole,” violated the Eighth Amendment”—a claim the Supreme Court accepted in affirming the lower courts’ remedial order.89

Yet the facts of Plata were extreme, and would be a mistake to read the decision as signaling broad availability of systemic challenges.90 The Court has rejected institutional reform suits on standing grounds precisely because of their unduly systemic character, insisting in Lewis v. Casey that “merely the status of being subject to a governmental institution that was not organized or managed properly” was an insufficient basis on which “to invoke the intervention of the courts,” absent evidence of a distinct and concrete injury caused by that improper management.91 Nor has the Court demonstrated much sympathy for institutional reform litigation of late, critiquing such litigation as entailing judicial assumption of responsibility for administrative choices that should be made by the political branches and state governments.92 Hence, institutional reform litigation

---

89 131 S.Ct. at 1925 n.3, 1940-41; id. at 1952 (Scalia, J., dissenting); see also id. at 1951-52 (“Under this theory, each and every prisoner who happens to be a patient in a system that has systemic weaknesses . . . has suffered cruel and unusual punishment, even if that person cannot make an individualized showing of mistreatment.”).

90 Id. at 1923-28, 1932-37 (documenting the complete failure of California’s prison health system, a failure that had been ongoing for well over a decade, was worsening, and resulted in frequent deaths and unnecessary suffering.)


92 See Horne v. Flores, 553 U.S. 433, 447-50 (2009); Missouri v. Jenkins, 515 U.S. 70, 97-102 (1995). Although institutional challenges continue to be successful in a number of contexts, the conventional view is that there has been a significant retrenchment in broad structural reform by judicial order since the 1970s. See Jeffries & Rutherlgen, supra note 88, at 1408-12 (offering a brief history of structural reform litigation); see also Schlanger, supra note 91, at 564-66 (describing the conventional view). Some scholars maintain that the conventional prediction of institutional reform litigation’s death in federal court are premature, see, e.g., Myriam Gilles, An Autopsy of the Structural Reform Injunction: Oops . . . It’s Still Moving, 58 U. Miami L. Rev. 143, 146-47, 169-71 (2003), and recent decades have witnessed an expansion in lawsuits in some areas, like child welfare, education, or law enforcement. See Catherine Y. Kim, Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After Horne v. Flores, 46 U.C. Davis L. Rev. 1435, 1444-48 (2013). But more of this litigation is in state court or involves the Department of Justice (DOJ) as a plaintiff, pursuant to congressional authorization. See 42 U.S.C. §14141; see also Erica Goode, Some Chiefs Chafing as Justice Dept. Keeps Closer Eye on Policing, N.Y. Times, July 28, 2013, at A28 (describing DOJ’s actions against local police
demonstrates the limitations on judicial consideration of systemic administration as much as it represents a deviation from the norm.

Standing’s barrier to generalized challenges is well known. Less broadly appreciated is the judicial resistance to considering systemic administration that appears in separation of powers challenges. Overall administration would seem particularly relevant to doctrines addressing the constitutionality of different federal governmental structures. Surprisingly, however, consideration of systemic administration in separation of powers analysis is uneven and narrow in scope.

Take, for instance, contemporary nondelegation doctrine. Although challenges to legislation as delegating excessively broad authority to the executive branch are almost uniformly rejected, the basis on which these claims falter has varied over time. Some early post-New Deal cases paid particular heed to how agencies wielded their delegated powers, emphasizing administrative rules or internal procedures that governed agency determinations. More recently, however, the Court has downplayed the role that internal administrative constraints play in assessing a delegation’s constitutionality, insisting that the onus is on Congress to provide an intelligible principle; limitation by an agency is constitutionally insufficient. Post-New Deal jurisprudence emphasizing the importance of government supervision of private delegations has not been questioned, but in these cases the courts never required much by way of actual supervision or probed behind formal provision for government ratification of private decisionmaking, however perfunctory.

Administrative structure surfaces more centrally in cases addressing Article II and the scope of presidential power. Thus, for example, the extent to which an executive branch officer’s decisionmaking is supervised determines whether she qualifies as a principal or inferior officer, resulting in scrutiny of oversight mechanisms in Appointment Clause challenges. Similarly, removal challenges
focus on the extent to which a removal restriction unconstitutionally limits the President’s ability to oversee the executive branch.\footnote{\citename{Free Enterp. Found.}, 130 S. Ct. at 3153-54. (holding that multiple levels of for cause removal protection rendered the President’s control too attenuated); \cite{Morrison v. Olson}, 487 U.S. 654, 692-93, 696 (1988) (concluding that the Attorney General’s ability to remove the independent counsel for cause and the counsel’s obligations to follow Department of Justice policy provided sufficient basis for presidential oversight).}

Yet many important aspects of systemic administration are often excluded from analysis even in the Article II context. Again, emphasis is largely placed on formal oversight mechanisms, rather than on investigating the extent to which an officer’s decisions are actually reviewed or controlled. The Court’s 2010 decision in \textit{Free Enterprise Foundation v. PCAOB} is a case in point, with the majority there zeroing in on one slice of administrative structure—removal power—and discounting other ways in which the Securities and Exchange Commission exercised broad power over the Public Company Accounting Oversight Board’s functions.\footnote{See \textit{Morrison}, 487 U.S. at 695-96 (considering limits on the independent counsel separate from removal in concluding opportunities for presidential oversight were adequately preserved.).} Moreover, removal is an individualistic mechanism of supervision. It focuses on controlling a particular official and assumes that single official can then control how a vast modern agency operates. Perhaps most notably, this Article II case law is largely silent on the idea of presidential oversight as a duty that the President must undertake and not just a power the President must have available. Although \textit{Free Enterprise} described the President as subject to a nondelegatable duty of “active supervision,” the concept of a presidential duty to supervise received no further development there or in other decisions.\footnote{\citename{Clinton v. Jones}, 520 U.S. 681, 713 (1997) (Breyer, J., concurring in the judgment) (“[A] President, though able to delegate duties to others, cannot delegate ultimate responsibility or the active obligation to supervise that goes with it.”).}

\section{2. Individual Rights: The Eighth Amendment, Due Process and Restrictions on Liability for Failed Supervision.} An even clearer pattern of exclusion or limited acknowledgement of systemic administration occurs in the individual rights context. Again, this exclusion is not absolute, with the Court at times giving internal administration mechanisms constitutional significance, such as administrative licensing systems in First Amendment challenges and internal administrative procedures in habeas and \textit{Bivens} contexts.\footnote{See \textit{Gillian E. Metzger, Ordinary Administrative Law as Constitutional Common Law}, 110 Colum. L. Rev. 479, 488-89, 498 (2010).} But there are many other instances in which the Court has refused to accord administration
constitutional salience despite its seeming relevance. More importantly, the Court has developed substantive standards that restrict constitutional consideration of systemic administration and largely eviscerated supervisory liability.

i) Eighth Amendment and Due Process. The phenomenon of anti-systemic substantive standards is clearly evident in Eighth Amendment jurisprudence. Extension of the Eighth Amendment’s prohibition on cruel and unusual punishment to the conditions under which prisoners are held has led to substantial court involvement in the administration and operation of prisons. Yet the tests the Court has developed over time to identify Eighth Amendment violations (perhaps, in part, to limit that involvement) are remarkably individualistic and noninstitutional in their framing. In particular, the Court requires that a prisoner demonstrate not just a grave deprivation—in the Court’s words, a deprivation of “the minimal civilized measure of life’s necessities”—but also that prison officials act with subjective “deliberate indifference” to the harm they are imposing.

Two decisions, Wilson v. Streiter and Farmer v. Brennan, demonstrate the exclusion of administration that results. Wilson involved a §1983 action alleging systemic failures in how an Ohio prison was operated. The Court held that prisoners must demonstrate a culpable state of mind on the part of prison officials that rises to the level of “deliberate indifference” in order for inadequate prison conditions to constitute punishment sufficient to trigger the Eighth Amendment. But as Justice White noted in concurring in the judgment, “[i]nhumane conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. [I]ntent simply is not very meaningful when considering a challenge to an institution such as a prison system.” In Farmer, the Court took this individualistic focus one step further, holding that the requisite test for deliberate indifference was recklessness and that recklessness should be measured subjectively. Thus, to found liability “the official must both be aware of facts from which the inference

101 See id., at 483-84, 519-34 (noting the Court’s failure to require or encourage internal administrative controls to protect against Fourth Amendment violations, despite recognizing their value, and its refusal to ordinary administrative law as a means for encouraging administrative agencies to take constitutional concerns seriously). But see Daphna Renan, The Fourth Amendment as Administrative Procedure, draft, at 21-22 (noting suggestions of an administrative model in some Fourth Amendment jurisprudence).
103 For an account of how an individualistic model has dominated over more systemic approaches in constitutional torts generally, see Christina B. Whitman, Governmental Responsibility for Constitutional Torts, 85 Mich. L. Rev. 225 (1986).
107 501 U.S. at 296.
108 Id at 300-03.
109 Id. at 310.
could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”

Like Wilson, Farmer’s focus is on the state of mind of specific prison officials, not on how the prisons they oversaw actually operated or whether these prisons were administered in a manner well below the norm.

In the due process realm, the reigning Matthews v. Eldridge analysis—under the individual’s private interest at stake is balanced against the government’s interest and the potential accuracy benefits from different or additional procedures—has a decidedly systemic and managerial cast. The relevant governmental interests are overall administrative concerns and accuracy is also defined systemically. Even the individual interest at stake is often abstracted away from the particulars of the plaintiff’s situation. Still, substantial aspects of government administration are denied constitutional relevance even here. A prime culprit is limitation of the types of property interests that trigger due process protection to those to which an individual has “a legitimate claim of entitlement.” This precludes procedural due process scrutiny of the numerous administrative arrangements where administrators exercise broad discretion and such entitlements are deemed lacking. Moreover, in restricting the scope of interests that trigger due process protection the Court has invoked the same concern with inappropriate

---

111 Id. at 837. In truth, Justice Souter’s majority opinion appears to waiver somewhat on exactly how rigorously this requirement of subjective awareness should be enforced, emphasizing that evidence of risks that were “longstanding, pervasive, well-documented, or expressly noted by prison officials in the past” could suffice unless officials could show that they were nonetheless unaware of the risks involved. Id. at 842-44; see also Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 889-92 (2009) (critiquing the individualistic focus of Farmer).

112 Moreover, Farmer similarly justified its individualistic and subjective focus on the argument that otherwise the conditions at issue would not rise to the level of punishment, 511 U.S. at 837-40, thereby defining punishment in terms of “specific acts attributable to individual state officials” instead of as “a cumulative agglomeration of action (and inaction) on an institutional level,” Id. at 855 (Blackmun, J., concurring) (quoting The Supreme Court—Leading Cases, 105 Harv. L. Rev. 177 (1991)).


115 Fallon, Some Confusions, supra note 113, at 311 (“Courts seldom inquire into whether procedures sufficed to ensure fair resolution of a particular case. Attention centers instead on whether decisionmaking structures are adequate to achieve, on average, a socially tolerable level of accuracy.”)

116 Board of Regents v. Roth 408 U.S. 564, 577 (1972).

117 See, e.g., Lightfoot v. District of Columbia, 448 F.3d 392, 400-01 (D.C. Cir. 2006) (Silberman, J., concurring). Preclusion of procedural due process claims in such discretionary contexts leaves open the possibility of a substantive due process challenge, but such a challenge is unlikely to succeed except in cases where a fundamental liberty interest is at stake or the governmental action is so extreme and egregious as to “shock[] the conscience.” County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998).
intervention of the federal courts in “day-to-day administration” evident elsewhere in its case law.  

Failure to train claims represent another interesting linkage between due process—here, substantive due process—and systemic administration. *City of Canton v Harris* held that a municipality could be found to have violated due process for its failure to adequately train its employees, “where the failure to train amounts to deliberate indifference to the rights of person with whom [its employees] . . . come into contact.” *Canton* rests on recognition of the role that general administrative measures such as training and oversight play in preventing constitutional violations, and thus, like *Matthews*, is a rare acknowledgment of systemic administration’s constitutional significance. Even so, application of the deliberate indifference standard has significantly limited the viability of failure to train and failure to supervise challenges. Although such claims occasionally succeed, such a result is rare. It is all the more striking, therefore, that the *Canton* Court justified its imposition of the deliberate indifference standard not on due process’s substantive demands but on the prohibition on respondeat superior liability in suits brought under § 1983.  

### ii) The Denial of Supervisor Liability. The Court famously articulated this prohibition on respondeat superior liability in *Monell v. Department of Social Services*, basing it on the language and legislative history of § 1983. Those bases have come in for substantial criticism, yet the Court has shown little inclination to revisit the issue. Instead, it has often reaffirmed the prohibition on respondeat

---


119 489 U.S. 378, 380, 388 (1989); see also *Collins*, 503 U.S. at 117, 126 (reaffirming the potential availability of a failure to train challenge).

120 See *Canton*, 489 U.S. at 382-83 (indicating that a failure to train is actionable where constitutional violations are substantially certain to result). In addition, *Canton*’s invocation of an objective measure of deliberate indifference suggests more willingness to consider institutional reality in due process failure to train challenges than under the Eighth Amendment. See *Canton*, 489 U.S. at 389-90.

121 See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1359-60 (2011) (emphasizing stringency of deliberate indifference test); Barbara E. Armacost, Organizational Culture and Police Misconduct, 72 Geo. Wash. L. Rev. 453, 472, 476-86 (2004); see also *Board of Comm’rs v. Brown*, 520 U.S. 397, 407-08 (1997) (underscoring *Canton*’s emphasis on liability being tied to a deficient training program because “[e]xistence of a ‘program’ makes proof of fault and causation at least possible in an inadequate training case.”).


123 436 U.S. 668, 691 (1978). As to language, the Court argued that §1983’s imposition of liability on “[e]very person who, under color of [law] … subjects, or causes to be subjected … any …person,” 42 U.S.C. § 1983, to a deprivation of federal rights “cannot easily be read to impose liability vicariously.” 436 U.S. at 692. The legislative history emphasized by the Court was Congress’s rejection of the Sherman Amendment, which would have made cities liable for harms resulting from Klan or other mob riots. Id. at 664, 693-95.

124 For a sampling of these complaints, see, e.g., *Brown*, 520 U.S. at 431-33 (Breyer, J., dissenting) (critiquing both arguments); David Jacks Achtenberg, Taking History Seriously:
superior liability and extended it to the context of *Bivens* suits against federal officers—even though *Bivens* suits are inferred directly from the Constitution and thus are not limited by any underlying statute. Hence, although private employers are vicariously liable for actions taken by their employees in the usual course of employment, public employers are not.

At the same time as denying respondeat superior liability, *Monell* ruled that a municipality could be liable under §1983 “if a municipal ‘policy’ or ‘custom’ … caused the plaintiff’s injury,” as liability in such a case would be direct rather than vicarious. In theory, *Monell*’s policy exception represents another significant incorporation of administration into constitutional rights enforcement. In practice, however, *Monell*’s policy exception has not lived up to its billing. Fear of violating the prohibition on respondeat superior liability has led the Court to restrict liability to actions by an official municipal policymaker with authority to establish the city’s policy in a particular area, to demand a high level of culpability, and to require tight causation “between [a] policymaker’s inadequate decision and the particular injury alleged.” These requirements not only substantially limit the exception’s practical utility, but also preclude consideration of key administrative forces such as street level decisions and practices. In addition, these tight culpability and causation requirements serve to exclude liability for “systemic injuries,” which “result not so much from the conduct of any single individual but from the interactive behavior of several government officials, each of whom may be acting in good faith.”

Perhaps most importantly, the Court’s denial of respondeat superior liability precludes consideration of all of the ways that government agencies control and shape actions by their employees separate from official policies or customs. The focus is put on individual employees, but individual employees’ actions cannot be accurately assessed in isolation from the institutional contexts in which they occur. Instead, agency cultures, practices, and structures profoundly affect how personnel act and the weight given certain types of concerns. In addition, “the threat that

---

127 Brown, 520 U.S. at 403; see Monell, 436 U.S. at 694.
128 Brown, 520 U.S. at 410, 415; Canton, 489 U.S. at 391-92; Pembauer v. City of Cincinnati, 475 U.S. 469, 483 (1986); see Achtenberg, supra note 124, at 2190-91.
131 See, e g., Armacost, supra note 121, at 455-56, 507-14 (arguing that police misconduct often arises from mismanaged public safety organizations and discussing impact of organizational culture on police behavior); Schuck, supra note 129, at 1778; Sidney A. Shapiro & Ronald F. Wright,
damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize likelihood of unintentional infringements on constitutional rights.”\textsuperscript{132} Whether in fact respondeat superior liability would lead to greater deterrence of constitutional violations or instead to overdeterrence is a source of some debate.\textsuperscript{133} But the key point for my purposes here is that the Court has largely excluded judicial consideration of such incentives on agency behavior by categorically prohibiting respondeat superior liability.\textsuperscript{134} To the extent the Court considers the incentive effects of liability, it is again with an individualistic focus, in the context of developing immunity doctrines that limit government officers’ personal liability.\textsuperscript{135} And, strikingly, in doing so the Court does not consider administrative features such as near universal indemnification of governmental employees, which likely affect how individual officers respond to the possibility of being sued.\textsuperscript{136}

The related denial of supervisory liability under §1983 and \textit{Bivens} serves to further exclude consideration of administration in individual rights enforcement. Supervisory liability claims represent an effort to avoid \textit{Monell}’s ban on respondeat superior and vicarious liability by charging high-level government officials with direct liability for their deficient supervision of subordinates.\textsuperscript{137} A recent assertion of supervisory liability appeared in \textit{Ashcroft v. Iqbal}, in which the plaintiffs brought suit against the Attorney General and FBI Director for, among other things, knowing and acquiescing in their subordinates’ policy of subjecting post 9-11 detainees to harsh conditions of confinement solely on account of their race, religion, and national origins.\textsuperscript{138} Appellate courts had allowed the possibility of

\begin{thebibliography}{99}
\bibitem{132} Owen, 445 U.S. at 652.
\bibitem{133} Compare Daryl Levinson, Making Government Pay, 67 U.Chi. L. Rev. 345, 354-57 (2000) (arguing that government liability is unlikely to produce deterrence because public employers are not as responsive to costs as private employers) with Larry Kramer & Alan O. Sykes, Municipal Liability Under §1983: A Legal and Economic Analysis, 1987 Sup Ct. Rev. 249, 287 (arguing that government liability is likely to produce better deterrence and training than officer liability) and Myriam Gilles, In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies, 35 Ga. L. Rev. 845, 854-58 (2001) (arguing that that tort damages against government officials may have a deterrent effect).
\bibitem{134} The Court occasionally has discussed the comparative deterrent effect of direct officer liability and governmental liability in the \textit{Bivens} context, but its analysis is quite superficial and largely ignores the impact of key factors such as individual officer immunity or indemnification. See, e.g., Carlson v. Green, 446 U.S. 14, 21 (1980) (arguing a \textit{Bivens} action would have more deterrent effect than a tort suit against the federal government because officers themselves would face financial liability).
\bibitem{137} See, e.g., Whitfield v. Melendez–Rivera, 431 F.3d 1, 14 (1st Cir. 2005) (distinguishing between respondeat superior liability and supervisory liability); see generally Kit Kinports, The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases, 1997 U. Ill. L. Rev. 147 (describing supervisory liability and variations in lower court approaches).
\bibitem{138} 129 S. Ct. 1937, 1944 (2009).
\end{thebibliography}
such supervisory liability claims, under somewhat varying standards, and the
government defendants had conceded that “they would be liable if they had ‘actual
knowledge’ of discrimination by their subordinates and exhibited ‘deliberate
indifference’ to that discrimination.”

Nonetheless, the Court rejected such
deficient supervision as a basis for liability in terms that suggested elimination of
supervisory liability altogether, stating that “[i]n a § 1983 suit or Bivens action—
where masters do not answer for the torts of their servants—the term ‘supervisory
liability’ is a misnomer.”

As a result, in order for the defendant
officials to be
liable, the plaintiff had to plead and prove that they had acted with discriminatory
purpose.

_Iqbal’s_ rejection of supervisory liability is not surprising. Leaving aside the
Court’s likely reluctance to second-guess high-level officials’ responses to the
September 11th attacks, parsing the line between direct liability for inadequate
supervision of subordinates who commit constitutional violations and vicarious
liability for actions of subordinates is difficult indeed. Worse, unlike respondeat
superior which would impose liability on the governmental employer, liability for
deficient supervision would attach to individual superior officers, whose ability to
exercise close supervision may be seriously constrained by institutional forces over
which they have little control. Inadequate supervision seems more likely to be an
institutional failing than an individual one. But the fault for this misframing lies
with the Court’s insistence on approaching liability under § 1983 and _Bivens_ in
individualized rather than institutional terms. Having done that, and having
developed the deliberate indifference standard in other contexts, the Court’s
preclusion of supervisory liability claims subject to this standard is hard to
defend.

3. Recurrent Themes. This overview, spanning a variety of constitutional
doctrines, suffices to demonstrate four key themes. First is the Court’s deep
reluctance to incorporate general government administration into constitutional
law, a reluctance that is manifested in an array of doctrinal requirements and
appears to have increased with time. Second, when administration does enter
constitutional analysis, the emphasis is put on specific identified practices rather
than overall institutional functioning and on formal administrative features instead
of actual practice. Third, supervision makes a decidedly one-sided appearance.
Although the Court demands that provision be made for the President and high-
level officials to oversee the actions of lower officials, little attention is paid as to
whether such oversight actually occurs and the Court is extremely resistant to
faulting high-level officers for failed supervision. The net effect is that systemic
administrative functioning is denied constitutional relevance and no constitutional

---

139 Id. at 1956 (Souter, J., dissenting); see also Sheldon Namoud, Constitutional Torts,
Over-Deterrence, and Supervisory Liability After _Iqbal_, 14 Lewis & Clark L. Rev. 279, 292-93
(2010) (describing pre-_Iqbal_ case law on supervisory liability in the circuits)
140 _Iqbal_, 129 S. Ct. at 1949.
141 Id. at 1948.
142 Cf Namoud, supra note 139, at 294-95, 298-305 (defending _Iqbal_ but arguing that the
Court’s approach there is inconsistent with _City of Canton_ and failure to train cases).
claim can be made simply because a government agency or institution is inadequately managed or supervised.

The fourth theme is that underlying this exclusion of administration lie concerns about the proper judicial role. These concerns are sometimes voiced as the objection that general policy choices and priority-setting should be left to politically-accountable branches and sometimes in terms of limited judicial competency, specifically the courts’ lack of expertise in assessing administrative adequacy and inability to force meaningful change. Either way, the gist is clear: systemic administration is beyond the courts’ legitimate purview. But even though constitutional doctrine’s exclusion of systemic administration turns so heavily on distinctly judicial factors, the Court never suggests that general aspects of agency structure and functioning might carry greater constitutional weight outside the courts. Instead, it at most states that the Constitution assigns responsibility for shaping administration and overseeing law execution to the President and Congress.143

4. Administrative Law and Systemic Administration. A final word should be said about administrative law, which might seem to be the natural home for fuller judicial consideration of systemic administration. Administrative law, after all, is centrally concerned with how agencies operate, and systemic administrative features play a central role in determining how well an agency performs. Indeed, systemic administration constitutes a central focus of executive-branch generated administrative law, perhaps most clearly evident in presidential creation of a centralized process for regulatory review.144

Nonetheless, judicially-enforced administrative law excludes many systemic aspects of agency functioning in ways very similar to constitutional law.145 Much of this exclusion occurs through jurisdictional doctrines, with the Court reading the Administrative Procedure Act (APA)’s provision for review of “final agency action” as requiring that suit be brought against discrete agency actions rather than against the agency’s broader policies or programs which those actions reflect.146 Although this line of cases ostensibly turns on the text of the

144 Exec. Order No. 13,563, §6; Exec. Order No. 12866 §§4-6. Plans and high-level oversight are also at the White House initiatives to increase transparency and address expanded agency reliance on informal guidance. See OMB, Bulletin on Good Guidance Practices, § II.1 (2007); see also Peter R. Orszag, Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive (Dec. 8, 2009) (requiring agencies to develop open government plans that specify in detail steps the agency would take to encourage greater transparency and participation).
145 See Gillian E. Metzger Federalism and Federal Agency Reform, 111 Colum. L. Rev. 1, 37-44 (2011); see also Shapiro, supra note 17, at 1 (arguing that the exclusion of internal administrative practice dates back to the early identification of administrative law as a distinct field of study).
APA, the Court’s separation of powers concerns with judicial involvement with administration plainly fuels its statutory reading. In Justice Scalia’s typically pointed phrasing, the limitation of final agency action to discrete acts ensures that individuals “cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.”

The effect is not just to preclude “broad programmatic attacks,” but more particularly to forestall challenges to systemic nonenforcement and agency inaction, despite the APA’s express grant of review of agency failures to act. This point was underscored by the Court’s 2004 decision in Norton v. Southern Utah Wilderness Alliance, which held that the APA’s provision for suit to “compel agency action unreasonably withheld or unreasonably delayed” was available “only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take.” Rarely do claims of systemic agency failure involve such discrete and required actions; instead, agencies often will have broad discretion in choosing how to implement their statutory responsibilities, and “[g]eneral deficiencies in compliance … lack the specificity requisite for agency action.”

The exclusion of systemic administration from administration law is not total, and sometimes more general aspects of agency functioning are accorded weight. One prominent instance is United States v. Mead, where the Court tied the deference accorded agency statutory interpretations to the procedures by which they are promulgated and the extent to which they are subject to centralized agency review. Even Mead’s engagement with administrative structure is limited, however. Rather than expressly tying deference to whether an interpretation is adopted by an agency’s leadership, Mead put prime focus on congressional authorization and agency use of more formal procedures, and it gave no weight to the fact that the tariff ruling in question had been issued by central headquarters. But courts have also been reluctant to allow judicial review of true agency guidance (as opposed to an agency statement claiming to be guidance but actually operating

---

147 Nat’l Wildlife Found., 497 U.S. at 891.
148 Id. The Court’s reluctance to review nonenforcement is evident in other decisions as well. See Heckler v. Chaney, 470 U.S. 821, 831-33 (1985) (presumption of nonreviewability for nonenforcement decisions); Allen v. Wright, 468 U.S. 737, 759-60 (1984) (rejecting standing on grounds that causation between government nonenforcement of prohibitions on discrimination in granting schools tax-exempt status and plaintiffs’ injury were too attenuated).
150 Keene v. Consolidated Coal Co., 644 F.3d 845, 870 (9th Cir. 2011) (quoting Norton, 542 U.S. at 66).
151 533 U.S. 218, 233-34 (2001); M. Elizabeth Magill & Adrian Vermeule, Allocating Power Within Agencies, 120 Yale L.J. 1032, 1062-63 (2011); see also National Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971) (emphasizing decisionmaker’s position in the agency and the shape of the agency’s decisionmaking process as factors affecting whether agency guidance is considered final and subject to challenge).
152 Mead, 533 U.S. at 238; see also David J. Barron & Elena Kagan, Chevron’s Nondelegation Doctrine, 2001 Sup. Ct. Rev. 201, 201-02, 204-05 (arguing that the availability of deference to agency statutory interpretations should turn on whether the interpretation was issued by a high level official).
as a de facto rule), notwithstanding that guidance is a central mechanism by which higher agency officials control lower level discretion.\textsuperscript{153}

In short, the main forces driving agency action fall largely outside of judicial administrative law’s ambit. Moreover, administrative law continues to have a court-centric focus, despite increased attention to administrative law as it surfaces within the executive branch.\textsuperscript{154} As a result, as Daniel Farber and Anne Joseph O’Connell recently remarked, the “actual workings of the administrative state have increasingly diverged from the assumptions animating” administrative law.\textsuperscript{155}

II. RETHINKING ADMINISTRATION’S CONSTITUTIONAL STATUS: THE CONSTITUTIONAL DUTY TO SUPERVISE

The mismatch between the current legal constructs and the reality of modern administrative government is reason enough to reconsider existing doctrine’s exclusion of systemic administration. As important, however, is the significance that the Constitution itself assigns to systemic administration, in particular the administrative feature of internal oversight by federal officers. This part offers an argument for inferring a constitutional duty to supervise. It first sets out two constitutional grounds—one rooted in Article II and the Take Care Clause, the other in delegation and accountability principles—for inferring such a duty, and then analyzes the scope of the duty to supervise that results before turning to the question of whether such a duty to supervise is judicially enforceable.

The argument for a constitutional duty to supervise offered here draws on many conventional sources of constitutional interpretation, including constitutional text, historical practice, precedent, and normative and pragmatic analysis.\textsuperscript{156} But the preeminent basis is constitutional structure, with the duty to supervise inferred from the hierarchial ordering and accountability relationships evident in the Constitution.\textsuperscript{157} Such structural reasoning frequently appears in separation of powers analysis and is particularly appropriate in this context, given limited textual guidance and the lack of prior judicial engagement with the supervision’s constitutional underpinnings. Moreover, structural reasoning is well-suited to instances such as this, where as I argue below primary enforcement may often lie with the political branches. Whatever concerns structural analysis may raise when employed by the courts to overturn congressional measures—on the view that the

\begin{footnotes}
\item[155] Farber & O’Connell, supra note 17, at 1140.
\item[156] For two leading accounts of these standard forms of constitutional argument, see PHILIP BOBBITT, CONSTITUTIONAL FATE 1-119 (1982), and Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1194-1209 (1987).
\item[157] For the classic exposition of structural inference as a method of constitutional interpretation, see CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).
\end{footnotes}
Necessary and Proper Clause grants Congress general power to structure government subject only to specific limitations—are of little relevance when the questions is what separation of powers precepts should guide the political branches.  

A. Article II and the Duty to Supervise

Article II provide the most express textual constitutional recognition of a duty to supervise. Unfortunately, such a duty and its implications are lost in current debates, which focus instead on whether the President has the right to control administrative decisionmaking. This focus not only downplays presidential obligation in favor of presidential power, it also obscures the fact that Article II’s emphasis on oversight and supervision is not limited to the President. Instead, the need for oversight and supervision represents instead a broader structural principle running throughout Article II’s treatment of the executive branch.

1. The Take Care Clause and the Textual Basis for a Duty to Supervise. As Jerry Mashaw has put it, there is a hole in the Constitution where administration should be. Almost none of the federal government’s administrative structure—the different departments, their responsibilities, leadership, interrelationships—is constitutionally specified. Instead, the Constitution grants Congress broad power to construct the administrative apparatus “necessary and proper for carrying into Execution” the federal government’s powers, including not just those granted Congress but “all other Powers vested … in the Government of the United States, or in any Department, or Officer thereof.” Congress acts, however, subject to some structural limitations, largely specified in Article II. These include that “[t]he executive Power shall be vested in a President” and that the President: shall be Commander in Chief of the Army and Navy; “may require” a written opinion from “the principal Officers in each of the executive Departments … on any Subject relating to the Duties of their respective Offices”; commissions all officers; appoints principal officers with senatorial advice and consent and inferior officers if Congress so provides; and “shall take Care that the Laws be faithfully executed.”

The Take Care Clause is particularly relevant to considering constitutional supervisory duties. Two points seem evident from its text. The first, indicated by the Clause’s use of the passive voice and the sheer practical impossibility of any

---

158 For a recent important attack on structuralist reasoning on this ground, contending that the Constitution contains “adopts no freestanding principle of separation of powers,” see John F. Manning, Separation of Powers As Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1944-47 (2011); See also id. at 1950-52, 1986-1993 (tying criticism of structuralist reasoning particularly to its use by courts to overturn congressional legislation).

159 MASHAW, supra note 36, at 30.


161 Other important constraints not so housed are that no member of Congress can be simultaneously a government officer, U.S. Const., art. I, §6, and restrictions inferred from general separation of powers principles, see, e.g., Bowsher v. Synar. 478 U.S. 714, 723-26 (1986).

162 U.S. Const., art. II., cl. 1-3.
other result, is that that the actual execution of the laws will be done by others. Despite vesting the executive power in the President, the framers did not expect that the President would be directly implementing the laws, with advocates of strong executive power even acknowledging that “without [key] … ministers, the Executive can do nothing of consequence.” This point is reinforced by the Appointments Clause’s provision for executive officers as well as the Opinion Clause’s assurance that the President can obtain written opinions from principal officers. As the Court has stated, quoting George Washington: “In light of ‘[t]he impossibility that one man should be able to perform all the great business of the State,’ the Constitution provides for executive officers to ‘assist the supreme Magistrate in discharging the duties of his trust.’”

The second point is that this presidential oversight role is mandatory. This obligatory character is often obscured by the more prominent and ongoing debate over the scope of presidential power. Advocates of a strong unitary executive use the Take Care Clause’s requirement that the President ensure faithful execution of the laws to infer that he or she must have full power to control those implementing federal law. Those defending a more constrained account of presidential power counter by arguing that the fact the Clause is phrased as imposing a duty counsels against reading it to support assertions of broad presidential authority. In short, both camps use the obligatory nature of the

163 See Harold H. Bruff, Balance of Forces: Separation of Powers Law in the Administrative State 455 (2006) (emphasizing passive tense); Peter L. Strauss, A Softer Formalism, 124 Harv. L. Rev. F. 55, 60 (2011) (“[T]he passive voice of the Take Care Clause, hidden between his (not that important) responsibilities to receive ambassadors and to commission officers, confirms that the President is not the one whose direct action is contemplated.”).

164 Max Farrand, ed., 2 The Records of the Federal Convention of 1787 54 (1911, 1966); see also 1 Annals of Congress 1789-91 492 (statement by Fisher Ames) (“Could [the President] personally execute all the laws, there would be no occasion for auxiliaries; but the circumscribed powers of human nature in one man, demand the aid of others.”).


166 Free Enterp. Fund v. PCAOB, 130 S. Ct. 3138, 3146 (2012) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed.1939)); see also Saikrishna B. Prakash, Note, Hail to the Chief Administrator, 102 Yale L. J. 991, 993 (“The Framers recognized the President could not enforce federal law alone; he would need the help of others.”).

167 See Delahunty & Yoo, supra note 7, at 799).

168 See, e.g., Free Enterp. Fund, 130 S. Ct. at 3146 (“The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”); Steven G. Calabresi & Saikrishna B. Prakash, The President’s Power to Execute the Laws, 104 Yale L. J. 541, 583 (1994) (“[T]he duty-imposing language of the Take Care Clause makes sense if the President has already been given a grant of the executive power … Otherwise, how could the President possibly live up to the duty the Take Care Clause imposes?”).

169 See Myers v. United States, 272 U.S. at 177 (Holmes, J., dissenting) (“The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 62-63 (1994) (“[T]here is something quite odd about the structure of the Take Care Clause if it was conceived by the framers as a source of presidential power over all that we now consider administration: Unlike the other power clauses of Article II, the Take Care Clause is expressed as a duty”).
President’s oversight duty primarily as grounds for drawing conclusions about the scope of presidential authority.

But the mandatory character of the Take Care Clause is worth underscoring in its own right. This feature, combined with the Clause’s oversight phrasing, means that the Take Care Clause represents the clearest constitutional statement of a duty to supervise. Indeed, the Clause stands as a rare acknowledgement of affirmative duties in the Constitution. According to David Dreisen, this duty aspect is reinforced by the presidential Oath Clause, which not only includes a promise “to faithfully execute the Office of President,” but also to “preserve, protect, and defend the Constitution,” thereby “impl[y] a … duty to try to prevent others from undermining it through maladministration of the law.”

Exactly what such a duty to supervise was understood to mean is less clear, and the drafting history of the Take Care Clause sheds little light on this question. Earlier versions spoke of the President having power or authority to execute the laws, and the transformation into the ultimate duty phrasing occasioned little discussion. This suggests that the Framers did not attach particular significance to the President’s having an express duty to ensure law execution, but that could be because they had always envisioned the power to execute in similar obligatory terms. Much also turns on what faithful execution of the laws means, itself a

---

170 For a rare scholarly emphasis on the importance of the Take Care Clause’s obligatory character, see David M. Dreisen, Toward a Duty-Based Theory of Executive Power, 78 Fordham L. Rev. 71, 80-94 (2009) (drawing on the Take Care and Oath clauses to argue that the Constitution seeks to instill a duty in all executive branch officers to faithfully execute the law).

171 Id. at 86; see also The Federalist No. 72, at 436 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that executive officers should be subject to presidential “superintendence”); CHARLES C. THATCH, JR., THE CREATION OF THE PRESIDENCY 1775-1789 at 92, 99 (1923, 1969) (describing support of Morris and Hamilton for strengthening the executive).

172 The Virginia Plan, which was used as the basis for the Constitutional Convention’s initial discussion, provided that the national executive should have “a general authority to execute national laws.” See 1 FARRAND, supra note 164, at 21; see also 1 id. at 244 (nearly identical phrasing in the New Jersey Plan). Subsequent versions added more implication of execution by others, stating that the President shall have the “power to carry into execution the national laws.” 1 id at 63; 2 id. at 32. But it was in the Committee of Detail that the take care language was incorporated into the Constitution, although the duty phrasing earlier appeared in Charles Pickney’s plan. 3 id. 606 (“It shall be [the President’s] Duty . . . to attend to the Execution of the Laws of the U.S.”) The Committee itself considered two alternatives: “(He shall take Care to the best of his Ability, that the Laws) (“It shall be his duty to provide for the due & faithful exec---of the Laws) of the United States (be faithfully executed)” and opted for the take care formulation, with the slight change of “be duly and faithfully executed.” The additional “duly and” were ultimately removed by the Committee on Style. See 2 id. at 171, 185, 600; Prakash, supra note 166, at 1001-02 (recounting drafting history). No discussion of these changes is reported in notes on the Convention. In its final form, the Clause closely parallels a similar provision in the New York Constitution on gubernatorial duties. See THATCH, supra note 171, at 36, 176 (quoting art. XIX and noting importance of New York Constitution to shape of the federal executive).

173 Larry Lessig and Cass Sunstein take a different view, arguing that the change in the language that became the Take Care Clause reflects the fact that the Committee on Detail also added the Necessary and Proper Clause, granting Congress the power to define how administrative powers would be executed. See Lessig & Sunstein, supra note 169, at 66-67. Although the simultaneity of this change is suggestive, Lessig and Sunstein’s account fails to explain why the alteration triggered
source of debate. General agreement exists, however, that the Clause at least embodies the principle that the President must obey constitutional laws and lacks a general prerogative or suspension power.

2. Hierachial Oversight and Article II. These two features of the Take Care Clause—provision for presidential oversight and language signaling that such oversight is obligatory—combine to imply a hierarchial structure for federal administration, under which lower government officials act subject to higher level superintendence. That hierarchy is echoed in Article II’s other provisions. A prime example is the Appointments Clause, with its differentiation between “Officers of the United States” and “inferior Officers,” the latter being appointable by (and thus implicitly subservient to) Heads of Department. This implication of hierarchial oversight is highlighted by current Appointments Clause case law, which defines inferior officers as “‘officers whose work is directed and supervised at some level’ by other officers appointed by the President with the Senate's consent.” Similarly, as David Barron and Martin Lederman have argued, “the textual designation of the President as the Commander in Chief … establishes a particular hierarchial relationship within the armed forces and the militia … at least for purposes of traditional military matters.” An oversight role is additionally implied by the Opinion Clause, as the President’s power to require written opinions from principal officers both signals that the President was expected to play an oversight role and ensures that such officers cannot keep the President in the dark about how their departments are operating. To be sure, the Opinion Clause is permissive rather than mandatory—stipulating that the President “may require” opinions rather than that the President must. But that phrasing does not undermine

no discussion, if indeed it wrought as significant a change as transferring power to structure administration from the President to Congress.

In particular, disagreement exists over the extent to which the Take Care Clause allows a President to refuse to enforce governing statutes he or she considers unconstitutional. Compare, e.g., Eugene Gressman, Take Care, Mr. President, 64 N.C. L. Rev. 381, 382-83 (1986) (arguing that the Take Care Clause prohibits the President from refusing to enforce validly enacted laws, even if the President believes them to be unconstitutional) with Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L. J. 217, 221-22, 261 (1994) (arguing that the Take Care Clause imposes a duty on the President not only to independently interpret the law, but also to refuse to enforce any laws or judgments that the President deems contrary to law).

See Christopher D. Moore & Gary Lawson, Executive Power of Constitutional Interpretation, 81 Iowa L. Rev. 1267, 1312-13 (1996) (“[T]he most important, if not the sole, aspect of [the Take Care Clause] is to make clear that “The executive Power” does not include a power analogous to a royal prerogative of suspension”); see also Calabresi & Prakash, supra note 168, at 582-84, 589-90, 616-17, 620-22 (Take Care Clause means that the President must adhere to the laws, but not those that undermine his or her constitutional authority); Lessig & Sunstein, supra note 169, at 69 (“[T]he Take Care Clause … obliges the President to follow the full range of laws that Congress enacts, [including] …laws regulating execution.”).


David J. Barron & Martin S. Lederman, The Commander in Chief at Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding, 121 Harv. L. Rev. 689, 768 (2007).

the hierarchial oversight dynamic signaled by Clause so much as indicate that requesting opinions is just one method the President can use to fulfill the Take Care supervisory duty.\textsuperscript{179} Finally, although less clearly addressing the shape of internal executive structure, the Vesting Clause’s identification of “a President” in whom “[t]he executive Power shall be vested” makes clear that this hierarchy takes a general pyramidal form, narrowing to an apex at the top.\textsuperscript{180}

In short, despite leaving open most of the federal government’s administrative organization, Article II’s text signals that hierarchial supervision within the executive branch is an important structural principle. This hierarchial structure also has been central to the debate over the constitutional scope of presidential power. Unitary executive scholars claim that Article II’s hierarchy requires broad presidential authority to control all executive branch decisionmaking or at least at-will presidential removal power over those executing federal law.\textsuperscript{181} But such a claim of broad presidential authority mistakenly elides the President’s right and duty to supervise law execution, which is what the structural principle of hierarchy entails, with the question of the scope of such presidential supervision.\textsuperscript{182} Only if supervision could not otherwise occur—a dubious proposition, given the variety of forms supervision takes today\textsuperscript{183}—would such broad claim of presidential power follow.

Similarly, although the Supreme Court has tied the Take Care duty closely to the President’s power to remove principal officers,\textsuperscript{184} it is not obvious that

\textsuperscript{179} See Akhil Amar, Some Opinions on the Opinion Clause, 82 Va. L. Rev. 647, 658—661 (1996) (exploring implications of the Clause’s “may require” language and concluding that “the Opinion Clause clearly exemplifies the President’s supervisory power over the executive departments” and with it “Presidential responsibility and accountability for these departments”); Vasan Kesavan & J. Gregory Sidak, The Legislator-In-Chief, 44 Wm. & Mary L. Rev. 1, 9 (2002) (arguing that, in contrast to the mandatory language in the State of the Union Clause, the Opinion Clause’s use of “may” signals an information exchange between a superior and his inferiors, whereas the State of the Union Clause governs an information exchange between two equals).


\textsuperscript{181} For unitary executive arguments emphasizing Article II hierarchy, see Calabresi & Prakash, supra note 168, at 559, 584, 663; Steven G. Calabresi & Kevin H. Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1165-66 (1992); see also Lessig & Sunstein, supra note 169, at 4, 9-10, 84-85 (describing hierarchial account of Article II though rejecting it as a matter of original meaning).

\textsuperscript{182} That said, acknowledging Article II’s hierarchial structure is at odds with some anti-unitary executive arguments, in particular Lessig and Sunstein’s contention that the Constitution distinguishes between executive and administrative power and only requires presidential oversight of the former. See Lessig & Sunstein, supra note 169, 38-70. Notably, however, Lessig and Sunstein ultimately argue that given the dramatic expansion of policymaking by administrative officials, the constitutional value of political control of policymaking now requires broad presidential oversight. See Lessig & Sunstein, supra note 169, at 93-98. As a result, their argument is not at odds with my wider project of defending a constitutional duty to supervise, though presumably they would base any such duty on the delegation arguments outlined infra in Part II.B.

\textsuperscript{183} See supra TAN 24-27.

\textsuperscript{184} See Free Enterp. Found., 130 S. Ct. at 3156, 3158-59 (discounting functional mechanisms of control and underscoring importance of removal).
removal should play such a pivotal role. Removal is certainly one means of achieving higher level oversight. But other structures for such supervision plainly exist—whether in the form of traditional mechanisms that enable review of decisions and policies, or more contemporary audit procedures to monitor performance and identify potential problems. The Court recently dismissed these mechanisms as “bureaucratic minutiae” lacking constitutional significance, yet in practice such bureaucratic minutiae are central to day-to-day implementation of the laws. Indeed, removal’s constitutional centrality seems yet another manifestation of constitutional law’s rejection of systemic administration—bureaucracy—in favor of the individualistic model of a chief personally firing an assistant.

The Appointments Clause is particularly important in to assessing the Article II approach to supervision. It indicates that the supervision envisioned by Article II is broader than just presidential oversight. The Clause’s distinction of principal and inferior officers reveals that supervision was expected to occur at lower down administrative levels as well. Indeed, the Constitution’s express authorization of inferior officer appointment by courts or heads of departments, particularly combined with the Opinion Clause’s limited application to principal officers of the departments, makes clear that the President’s direct supervision was expected to be focused on the top of the administrative bureaucracy, at least outside of the military. This again reinforces that supervision should not be equated with removal. Removal is a mechanism best targeted to the top of an agency, given the difficulty tracing particular institutional policies to specific lower down officials, well-entrenched civil service protections, and the public outcry removal often triggers. At middle and lower levels the other oversight methods detailed above, along with more indirect measures such as professional norms, agency culture, or

---

185 See id. 3172-73 (Breyer, J., dissenting) (arguing broad oversight of functions made removal less important).

186 Id. at 3157.

187 See Free Enterp. Fund v. PCAOB, 561 U.S. 477, 496 (2010) ((holding that double-for cause removal protection prevents “[t]he President [from] hold[ing] the Commission fully accountable for the Board's conduct [because he lacks] … the ability to oversee the Board, or to attribute the Board's failings to those whom he can oversee.”).

188 Charles Pinkney’s proposal with Gouverneur Morris for a Council of State to assist the President supports this emphasis on executive branch supervision beyond the President’s own oversight. The proposal provided for five executive departments, with the heads of three—Commerce and Finance, War, and Marine—required to “superintend every thing” in their departments or “all matters relating to the public finances.” 2 Farrand at 335-36. Of similar effect is Pinkney’s suggestion, also not adopted, that the President be “empowered … to inspect” certain key departments on the grounds that such inspection “will operate as a check on those Officers, keep them attentive to their duty, and may be in time a means not only of preventing and correcting errors, but of detecting and punishing mal-practices.” 3 Farrand at 111.

reputational concerns, may be more effective mechanisms of controlling administrative behavior.  

3. Hierarchial Oversight and Executive Branch Supervision in Practice. Given this textual and structural emphasis on hierarchial oversight, some features of early administrative practice under the Constitution might seem surprising. In several contexts presidential supervision and other forms of internal executive branch oversight were quite circumscribed. One prominent example concerns district attorneys. “Before 1861, the district attorneys either reported to no one (1789 to 1820) or to the Secretary of the Treasury (1820 through 1861). Throughout this period, they operated without any clear organizational structure or hierarchy.” Although this lack of formal hierarchy did not preclude presidential supervision and direction, it certainly limited the occasions when such supervision would occur. A second example involves reliance on state courts and state officials for some federal law enforcement, a reliance that the framers clearly anticipated. Harold Krent emphasizes that “Congress vested jurisdiction in state courts over actions seeking penalties and forfeitures, granted concurrent jurisdiction to state courts over some criminal actions, and assigned state officials auxiliary law enforcement tasks. … [These] state officials … were far removed from control of the executive branch.” A third is the widespread delegation of responsibility to nongovernmental actors, such as use of private merchants as assessors in customs disputes and reliance on the Bank of the United States to control the money supply. Here again, presidential control and executive branch oversight were lacking.

But there were also numerous administrative arrangements characterized by a fairly high degree of internal oversight. Jerry Mashaw’s recent excavation of early administrative practice emphasizes the central role of what he terms the “internal law of administration,” under which “higher-level officials instruct

---

190 See Shapiro & Wright, supra note 131, at 602-04 (citing studies indicating that civil servants are strongly motivated by non-pecuniary incentives beyond fear of demotion or other punishment).

191 Lessig & Sunstein, supra note 169, at 16-17. Another example comes from the Treasury Department, where Congress vested important powers in officials below the Secretary in the aim of providing internal checks, as opposed to clear hierarchial structure. See MASHAW, supra note 159, at 40, 50-51.

192 For a well-known instance when the President sought to intervene and forestall a prosecution for forfeiture, see The Jewels of the Princess of Orange, 2 Op. Att’y Gen. 482 (1831) (Roger Taney).


195 MASHAW, supra note 116, at 36-38; Lessig & Sunstein, supra note 169, at 30-31
subordinates and through which they can call them to account for their actions.”

A key instance was the Treasury Department. Mashaw documents how two early Secretaries of the Treasury, Alexander Hamilton and Albert Gallatin, exercised close oversight of customs officials through daily correspondence and frequent circulars. A similar pattern of central oversight and instruction of field office personnel is evident in the land office context, though with a more uneven record. In addition, early statutes setting up the administrative departments emphasized internal oversight and stipulated that lower level officials would be subject to higher-level “superintendence.” Thus, for example, the 1794 statute creating the Post Office provided that the Postmaster General “shall also have power to prescribe such regulations to the deputy postmasters, and others employed under him, as may be found necessary, and to superintend the business of the department, in all the duties, that are or may be assigned to it.” Notably, these statutes focused primarily on superintendence by principal officers, thereby reinforcing the point that hierarchical superintendence was not seen as coterminous with broad presidential control. Moreover, ensuring adequate government administration at the federal level was plainly a central concern of many framers, with the Federalist Papers proclaiming that “the true test of a good government is its aptitude and tendency to produce a good administration.”

The historical record thus demonstrates that hierarchical executive branch oversight was understood to be an important accountability mechanism, particularly in the form of supervision of lower-level government officers by department heads and other top departmental officials. To be sure, such oversight

\[196\] Mashaw, supra note 159, at 7. The term “internal administrative law” was first coined over one hundred years ago by Bruce Wyman. See Bruce Wyman, Administrative Law 4, 9-14 (1905).

\[197\] Id. at 54-57, 91-104; see also Leonard D. White, The Federalists 202-209 (1948) (detailing mechanisms of internal control used during the Washington and Adams administrations).

\[198\] Id. at 124-37; see also Malcolm J. Rohrbough, The Land Office Business 33-70 (1968) (detailing internal mechanisms of control in the Land Office).

\[199\] Act of May 8, 1794, §3, 3d Cong., 1st Sess., 1 Stat. ch. XXIII; see also Act of Apr. 2, 1792, §3, 2d Cong., 1st Sess., 1 Stat. ch XVI (“The Director of the mint shall have the chief management of the business thereof, and shall superintend all other officers and persons who shall be employed therein.”); Mashaw, supra note 159, at 56-57.

\[200\] In a few statutes relating to areas of particular presidential authority, provision was specifically made for presidential oversight and instruction. See Act of Aug. 7, 1789, 1st Cong., 1st Sess., 1 Stat. ch. 7 §1 (creating Department of War headed by a Secretary, a principal officer, and “the said principal officer shall conduct the business of the said department in such manner, as the President of the United States shall from time to time order or instruct”); Act of July 7, 1789, 1st Cong., 1st Sess., 1 Stat. ch. IV §1 (same language for the Department of Foreign Affairs); see also Jerry L. Mashaw, The American Model of Federal Administrative Law: Remembering the First One Hundred Years, 78 Geo. Wash. L. Rev. 975, 982-85 (2010) (describing the variation in early administrative structures and concluding that “the conventional story of specific statutes, limited administrative discretion, congressional control of policy, and a unitary executive hardly describes nineteenth-century federal administration or administrative law.”).

\[201\] The Federalist No. 68, at 414 (Alexander Hamilton) in The Federalist Papers (Clinton Rossiter ed., 1961); Rohr, supra 17, at 1-3; see also The Federalist Nos. 76, 77 (Alexander Hamilton) (justifying the Constitution’s appointment process in terms of its ability to select good officials and support administrative stability).
was not uniformly required, nor was it the only means of ensuring effective government and checking overreach.\(^2\)\(^3\) Still, according to Mashaw “the consistency, propriety, and energy of administrative implementation was made accountable primarily to high-ranking officials … . These were the sources of instruction, interpretation, audit, and oversight that counted in the day-to-day activities of administrative officials.”\(^2\)\(^4\) Although such internal oversight sometimes took the form of review of individual decisions, it often had a more systemic and prospective cast, with the aim being to supervise statutory implementation and administrative performance generally.\(^2\)\(^5\) Frequently, moreover, such oversight was informal, taking the form of lower officials consulting with their superiors and their superiors seeking the President’s advice—and the President in turn requesting to be kept informed and consulted on departmental matters.\(^2\)\(^6\)

One final aspect of historical practice worth considering is the development of the civil service. Beginning with enactment of the Pendleton Act in 1883 and culminating in additional measures through the 1930s, federal workers gradually gained independence protections in hiring, tenure, and salary.\(^2\)\(^7\) The result today is a system criticized as limiting managers’ ability to fire employees or reduce salaries in response to poor performance.\(^2\)\(^8\) Development of the civil service thus might seem at odds with an emphasis on internal supervision. In fact, however, the opposite conclusion is more accurate. The civil service arose as a response to the partisan hiring that began with Andrew Jackson and took hold over the course of the 19th century. Under this “spoils system,” control over government employment lay with the political party of the President.\(^2\)\(^9\) The emergence of the civil service supported a broader transfer of authority to administrative officials, with bureau chiefs gaining ability to select personnel and control over agency activities—what Daniel Carpenter has termed the emergence of bureaucratic autonomy.\(^3\)\(^0\) Indeed, the broadest reach of the federal civil service occurred at the heyday of modern federal administrative bureaucracies, with their characteristic of tight internal

---

\(^2\)\(^2\)\(^3\) See Mashaw, supra note 159, at 40-41, 64-78 (noting judicial review and congressional oversight as other techniques); Nicholas Parrillo, Against the Profit Motive: The Salary Revolution in American Government 1780-1940 (2013) (emphasizing reliance on private expertise and private financial incentives as means of improving governmental performance).

\(^2\)\(^4\) Id. at 57 (quoting Alexander Hamilton circular).


\(^2\)\(^7\) See, e.g., Johnson & Libecap, supra note 206, at 1-5; Partnership for Pub. Serv., A New Civil Service Framework 7-10 (2014).

\(^2\)\(^8\) See Daniel Carpenter, The Forging of Bureaucratic Autonomy 40-51 (2001); see generally Ari Arthur Hoogenboom, Outlawing the Spoils (1968) (describing the emergence and development of the civil service reform movement in the United States).

\(^2\)\(^9\) Carpenter, supra note 208 Error! Bookmark not defined., at 4, 18-27, 353-54. Carpenter argues that civil service reform alone is not sufficient for bureaucratic autonomy, which he maintains is dependent on development of legitimacy and reputation on an agency-by-agency basis. See id. at 10-11.
hierarchical control.\textsuperscript{210} Hence, development of the civil service is more illuminating of the tension that exists between presidential and political supervision on the one hand and internal agency supervision on the other—a tension that surfaces today primarily in battles over agency politicization.\textsuperscript{211}

Yet that internal oversight and hierarchial supervision were viewed as important and as necessary for effective and accountable government does not demonstrate that these administrative practices were understood to have a constitutional basis. The variation in administrative structures and use of administrative arrangements with limited oversight suggests that early Congresses did not consider hierarchial supervision from the President down to be a constitutional imperative across-the-board.\textsuperscript{212} Still, that leaves the possibility that internal executive branch oversight was understood to have constitutional underpinnings, even if not required in all instances. Some suggestion of such a view can be gleaned from early Attorney General opinions. Attorneys General disagreed over the extent of the President’s power to direct executive officers on matters statutorily entrusted to their discretion. In particular William Wirt, who insisted that the President was limited to “see[ing] that the officer assigned by law performs his duty … not with perfect correctness of judgment, but honestly,” also concluded that if an officer had made a “corrupt” decision, “the President is constitutionally bound to look to the case” and take care that the officer be punished or removed.\textsuperscript{213} Wirt’s distinction of honest and corrupt decisions suggests that he was saw presidential oversight as required to police intentional misuse of governmental power rather than more broadly, but his invocation of a constitutional obligation of presidential oversight even in this context is noteworthy.

\textbf{B. Delegation, Accountability, and the Duty to Supervise}

Although the Take Care Clause and Article II’s provision for hierarchial oversight within the executive branch represent the most overt constitutional reference to a duty to supervise, an additional basis exists on which to infer such a constitutional duty. This approach identifies the duty to supervise as a necessary structural corollary of delegation. The connection between delegation and supervision is supported both by constitutional references to hierarchial supervision

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{210} See Jon D. Michaels, An Enduring, Evolving, Separation of Powers, 115 Colum. L. Rev. __ (2015) (draft at 17-18); see also sources cited notes 28-29 (identifying merit selection as a core characteristic of modern bureaucracy)
\item \textsuperscript{211} See LEWIS, supra note 30, at 5-8, 20-37.
\item \textsuperscript{212} See MASHAW, supra note 159, at 82-83; Lessig & Sunstein, supra note 169, at 22-32.
\item \textsuperscript{213} The President and The Accounting Officers, 1 Op. Att’y Gen. 624 (1983), reprinted in H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL 29, 30 (1999). See also Relation of the President to the Executive Departments, 7 Op. A.G. 453 (1855), reprinted in Powell, supra, at 131, 137 (Caleb Cushing) (invoking executive branch hierarchy, the take care duty, and the vesting of executive power in the President to justify presidential power to direct certain actions be taken by officers below the head of department level); see also Office and Duties of the Attorney General, 6 Op. Att’y Gen. 326 (1854), in id. at 78, 86-88 (emphasizing the need for Attorney General control over subordinate law officers, and in all departments for hierarchical control running from the President to the lowest official of the government).
\end{itemize}
\end{footnotesize}
in delegation contexts and by structural principles that demand the accountability of governmental power. Like its Article II counterpart, this version of the duty to supervise puts prime emphasis on hierarchial supervision within the executive branch, but potentially has a wider and more flexible import.

1. Delegated Authority and the Hierarchial Oversight Model. The hierarchial oversight model identified in Article II, under which lower level officials act subject to higher level oversight, can also be found in Article III. Article III vests the judicial power “in one Supreme Court, and in such inferior Courts” as Congress may establish, and Article I strikes a similar theme in authorizing Congress to “constitute Tribunals inferior to the supreme Court.” Article III also expressly provides for Supreme Court appellate jurisdiction, suggesting a reviewing and oversight role for the Court, albeit one subject to “such exceptions, and under such regulations as the Congress shall make.”

A number of scholars have argued that Article III’s “coordinate requirements of supremacy and inferiority” give the federal judiciary a “pyramidal structure” and “hierarchal nature.” According to James Pfander, “[s]upremacy encompasses a power to oversee and control the judicial work of all inferior courts and tribunals in the judicial department” such that Congress “cannot place lower courts entirely beyond the [Supreme] Court’s oversight and control.” Steven Calabresi and Gary Lawson push the point further, drawing on the uses of “supreme” and “inferior” in the Supremacy and Appointments Clauses to conclude that “inferior federal courts must be subject to the decisional supervision and control of the Supreme Court, which must be able to veto (reverse) any decision made by a subordinate court. Otherwise, they are not hierarchically inferior.”

Other scholars reject this reading, noting that “supreme” and “inferior” can refer to stature or importance instead of hierarchy, in which case “inferior” courts might be courts of limited geographic scope and narrower but not subordinate to supreme courts. And the Supreme Court has never issued anything approaching

214 U.S. Const., art. I, §8, cl. 9; art. III, §1, cl. 1.
215 Id. art III, §2, cl. 2;
217 Id. at xi, xiv.
a definitive view of “whether Article III requires a residuum of Supreme Court supervisory jurisdiction, even in cases in which Congress has invoked its power to create an exception to the Court’s appellate jurisdiction.”

Clear conclusions about the structure of Article III and the extent of the Supreme Court’s mandated oversight authority are thus elusive. Yet general agreement exists that the Court cannot be denied review authority in all cases from the lower federal courts presenting constitutional questions.

To paraphrase Henry Hart, there is thus a core of supervisory responsibility that cannot be denied without “destroy[ing] the essential role of the Supreme Court in the constitutional plan.”

Even more significantly, assertions of some supervisory role for the Supreme Court are now supported by longstanding and contemporary practice. Since 1875 Congress has granted the Court broad power to review lower federal court decisions and granted review of state court decisions rejecting federal law claims going back to the 1789 Judiciary Act. Congress has also long authorized the Court to adopt rules of procedure and practice that would bind lower federal courts, and the Court has asserted such a supervisory role for itself, including insisting that lower federal courts follow its precedents.

Hence, in practice both Congress and the Court have viewed Supreme Court supervision as a key aspect of the federal court system.

Interestingly, a similar hierarchial oversight structure is not present with respect to Congress. Instead, Article I proclaims the internal autonomy of the two parts of Congress by mandating separate passage of legislation by both and expressly providing that “Each House” shall choose its own officers, judge the elections and qualifications of its own members, determine its own rules, police and expel its own members, and keep its own journal.

Although both the House and the Senate are granted distinct powers, only when it comes to authorizing adjournment are the two branches given express control over each other. More common is a model of reciprocal checking, seen perhaps most clearly in the distinct
role each plays in impeachment. Further, the Constitution nowhere specifies how each house is internally structured or how legislative officials are chosen below the highest level. The Court reinforced this structural independency in United States v. Nixon, where it held that determinations about which procedures conform to the Constitution’s requirement that the Senate “try” impeachments were for the Senate alone to make.

One explanation for this equal stature and internal independence within Congress is no doubt the disagreements between large and small states that led to Congress’s bicameral structure, as well as ongoing struggles at the constitutional convention over the respective powers of the House and Senate. Overt hierarchy or supervisory control by one house over the other might well have precluded the compromises over Congress that allowed the convention to reach agreement. But another likely factor is the manner in which Congress was expected to operate. Both houses are required to meet at the same place and take decisions collectively, with no allowance made for final legislative action other than through the process of bicameralism and presentment. By contrast, the Constitution expressly authorizes appointment of government officers and inferior federal tribunals, with a plain expectation that executive and judicial branch actors would not be limited to the President and the Supreme Court. Put differently, Congress was thought to be the unique legislative actor, whereas it was understood that there would many executive officials and judges other than the President and the Justices of the Supreme Court.

This latter point suggests a hierarchical oversight structure as the constitutional companion of delegated implementation. When a branch is expected to operate through a number of government actors or institutions, the Constitution invokes a dynamic of supervision. Again, this is not to say that all implementation of federal law must be subject to full presidential or Supreme Court control. But the repeated supervisory motif evident in the Constitution, and embodied in longstanding practice, suggests recognition of oversight and internal hierarchy as important features for controlling delegated federal power.

2. Supervision and Accountability of Delegated Authority. Further support for a relationship between delegation and supervision comes from accountability principles inferred from the Constitution’s structure. Often identified as a core constitutional concern, accountability is a broad and malleable concept. It implies answerability, and in public law contexts the focus is often on the answerability of governmental officials. But that focus still leaves key questions open, in particular:

---

See art. I, § 2 (granting the House of Representatives sole power to initiate impeachment proceedings), § 3 (granting the Senate sole power to try all impeachments)


See JACK N. RAKOVE, ORIGINAL MEANINGS 57-93 (1997).


This view of Congress underlies the argument that broad congressional delegations are at odds with the Constitution’s structure. See Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1237-40 (1994).
which officials, answerable to whom, through which mechanisms, for what actions or decisions, and measured by what metric? Not surprisingly, therefore, accountability surfaces in a variety of constitutional guises.

Perhaps the most obvious is political or electoral accountability, with officials having to answer to voters—or to answer to other officials who answer to voters. The principle of political accountability runs throughout the Constitution’s structural provisions, evident in the stipulation of electoral selection for Congress and the President, political appointment of principal officers, and removal of officers via congressional impeachment. Indeed, these provisions reveal that political accountability itself takes a variety of forms—forms that have changed over time, involve different voters, and entail more or less immediate control. Political accountability concerns also underlie many constitutional doctrines, such as nondelegation doctrine, the federalism anti-commandeering rule, and jurisprudence on the presidential removal power.

Less textually prominent, but equally basic, is the principle of legal accountability. Legal accountability represents not just the constitutional commitment to “a government of laws, and not of men,” but also the core rule of law requirement that all exercises of governmental power be subject to constitutional limits that the political branches lack power to alter through ordinary legislation. Famously articulated in Marbury v. Madison’s defense of judicial review and repeatedly underscored by judicial decisions, the principle of legal accountability is often identified as entailing court enforcement. But the

---

232 Jerry Mashaw, Accountability and Institutional Reform in Public Accountability: Designs, Dilemmas and Experiences 118 (Michael W. Dowdle ed. 2006). According to Ed Rubin, “[a]ccountability can be roughly defined as the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or explanation.” Rubin, The Myth of Accountability and the Anti-Administrative Impulse, 103 Mich L Rev 2073, 2073 (2005); see also Barbara S. Romzek & Melvin J. Dubnick, Accountability to the Public Sector: Lessons from the Challenger Tragedy, 47 Pub. Admin. Rev. 227, 228 (1987) (arguing that answerability is too narrow and accountability “involves the means by which public agencies and their workers manage the diverse expectations generated within and outside the organization”).

233 For different taxonomies, see Mashaw, supra note 232, at 118-29; Michael W. Dowdle, Public Accountability: Conceptual, Historical, and Epistemic Mappings, in Public Accountability, supra note 232, at 1, 3-8; Romzek & Dubnick, supra note 232, at 228-29 (identifying bureaucratic, legal, professional, and political accountability as central to public organizations).

234 U.S. Const. art. I, §§ 2, 3; U.S. Const. art. II, §§ 1, 2, 4.


237 Marbury v. Madison, 1 Cranch (6 U.S.) 137, 163 (1803).

238 Metzger, Privatization as Delegation, supra note 95, at 1400-01.

239 See id; see also Jerry Mashaw, supra note 232, at 120, 128 (describing legal accountability).
principle of adherence to governing law has broader reach, and applies even when governmental actions lie outside the ambit of judicial scrutiny.\textsuperscript{240}

A third form of constitutionally-salient accountability is accountability through supervision and oversight, what is sometimes referred to as bureaucratic or managerial accountability.\textsuperscript{241} This form of constitutional accountability is far less commonly acknowledged, despite its embodiment in the textual references to supervision detailed above.\textsuperscript{242} Indeed, as Ed Rubin has noted, bureaucratic accountability is often portrayed as at odds with political accountability, a growing phenomenon he argues reflects resistance to the legitimacy of administrative government.\textsuperscript{243} A striking recent example is \textit{Free Enterprise Fund v. PCAOB}, in which Chief Justice Roberts, writing for the majority, rejected the suggestion that either the presence of administrative oversight or the need for administrative expertise could justify the removal restrictions at issue:

One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people. This concern is largely absent from the dissent’s paean to the administrative state.\textsuperscript{244}

Such suggestion of opposition between political and bureaucratic accountability are deeply mistaken. Most critically, this argument fails to account for the reality of delegation that lies at the heart of modern administrative government. Delegation not only runs from Congress to the executive branch, with vast responsibilities and discretion delegated to administrative agencies. It also occurs within the executive branch, with the President and principal officers regularly assigning significant responsibility to lower down officials.\textsuperscript{245} Such delegations to and through the executive branch necessitate a hierarchy of supervision in order for knowledge of official actions and policies to reach elected officials at the top of government. Furthermore, such internal administrative

\textsuperscript{240} This marks somewhat of a change in view from my earlier scholarship, in which I identified legal accountability as more closely tied to judicial review although similarly emphasizing the importance of governmental supervision to ensuring legal constraints were enforceable. See Metzger, Privatization as Delegation, supra note 95, at 1400-01.

\textsuperscript{241} See Mashaw, supra note 232, at 120-21, 128; Rubin, supra note 232, at 2020-25.

\textsuperscript{242} See supra TAN 159-162, 176-180.

\textsuperscript{243} Rubin, supra note 232, at 2091-98.

\textsuperscript{244} 130 S.Ct 3138, 3156 (2010).

\textsuperscript{245} See Farina, supra note 248, at 92-93 (discussing presidential subdelegation); see also Thomas W. Merrill, Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation, 104 Colum. L. Rev. 2097, 2101, 2109-14, 2175-81 (2004) (arguing that Congress has exclusive power to delegate authority to act with the force of law and discussing scope of presidential subdelegation authority).
oversight is equally required to ensure that policies and priorities specified by elected leaders are actually followed on the ground. Indeed, *Free Enterprise Fund* itself acknowledges this last point, tying political accountability to internal presidential oversight: “The people do not vote for the Officers of the United States. They instead look to the President to guide the ‘assistants or deputies ... subject to his superintendence.’ … Where [in the administrative system at issue]… is the role for oversight by an elected President?”

Internal supervision and oversight are also central to political accountability in another sense: that of allowing the public to be informed about administrative actions and providing a mechanism for public participation in administration. Political accountability in this sense is less about electoral control, though awareness of agency actions allows stakeholders to exert pressure on elected officials to ensure their interests are addressed. Instead, the focus is often on direct involvement by affected groups and other interested parties in administrative decisionmaking. Agency oversight structures help achieve transparency and opportunities for participation, for example by requiring advance notice, creating disclosure presumptions, reviewing decisions for responsiveness to identified concerns, and monitoring for adherence to agreed-upon norms and goals.

Supervision and oversight are similarly pivotal when it comes to legal accountability. While courts play a central role in enforcing legal constraints on government, a variety of factors can limit the effectiveness and availability of such judicial review. Internal supervision is free of many of these obstacles, and thus plays a critical role in guaranteeing administrative adherence to governing legal

---

247 130 S. Ct. at 3155 (internal quotations partially omitted) (quoting The Federalist No. 72, at 487 (Alexander Hamilton) (J. Cooke ed.,1961)); see also id., at 501 (“A key 'constitutional means' [of preserving the government's dependence on the people] vested in the President — perhaps the key means—was 'the power of appointing, overseeing, and controlling those who execute the laws.'”) (quoting 1 Annals of Cong., at 463).
251 See Sidney Shapiro, Elizabeth Fisher, & Wendy Wagner, The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy, 47 Wake Forest L. Rev. 463 (2012); see also Exec. Order 13563 §2 (requiring broad disclosure and participation in rulemaking); OMB, Good Guidance Practices supra note 144 (detailing requirements for disclosure and oversight of agency guidance); Orszag, supra note 144 (imposing open government requirements on agencies).
Reliance on internal supervision and oversight to achieve legal accountability, instead of just on courts, also minimizes the risk that enforcing legal constraints will undermine managerial control and accountability. Despite its resistance to according supervision much constitutional significance, the Court has noted the role bureaucratic supervision plays in ensuring legal adherence. Thus, for example, it has emphasized the availability of internal administrative complaint mechanisms that could uncover and address constitutional violations in refusing to imply a *Bivens* right to challenge such violations in court. A number of scholars have gone further, underscoring the importance of internal administrative constraints in ensuring that delegated power is not wielded in an arbitrary fashion. And while the scope of delegated federal power is much vaster today, similar concerns with ensuring that government officials adhere to governing legal requirements have fueled bureaucratic supervision since the birth of the nation.

Indeed, the Take Care Clause formally links supervision and legal accountability by tying supervision to faithful execution of the laws.

Put starkly, bureaucratic and managerial accountability in the form of internal executive branch supervision is an essential precondition for political and legal accountability, given the phenomenon of delegation. Scholars debate whether the broad delegations that characterize modern administrative government can ever accord with the Constitution’s grant of legislative power to Congress and separation of power principles. That debate will no doubt continue, but has been eclipsed by reality; modern delegation is here to stay. The more pressing question today is how best to integrate the inevitable phenomenon of delegation into the

---


254 Jerry Mashaw has analyzed the complicated relationship between legal and managerial accountability exceptionally well. See Jerry L. Mashaw, Bureaucracy, Democracy, and Judicial Review: The Uneasy Coexistence of Legal, Managerial and Political Accountability, in THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY (Robert F. Durant ed., 2010).


256 See, e.g., Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. Rev. 461, 516-19, 523-25 (2003) (justifying judicial rejection of broad presidential delegations on the ground that such delegations are likely to lead to arbitrary decisionmaking); Evan J. Criddle, When Delegation Begets Domination: Due Process of Administrative Lawmaking, 46 Ga. L. Rev. 117, 121-22 (2011) (arguing that due process concerns with arbitrary decisionmaking require that Congress channel delegation administrative power through substantive, structural, and procedural constraints); Metzger, Privatization As Delegation, supra note 95, at 1400-06, 1471-73.

257 See MASHAW, supra note 159, 53-60.

258 See supra TAN 159-190.

Constitution’s structure. The answer, to my mind, is recognizing that delegation creates a constitutional imperative to ensure that the powers transferred are used in accordance with constitutional accountability principles. In short, delegation creates a duty to supervise delegated power.

This argument for a duty to supervise is more intuitively plausible with respect to legal accountability than political accountability. To begin with, the connection between supervision and adherence to law is familiar and already embodied in the Take Care Clause, as well as failure-to-train doctrine. Even if this link were not formally mandated, however, it is not difficult to see how internal supervision (through review mechanisms, training, and the like) can help ensure that specific agency decisions and actions adhere to legal requirements. By contrast, the Constitution’s express requirements of political accountability — election of members of Congress and the President, and the political branches’ mandated role in appointment of principal officers — lack a similar formal tie to supervision. Moreover, the relationship between supervision and political accountability is more diffuse and the Court has rejected the suggestion that political accountability requires political control of specific decisions. Indeed, substantial disagreement exists on how much political oversight of administrative decisionmaking is even constitutionally required.

Yet these factors go more to limiting the extent of supervision that political accountability may require, rather than denying that the two are constitutionally connected at all. The basis of this constitutional connection is, to be sure, functionalist and pragmatic; the claim is that supervision is in practice necessary to achieve political accountability in a world of delegation. But functionalist analysis is a core feature of separation of powers jurisprudence. If the principle of political accountability has any constitutional heft beyond its specific express constitutional manifestations — and the Court often has suggested it does — then the functionalist and diffuse nature of a relationship between supervision and political accountability should not preclude its recognition.

260 See, e.g., Free Enterprise Fund v. PCAOB, 561 U.S. 477, 496-97, 508-09 (upholding arrangement under which the President can only control PCAOB decisionmaking by removing a member of the SEC, after excising provision granting PCAOB member also for cause protection); Morrison v. Olson, 487 U.S. 654, 661, 697 (1987) (upholding grant to independent counsel of power to undertake all investigative and prosecutorial decisions on matters within the counsel’s jurisdiction without Attorney General approval and thus independent of presidential control).

261 This disagreement arises most prominently in the debate over presidential administrative oversight, with strong unitary executive theorists insisting on a thick version of political accountability in the form of presidential power to control all administrative decisions, see Calabresi & Prakash, supra note 168, at __; and others countering that more minimal presidential supervision satisfies the Constitution’s demands for political control., see Compare Calabresi & Prakash with Strauss, supra note 178, at 648-50.

262 See, e.g.,Metzger, supra note 259, at 9-11.

263 See, e.g., TAN 236; see also Chevron v. NRDC, 467 U.S. 837, (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices [left unresolved by Congress.] … [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”)
As described, this link between delegation, accountability and supervision is a structural one, but it also can be viewed as rooted in due process’s prohibition on arbitrary exercises of governmental power. This prohibition is often invoked as a central concern in delegation, with due process seen as requiring that delegations be structured so as prevent delegated power from being used arbitrarily.264 Moreover, arbitrary action is understood to include not just unreasonable actions but also actions at odds with constitutional accountability requirements.265 Other administrative mechanisms also help prevent arbitrary decisionmaking, and judicial review of administrative action plays a starring role as well.266 Thus, due process does not necessarily require internal executive branch supervision to prevent arbitrary exercises of power. At a minimum, however, internal supervision is an important means of guarding against arbitrary use of governmental power, and one that becomes particularly important when judicial review is lacking.

3. The Alternative of Judicial Review. The close connection between delegation and supervision makes it all the more surprising that the Court in Whitman so strongly rejected the suggestion that how agencies implement their delegated authority may affect the constitutionality of the delegation.267 Yet even the earlier delegation jurisprudence, which did acknowledge the relevance of internal constraints on delegated authority, viewed any constitutionally-required oversight in quite minimal terms.268 Moreover, the need for supervision to preserve legal accountability, by among other things preserving the applicability of constitutional requirements to those wielding governmental power, is not now part of private delegation analysis.269 Current doctrine does suggest a link between delegation and supervision in one context: due process claims for failure to train.270

264 See Bressman, supra note 256, at 516-19, 523-25, 529-33 (emphasizing constitutional connection between delegation and concerns with arbitrary action); Criddle, supra note 256, at 121-24, 157-59 (arguing for reconceiving nondelegation doctrine as rooted in due process and requiring sufficient procedural and structural checks functionally comparable to the checks in Articles I and II); Donald A. Dripps, Delegation and Due Process, 1988 Duke L.J. 657, 659 (arguing that due process challenges operate as an enforcement tool for nondelegation doctrine); Metzger, Privatization, supra note 95, at 1460-61 (arguing that principle that government power cannot be delegated outside of constitutional constraints lies immanent in due process prohibitions on arbitrary action as well as structural principles of constitutionally constrained government).

265 See Bressman, supra note 256, at 499 (connecting the prohibition on arbitrary action to requirement of political accountability); Criddle, supra note 256, at 179 (arguing that due process requires that delegations be structured to preserve political accountability); Dripps, supra note 264, at 659-60, 675 (identifying a due process right “to protection against exercise of legislative power except as the Constitution provides”).

266 See Richard H. Fallon, Jr., Some Confusions about Due Process, Judicial Review, and Constitutional Remedies, 93 Colum. L. Rev. 309, 333-37 (1993); Shapiro & Wright, supra note 131, at 585-89 (emphasizing the importance of close bureaucratic monitoring, professionalization, and public service commitments in ensuring the legitimacy of administrative action); Simon, supra note Error! Bookmark not defined., at 5-6 (emphasizing transparency and participation as accountability mechanisms and rejecting administrative law’s traditional focus on delegation).

267 See supra TAN 93-95

268 See supra TAN 95.

269 For the argument that it should be, see Metzger, Privatization as Delegation, supra note 95, at 1444-45, 1457-61.

270 See supra TAN 119-122.
But the individual liability focus of such claims, reinforced by the Court’s imposition of the deliberate indifference standard, obscures recognition of supervision as a structural constitutional requirement of delegation.

This lack of development of the supervisory implications of delegation is puzzling. If delegation does indeed present such a challenge to the accountability of government, why hasn’t the linkage between delegation, accountability, and supervision received more judicial attention? One partial explanation for the courts’ failure to draw this connection is the availability of judicial review of specific administrative decisions. Rather than emphasizing internal supervision’s importance for ensuring accountability, courts have relied on external judicial scrutiny on specific actions to achieve this result. This reliance on judicial review in lieu of supervision is clearest with respect to legal accountability, given that the federal courts themselves lack direct electoral accountability. But judicial review also operates to reinforce political accountability by ensuring that agencies adhere to congressional instructions embodied in statutes. Indeed, the deference doctrines courts have constructed to guide their review of administrative action can be viewed as an effort to mediate control of agency action by two political principals, Congress and the President.

Interestingly, direct judicial review of administrative action is a modern phenomenon, developed only at the outset of the twentieth century under particular statutory schemes. Although such review was subsequently codified in the transubstantive APA in 1946 and is now the norm, for long periods of the nation’s history such direct review was only narrowly available and limited to nondiscretionary or ministerial executive action. Yet the absence of direct legal challenges to administrative decisions did not mean judicial review was lacking. Instead, courts employed other techniques to enforce legal constraints on agencies, in particular common law suits for damages against individual officers. Individuals could also assert lack of legal authority as a defense to suits by government officers to enforce the law.

A striking feature of many contemporary administrative contexts is the extent to which judicial review of specific administrative decisions is absent or substantially curtailed. Further, several statutory and doctrinal developments—such as the creation of broad official immunity doctrines, the limited availability of Bivens actions, the substitution of the government as a defendant in tort suits under

---

274 See Louis Jaffe, Judicial Control of Agency Action; MASHAW, supra note 159, at 249-50, 301-308.
275 MASHAW, supra note 159, at 66-73, 301-08.
276 MASHAW, supra note 159, at 68.
the Federal Tort Claims Act, the APA’s provision for direct suit against agencies, and indemnification provisions—have undercut individual federal officer suits as a method of ensuring accountability. Whether or not such limitations on judicial review are constitutional in their own right, they underscore the need to illuminate the constitutional linkages between delegation, supervision, and accountability that have previously lain dormant. Traditional judicial review of specific administrative actions is increasingly unable to stand in for internal supervision.

C. The Scope of the Duty to Supervise

Two alternative bases thus support recognition of a constitutional duty to supervise: the Take Care Clause and repeated suggestions of hierarchy in Article II; and Constitution’s structural connection of delegation, supervision, and accountability, which can also be rooted in due process. But a critical piece of the analysis for such a duty is still missing: what exactly does such a duty to supervise entail, and does the scope of the duty to supervise differ according to the basis on which it is justified?

In large part, these two bases yield overlapping versions of the duty to supervise, reflecting the fact that both share two key precepts. The first is a an emphasis on hierarchy and accountability, identifying the oversight of lower level exercises of governmental power by higher level officials—and ultimately the President—as a central principle of constitutional structure. The core scope of the duty to supervise follows from this precept: what the duty requires is internal executive branch supervision sufficient to ensure that this hierarchial structure is honored and delegated power is used in accordance with governing requirements. Although the Weberian ideal connects hierarchy to bureaucracy and to detailed specification and review of lower-level decisionmaking by higher level offices,

nothing in the principle of hierarchy per se demands this type of higher level control of subordinates. What the principle of hierarchy entails—and more importantly, what the hierarchial structures in the Constitution entail—is simply levels of authority, with lower level officials controlled by and accountable to those higher up; it does not require a particular form of control.

Here is where the second key precept of the duty to supervise becomes central: the duty is a systemic and structural one. It requires systems and structures of supervision adequate to preserve overall hierarchial control and accountability of governmental power. Failures of supervision in discrete circumstances are not constitutional violations if the underlying system for supervision is sufficient and


278 See supra TAN 28-29.

generally employed. Moreover, given this systemic and structural character, the duty to supervise is one that the institutions of government fundamentally bear, even if asserted in suits against individual officers in charge. This systemic focus marks a significant difference from the individualistic cast of current constitutional doctrines implicating supervision. And it means that whether the duty to supervise is violated should not turn on the state of mind of particular officials, but rather on an objective assessment of the adequacy of the supervisory arrangements in place.

Exactly what types of supervisory systems satisfy the duty will no doubt depend on context, as is currently true for the duty to train. Additional supervision may be needed for agency actions that are critical to an agency’s functioning or that implicate important private interests. Further, the central question is not whether the supervisory system in place was the best possible arrangement, but again whether it is adequate to ensure the level of supervision constitutionally required. As a result, much of the time a variety of supervisory approaches should suffice, ranging from detailed review of specific actions to more general monitoring or guidance.

This variety answers concerns that recognizing a duty to supervise is in tension with the contemporary governance trends towards more collaborative and decentralized administration, under which lower level federal officials—along with stakeholders, private contractors, state and local agencies and the like—exercise substantial discretion and control over the shape of government programs. Such lower level and nongovernmental discretion is not precluded, provided systems

---

280 See TAN 137-141. Interestingly, a duty to supervise appears to be emerging in private corporate law. Delaware courts have emphasized the importance of a corporation’s board of directors assuring that “information and reporting systems exist in the organization that are reasonably designed to provide … senior management and … the board itself timely, accurate information sufficient to allow management and the board … to reach informed judgments concerning both the corporation’s compliance with the law and its business performance.” In re Caremark Int’l Inc. Deriv. Litig., 698 A.2d 959, 970 (Del. Ch. 1996) As a result, under Delaware law board members can be liable for “utterly fail[ing] to implement any reporting or information system or controls; or … having implemented such a system or controls, consciously fail[ing] to monitor or oversee its operations.” Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) ; see also Caremark, 698 A.2d at 970 (holding directors can be liable for a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to attempt to assure a reasonable information and reporting system exists”). This private law analog or the duty to supervise differs significantly from the public law version in that it is only triggered by a finding that directors “directors fail[ed] to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities.” Stone, 911 A.2d at 370. Yet a corporation already faces institutional liability for objectively unreasonable actions of its employees under respondeat superior. Thus, the bad faith requirement seems intended to limit the possibility directors will be found personally liable, see TAN, concerns that less applicable in the constitutional context given immunity doctrines and the systemic aspect of the duty to supervise, see TAN 131-133, 135, 277.


283 See supra TAN 24-27 (noting different forms of supervision).

284 See TAN 33-35; see also Simon, supra note Error! Bookmark not defined., at 3-4, 11-15 (describing these trends in contemporary governance).
exist to ensure a minimum level of hierarchial oversight as well.\textsuperscript{285} That said, the duty to supervise does impose a constitutional barrier to administrative arrangements that diffuse governmental power to such a degree that such a minimal level of higher-level oversight is prevented.

This acceptance of a range of oversight mechanisms also importantly differentiates the duty to supervise from unitary executive approaches. As noted above, strong unitary executive advocates insist on full presidential control of all executive branch decisionmaking or executive officials.\textsuperscript{286} But insistence on such broad presidential supervision does not follow from the President’s supervisory obligation to ensure faithful execution of the laws.\textsuperscript{287} The general phrasing of “faithful execution of the Laws” seems satisfied by oversight that ensures overall or systematic legal adherence, rather than by presidential policing of individual decisions.\textsuperscript{288} Moreover, the systemic focus of the duty to supervise is shared by governing case law. The Supreme Court has upheld for cause limits on presidential removal power of an inferior officer, emphasizing the presence of “several means of supervising or controlling” the official’s powers and viewing the constitutional inquiry as whether there existed “sufficient control … to ensure that the President is able to perform his constitutionally assigned duties.”\textsuperscript{289} Similarly, in the Appointments Clause context, the Court has not required that an officer exercise no independent judgment or discretion to qualify as an inferior officer, instead simply demanding that an inferior officer’s work “‘be directed and supervised at some level’” by principal officers.\textsuperscript{290}

The core meaning of the duty to supervise, as requiring actual supervision or at least supervisory systems adequate to preserve overall hierarchial control and accountability of governmental power, does not vary with the constitutional basis from which the duty is derived. But because the delegation account derives the duty to supervise from a broader concern with avoiding arbitrary and unaccountable

\textsuperscript{285} Thus, the duty would appear satisfied by systems where supervision takes the form of requiring explanations to peers and supervisors for deviations from agreed-upon approaches and monitoring of results, see Noonan, Sabel, & Simon, supra note 24, at 535-48, or that incorporate staff independent judgment and peer review as well as political oversight, see Shapiro, Fisher, & Wagner, supra note 251, at 491-501.

\textsuperscript{286} See supra TAN 181-182.

\textsuperscript{287} See Strauss, supra note 169, at 648-50 (distinguishing supervision from power to direct all executive branch decisionmaking). Morrison v. Olson, 487 U.S. 654, 692-93 (1988) (holding limitation on removal to instances of good cause in the independent counsel statute to comport with the President’s duty to faithfully execute the laws); see also Free Enterp. Found. v. PCAOB, 130 S. Ct. 3138, 3157-58 (2012) (reading good cause provision to not allow removal for disagreement with officer’s policies and priorities and sustaining statute once it contained only one level for cause protection)

\textsuperscript{288} Indeed, this limited scope helps explain why strong unitary executive theorists ultimately give pride of place to Article II’s Vesting Clause rather than the Take Care Clause. See, e.g., Calabresi & Prakash, supra note 168, at 570-81.

\textsuperscript{289} Morrison v. Olson, 497 U.S. 654, 696 (1988)

\textsuperscript{290} See Free Enterp.Fund v. PCAOB, 130 S. Ct. 3138, 3162 (2010) (quoting Edmond v. United States, 520 U.S. 651, 662-63 (1997); Morrison, 497 U.S. at 671-73 (holding independent counsel to be an inferior officer notwithstanding that “she possesses a degree of independent discretion to exercise the powers delegated to her.”).
uses of governmental power, it might seem more easily satisfied by arrangements that achieve this goal even if actual supervision is minimal. For example, requirements of expertise-based decisions and professionalized staff can be an important check on abuse of power, and including such requirements in statutes is a means by which Congress can control executive branch decisionmaking. Yet it is harder to argue that professionalization satisfies the Article II version of the duty to supervise, particularly given that professional expertise can operate to insulate lower-level decisionmaking against direction and oversight from higher level executive branch officials.\(^{291}\) An even clearer instance comes from the use of judicial review to prevent abuse of delegated power, which seemingly foregoes internal supervision altogether in favor of external constraints.\(^{292}\) In reality, however, the difference between the two accounts on this score is not that great, given that the Article II-based duty does not require presidential or higher level review of all lower level decisionmaking and the delegation account requires some hierarchial supervision.

The more salient difference between the two accounts concerns instead to whom the duty to supervise applies under each. The Article II version is limited to the executive branch and emphasizes presidential supervision in particular. Supervision within the executive branch is also the prime target from a delegation and accountability perspective, but this account potentially has a wider range of application. Political accountability, for example, should lead the supervisory duty to extend Congress and not just the President or executive branch. Indeed, congressional supervision is not only necessary to ensure political accountability, but further can be an important mechanism for reinforcing legal accountability by investigating allegations that agencies have violated governing law.\(^{293}\) Yet inferring a congressional duty to supervise executive branch administration is hard to square with the separation of Congress and the executive branch that is central to the U.S. non-parliamentary system.\(^{294}\) On the other hand, extensive congressional oversight of the executive branch is a constant feature of contemporary federal administration, driven by politics and long periods of divided government.\(^{295}\) Thus, perhaps the most relevant implication of the duty vis-à-vis Congress is to sanction this current practice.

A more striking contrast relates to whether the duty to supervise extends to state and local governments. The Article II version is limited to the federal government and that is also the focus of the delegation and accountability approach,

\(^{291}\) See Shapiro & Wright, supra note 131, at 596-97 (describing economic and political science analysis disputing the reliability of government employees to serve in the public interest).

\(^{292}\) See supra Part II.B.4.

\(^{293}\) Metzger, supra note 252, at 437-38.

\(^{294}\) See U.S. Const. art. I, §6; Bowsher, 478 U.S. at 721-23.

resting heavily as it does on federal separation of powers. But the legal accountability principles underlying this latter basis for the duty, to the extent rooted in due process prohibitions on arbitrary uses of governmental power, are not so limited. 296 Whether that means the same duty to supervise that applies to federal executive officers also applies to state and local executive officers is a much harder question. Such a conclusion seems dubious, given that not just the duty’s separation of powers basis but also the longstanding understanding that constitutional separation of powers principles do not apply to state governments. 297 Still, the delegation-due process link suggests that supervision might be a relevant factor in assessing the constitutionality of state and local administrative arrangements in some circumstances.

D. Judicial Enforceability and Judicial Supremacy

The availability of judicial review of specific administrative actions as a means of policing agency action may help explain why federal courts have failed to develop the idea of a constitutional duty to supervise. But the more central reason is concern that articulating and enforcing such a duty would exceed the judiciary’s proper role and violate constitutional separation of powers. 298 Administrative arrangements for overseeing actions by government officials are deemed not the stuff that falls within the courts’ proper realm. 299

A central question then is whether Article III or separation of powers preclude judicial articulation and enforcement of a constitutional duty to supervise. This question requires a more nuanced assessment than the Court has so far provided. In some contexts, barriers to direct judicial enforcement of a duty to supervise are quite substantial, but these barriers do not apply across-the-board, and room may still exist for indirect enforcement through other constitutional or subconstitutional means. Regardless, judicial recognition of a central constitutional duty that the courts play a decidedly secondary role in enforcing would be valuable for the wider enterprise of constitutional interpretation. It illuminates the complexities of how constitutional demands are met, and how constitutional understandings generated, in the modern administrative state.

1. Article III and Political Question Barriers. One set of potential separation of powers obstacles arises out of Article III. As noted earlier, 300 the Court frequently invokes standing requirements rooted in Article III’s “case or controversy” requirement as the basis for rejecting efforts to challenge systematic

---

296 Metzger, Privatization as Delegation, supra note 95, at 1400-02.

297 See, e.g., Elrod v. Burns, 427 U.S. 347, 352 (1976) (“[T]he separation-of-powers principle, like the political-question doctrine, has no applicability to the federal judiciary's relationship to the States.”).

298 See supra Part I.C. and TAN 143. The Court also has invoked federalism concerns as a reason to limit federal judicial intervention in some state and local contexts, but my focus here is federal judicial enforcement of a duty to supervise against federal officers, where federalism concerns would not arise.


300 See supra Part I.C.1.
aspects of administrative functioning. A separate Article III-based concern, incorporated into current political question doctrine and also serving as a barrier to federal court jurisdiction, is that courts may lack judicially-manageable standards for determining what the duty to supervise requires and when it is violated. Yet another barrier invoked to preclude judicial consideration of systemic administration is that it leads the courts to intrude in contexts that are reserved for the political branches. Again, this concern connects to political question doctrine, this time to the preclusion of federal court jurisdiction when there is “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”

Article III standing requirements do not justify judicial refusal to recognize a duty to supervise. In fact, recognition of such a duty to supervise could alleviate rather than intensify the standing concerns associated with systemic challenges. These concerns typically center on lack of the requisite injury or causation relationship, with the Court at times skeptical that the systemic problem caused the discrete or particular injuries plaintiffs assert. Yet if the injury at issue is being subjected to inadequately supervised governmental action, then systemic improvements in supervision would be directly correlated to the claimed injury. Moreover, recognition of a constitutional duty to supervise can help to establish that being subjected to inadequately supervised action is, on its own, a constitutionally cognizable harm. A separate question is whether the structural nature of the duty to supervise means that its violation would represent a generalized grievance. But the Court regularly allows individuals to enforce general structural principles when they can show a distinct connection to the principle’s violation. Hence, even if the duty to supervise is such a general structural precept, individuals should have standing to allege its violation in a number of contexts when they can demonstrate this requisite connection, as when they are participant in the inadequately supervised institution or program at issue, or potentially when they would benefit from better supervised governmental action.

By contrast, both political question concerns—that judicially manageable standards for enforcing the duty to supervise may be lacking and that this duty is in any event textually committed to the political branches—represent more substantial obstacles to justiciability. Determining what counts as constitutionally inadequate supervision, as well as identifying what forms of supervision suffice to remedy found violations, will often be quite difficult. Again, myriad forms of supervision exist, and the level of supervision required will likely change in different contexts.

---

303 See supra TAN 91-92
305 In the beneficiary context, more of a question might be raised as to whether the failure to supervise is what caused the plaintiff’s inability to obtain the desired benefit, but that would lead to exclusion on a case-by-case basis, rather than the current insistence that questions of administrative supervision are more categorically off limits.
Judges are ill-equipped to identify which techniques are best suited for a particular administrative context, nor are they likely to have any particular expertise or competence in identifying when the supervision that is provided sinks below a minimally adequate threshold. In short, duty to supervise cases are likely to lack many of the indicia of judicially manageable standards, such as the ability to produce tests that have analytic bite, yield predictable and consistent results, avoid overreaching the courts’ empirical capacities, or guide remedial awards.\textsuperscript{306}

The danger that courts will intrude on the constitutional responsibilities of the other branches in duty to supervise challenges is equally serious. As the Court put the point in \textit{Allen v. White}, rejecting a challenge to the IRS’s implementation charitable deduction limitations on standing grounds: \textenquote{The Constitution . . . assigns to the Executive branch, and not the Judicial Branch, ‘the duty to take care that the law be faithfully executed.’}\textsuperscript{307} Assessing claims that high-level agency officials failed to adequately supervise lower-level officials can involve the courts in second-guessing central features of how the executive branch functions. The scope and nature of supervision reflects policy choices about how to structure agencies and administrative regimes; an agency’s decision to pursue more discretionary and flexible implementation will entail a different form of supervision than the choice to pursue a heavily rule-bound approach.\textsuperscript{308} Supervision is also intimately tied to policy priorities and an agency’s resource allocations. Moreover, the separation of powers concerns raised by such judicial scrutiny are even more acute when at issue is deficient supervision by the President or by Congress, as suggested by case law limiting exercise of judicial process against the President.\textsuperscript{309} All of this supports viewing the duty to supervise as textually committed to the political branches in at least some contexts. Indeed, in \textit{Gilligan v. Morgan} the Court has held as much with respect to military force, concluding that \textenquote{[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches” or “in which the courts have less competence” than the “power of oversight and control of military force.”}\textsuperscript{310}

Yet neither of these concerns justifies deeming duty to supervise challenges categorically nonjusticiable. It is possible to envision some cases in which the failure of supervision is so extreme—for example, a complete lack of oversight in a context where government employees have an obvious capacity to inflict great harm, or a longstanding and well-documented pattern of oversight failures and other conduct that falls below accepted norms—that identifying a violation of the

\textsuperscript{308} See supra TAN supra note 34.
\textsuperscript{309} See Franklin v. Massachusetts, 505 U.S. 708, 800-01 (1992) (refusing to find the President subject to the APA); Mississippi v. Johnson, 71 U.S. 475, 499-500 (1866) (“An attempt on the part of the judicial department … to enforce the performance of [the President’s take care duty and commander in chief supervision] might be justly characterized, in the language of Chief Justice Marshal, as ‘an absurd and excessive extravagance.’”) (quoting Marbury v. Madison, 5 U.S. 137 (1803).)
\textsuperscript{310} Gilligan v. Morgan, 413 U.S. 1, 10-11 (1973).
constitutional duty to supervise could be manageable. Other constitutional contexts exist in which the Court is quite reluctant to hold that governmental action crosses the constitutional line, but nonetheless does not find the constitutional claim at issue to be nonjusticiable. Prime among these are challenges to legislation as unconstitutionally delegating legislative power\textsuperscript{311} or to spending measures as unduly coercive on the states.\textsuperscript{312} Instead of categorically excluding these challenges from the judicial purview, the Court has simply made clear that it will rarely find a constitutional violation or concluded that wherever the constitutional line may lie, a challenged measure crosses it.\textsuperscript{313}

Similarly, enforcement of the President’s own Take Care duty or Congress’s supervision obligations seems most clearly assigned to the political branches. \textit{Gilligan} signals a similar conclusion for supervision at in the military context and other areas may seem sufficiently entrusted to the political branches as to justify the same result, with foreign affairs and national security coming particularly to mind. But this conclusion would not follow for most areas of federal administration, where the courts are regularly involved in reviewing executive branch action and enforcing legal obligations.\textsuperscript{314} Moreover, the Court frequently has enforced duties imposed on high-level officials despite the risk of interfering with presidential instructions, even in rare cases against the President.\textsuperscript{315} In fact, the Court has shown itself quite willing to police the constitutionality of governmental structures on separation of powers grounds, even when neither of the political branches is complaining.\textsuperscript{316} Insofar as the duty to supervise rests on a delegation and due process basis, as opposed to representing just a distinctly presidential obligation rooted in the Take Care Clause, its nonjusticiability is yet harder to justify. As noted above, delegation and due process failure to train challenges are regularly entertained, albeit rarely if ever successful.

In practice, duty to supervise challenges seem likely to prove closely analogous to excessive delegation claims. Courts will “almost never fe[el] qualified to second-guess Congress” or the President with respect to the appropriate form and scope of supervision.\textsuperscript{317} Put differently, the duty to supervise is primarily given over to the political branches to enforce:

\textsuperscript{311} See Whitman v. ATA, 531 U.S. 457, 474-75 (2000)
\textsuperscript{312} See South Dakota v. Dole, 483 U.S. 203, 211 (1987)
\textsuperscript{313} NFIB v. Sebelius, 132 S.Ct. 2566, 2606 (2012).
\textsuperscript{314} See Zivotofsky 132 S. Ct. at 1425 (2012) (rejecting claim that constitutionality of a statute governing issuance of passports to Americans born in Jerusalem was a political question over which the courts could not assert jurisdiction)
\textsuperscript{315} See United States v. Nixon, 418 U.S. 904 (1974); Little v. Barreme, 6 U.S. (2 Cranch) 170, 176-78 (1804); see generally Kevin M. Stack, The Reviewability of the President’s Statutory Powers, 62 Vand. L. Rev. 1171 (2009) (providing an account of when the President’s actions are reviewable).
\textsuperscript{316} See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S.Ct. 3138, 3155 (2010) (explaining that separation of powers does not depend on objections from the Executive Branch, because one President cannot choose to diminish his or her successors’ power).
Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management.\textsuperscript{318}

Still, this leaves room for judicial prompting when the political branches fail to undertake the supervision for which they are better equipped, or even for more direct judicial enforcement in discrete contexts where courts are competent to act. The duty to supervise thus may well be judicially underenforced, but that does not make it categorically unenforceable.\textsuperscript{319}

2. \textit{Departmentalism in a World of Judicial Supremacy}. The real question is not, therefore, whether judicial articulation and enforcement of the duty to supervise would violate constitutional limitations on the federal courts’ role. Instead, it is whether such judicial articulation is appropriate and worthwhile, particularly given the likely limited scope of judicial enforcement and the fact that the duty to supervise is primarily a responsibility of the political branches. Put even more pointedly, what exactly is gained by such judicial articulation over current practice, in which supervisory obligations are judicially acknowledged in narrow circumstances and the political branches already put substantial emphasis on oversight and supervision?

Despite its limited enforceability, judicial articulation of a constitutional duty to supervise could yield two important benefits. The first, more immediate and practical, would be improvements in current doctrine and case law. In particular, forthright judicial acknowledgement of a constitutional duty to supervise could allow current doctrine to move away from its excessive resistance to taking cognizance of systemic administration and flawed insistence on framing challenges to general administrative features solely in individualistic terms. Such acknowledgement would also allow courts greater room to enforce supervision requirements indirectly, through subconstitutional means such as administrative law. At a minimum, it would create a counter to existing precedent suggesting that statutory measures such as the APA should be narrowly read to preclude systemic challenges. These benefits, and a more detailed account of what recognizing a constitutional duty to supervise might mean in practice, are explored below in Part III.

The second benefit is more intangible and relates to the increasingly dominant role the courts play in constitutional interpretation in the United States.\textsuperscript{320}

\textsuperscript{318} Stark v. Wickard, 321 U.S. 288, 310 (1944).
\textsuperscript{320} For history and different accounts of the growth of judicial supremacy, see Barry Friedman & Erin F. Delaney, \textit{Becoming Supreme: The Federal Foundation of Judicial Supremacy},
Ours is a world of judicial constitutional supremacy, with the Court recently proclaiming its “primary role” in determining constitutionality: “[W]hen an Act of Congress is alleged to conflict with the Constitution, ‘it is emphatically the province and duty of the judicial department to say what the law is.’”\(^{321}\) To be sure, opportunities exist for constitutional interpretation by the political branches, but these opportunities are sometimes vanishingly thin.\(^{322}\) In a world where enforcing the Constitution is seen as overwhelmingly the responsibility of the courts, assignment of constitutional questions wholly outside of the judicial branch too easily becomes equated with denying that those questions have any real constitutional basis.

Judicial articulation of a duty to supervise, even with limited direct enforcement, can help ensure that the constitutional status of the duty to supervise is acknowledged. But this approach is not without risks of its own, in particular that the constitutional scope of the duty to supervise will be equated with its judicial manifestations.\(^{323}\) One way to counter this risk is for courts to be explicit that their constrained enforcement reflects specifically judicial limitations that do not extend to the political branches.\(^{324}\) Alternatively, courts could expressly acknowledge that their enforcement of the duty to supervise takes an indirect form, occurring largely through subconstitutional mechanisms and by incentivizing greater supervision rather than mandating it.

Such transparency about the courts’ secondary role and their reliance on indirect mechanisms to enforce constitutional obligations would be a welcome development for constitutional law generally. The Supreme Court has been open about its use of statutory interpretation to address constitutional concerns, invoking the canon of constitutional avoidance in prominent cases with regularity.\(^{325}\) But it has been far more reticent in other contexts, most notably about the ways that

---


\(^{322}\) See, e.g., Windsor, 133 S.Ct. at 2683-84, 2689 (chiding the President for refusing to defend the constitutionality of a statute based on a theory yet to gain judicial recognition); Zivotofsky, 132 S. Ct. at 1427 (2012); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).


\(^{324}\) Richard Fallon has suggested that in some contexts the practical barriers that limit judicial enforcement of certain constitutional requirements, in particular the difficulty crafting judicially manageable standards, may also justify limited political enforcement. As a result, he argues that some constitutional rights may be aspirational. See Fallon, supra note 306, at 1323-25. Others have critiqued the suggestion that the reasons for limiting judicial enforcement extend to the political branches. See Berman, supra note 323. But even accepting Fallon’s account, supervision and systemic oversight are areas where the executive branch in particular has substantial capacity and a central constitutional role, and thus lacks the liabilities that courts encounter.

ordinary administrative law serves to address constitutional concerns.\(^{326}\) For example, courts developed the APA’s initially modest prohibition on arbitrary agency actions into a robust reasoned decisionmaking requirement, and similarly strengthened the statutes’ minimal rulemaking demands. A major factor underlying these transformations was constitutional concerns with unchecked agency power and the breadth of modern rulemakings. Yet the Court has never acknowledged this constitutional basis.\(^{327}\) Similarly, the Court has at times sought to incentivize greater agency attention to the constitutional dimensions of their actions through deference doctrines and has indicated that adequate administrative proceedings can substitute for constitutionally mandated habeas review.\(^{328}\) But it has failed to identify these incentivizing efforts as a form of constitutional enforcement and rejected the suggestion that agencies should be particularly sensitive to constitutional values in their decisionmaking.\(^{329}\)

The net result is too limited understanding of how constitutional demands are met, and constitutional understandings generated, in the modern administrative state. It leads to a false perception of constitutional law as separate and distinct from other forms of law and of agencies as having little role as independent constitutional enforcers.\(^{330}\) Failure to acknowledge the complicated interplay among courts and agencies with respect to constitutional enforcement also makes it difficult to develop an account of the proper bounds of this relationship, in particular when the courts should be primary constitutional interpreters and when instead they should play a secondary role. One of the benefits of the duty to supervise is that, as an instance in which primary responsibility for constitutional enforcement falls to the political branches and agencies, it puts these issues front and center.

III. IMPLEMENTING THE CONSTITUTIONAL DUTY TO SUPERVISE

Judicial articulation of a constitutional duty to supervise thus could yield real benefits. The difficult questions that remain are identifying how a duty to supervise would be implemented in practice—what would such a duty look like, who would enforce, and how would recognition of such a duty address the mismatch between current doctrine and contemporary administrative practice. The discussion that follows begins by examining the possibility of direct judicial enforcement in privatization contexts, institutional reform litigation, and *Bivens* actions. It then turns to examining the possibility of judicial enforcement of the duty through administrative law. Here, recognition of the duty could lead to a

\(^{326}\) See Metzger, Ordinary, supra note 101, at 506, 534-36.

\(^{327}\) Id. at 490-94.

\(^{328}\) Id. at 497-501.

\(^{329}\) See FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 & n.3 (2009). But see Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247, 2259 (2013) (“[W]e think that—by analogy to the rule of statutory interpretation that avoids questionable constitutionality—validly conferred discretionary executive authority is properly exercised (as the Government has proposed) to avoid serious constitutional doubt.”).

\(^{330}\) See Metzger, Administrative Constitutionalism, supra note 15, at 914.
reframing of judicial analysis, thereby allowing administrative law to reinforce supervisory obligations in a way that current doctrine precludes. Finally, this part takes up the question of what enforcement of the duty to supervise might look like outside of the courts, through presidential and congressional action.

A. Direct Judicial Enforcement

Again, judicial involvement often may be limited to acknowledging the existence of a constitutional duty to supervise, with direct enforcement left to the political branches. But there will be some contexts when direct judicial enforcement may be appropriate. Extreme instances of supervisory failure are one. Three others, worth exploring in detail because they showcase the possibilities and obstacles to direct enforcement, are privatization, institutional reform litigation, and Bivens actions.

1. Privatization. Delegation and due process are central concerns implicated by privatization. Delegation because many forms of privatization—in particular, instances when the government contracts with private entities to provide services to third parties or manage government programs on its behalf—are best understood as instances in which the government is delegating government power into private hands. Due process, in turn, because often these private delegates have their own financial and institutional interests at stake in the decisions they make about which services an individual receives or how programs will be run. In addition, such private decisions substantially affect whether these aspects of government operate in a consistent, nonarbitrary fashion and adhere to governing legal requirements. Yet as noted, the government’s private partners often operate exempt from due process and other constitutional constraints.

I have elsewhere proposed addressing this deficiency in the current constitutional treatment of privatization through a delegation approach that emphasizes the government’s duty to supervise its private delegates. Under this approach, when the government authorizes private entities to interact with third parties on its behalf it would be required to provide adequate supervision of the actions of its private delegates or otherwise structure the powers it grants so as to ensure that constitutional limits on government power are preserved. Such supervision requirements could be directly judicially enforced, by legal challenges seeking invalidation of privatization arrangements as unconstitutional private delegations or seeking direct application of constitutional constraints to private actors to ensure enforceability of constitutional limits on governmental power.

The challenge for courts will be determining what qualifies as constitutionally adequate supervision. No doubt this would vary depending on the

331 See TAN 37-41
332 See Gillian E. Metzger, Private Delegations, Due Process, and the Duty to Supervise, in Freeman & Minow, eds., GOVERNING BY CONTRACT, supra note 37, at 299-306.
333 See supra TAN 42.
334 See id. at 1457-80.
extent of control a private entity wields over others and the significance of its determinations. But a core aspect would likely be complaint or appeals systems through which individuals could obtain governmental review of private decisions that determine their access to government benefits or participation in government programs. Not only do such systems enable government oversight of private decisions on its behalf, but they preserve constitutional accountability by providing governmental action—the government’s decision on review—against which constitutional claims can be lodged.\textsuperscript{335} Adequate supervision might also necessitate requiring private entities to promulgate standards and procedures, both to regularize their decisionmaking and to better enable oversight. Alternatively, the government could itself detail how programs should operate and the criteria and procedures for benefit determinations. In instances where the benefits and services at stake are highly discretionary, so that no individual could demand individualized process were the program implemented by the government directly, the duty to supervise might be limited to requiring government scrutiny of overall program functioning, rather than review of specific decisions.\textsuperscript{336} And less government supervision should be required when program participants themselves exercise significant control over the benefits and services they receive, because less government power over others is then being delegated.

This variability might raise a question about whether judicially manageable standards exist, but the fact that this approach would be tied to instances of privatization should mitigate that concern. These contexts present distinct issues of self-interest and private control of governmental power. In addition, courts have the oversight and review structures of publicly-run programs as a baseline against which to assess the adequacy of privatized arrangements. Moreover, private delegation and due process jurisprudence already identifies the constitutional danger of public power over third parties being wielded for private gain, as well as the importance of government supervision in mitigating that risk. Although this precedent often has focused on formal oversight instead of the active oversight proposed here, that move is less draconian than asking courts to consider the adequacy of supervision when it is not currently part of their analysis at all.

2. Institutional Reform Litigation. Litigation involving publicly administered institutions presents a more complicated case for direct enforcement of a duty to supervise. As noted above, although framed in terms of violation of discrete constitutional and statutory rights, much institutional reform litigation is centrally concerned with improving how the government programs and institutions in question are systemically administered.\textsuperscript{337} Thus, forthright recognition of a duty to supervise may seem particularly fitting and would allow such litigation to directly target those systemic administrative features that lead to violation of individual rights. Indeed, such recognition could have real benefits. For one, it could bridge the gap that some claim exists between the violated right and judicially-ordered relief in these cases, because requiring reformed administrative

\textsuperscript{335} See id. at 1472.
\textsuperscript{336} See Metzger, Private Delegations, supra note 332, at 306-09.
\textsuperscript{337} See TAN 88.
structures is closely tied to remediying violation of a constitutional duty to supervise. It could also mitigate doctrinal obstacles such as standing, as plaintiffs should be able to call upon a broader range of evidence to demonstrate injury and causation from an allegedly unconstitutionally supervised institution than if they have to demonstrate violation of a discrete right. Relatedly, focusing on general supervisory failures might enable broader and more effective remedies than reforming a discrete area where problems have emerged, and at a minimum, will avoid the problem of having to demonstrate that unconstitutional actions by street level officials are attributable to policy or actions of higher-level officers.  

Those benefits are two-edged, however, in that they demonstrate the broad potential reach of enforcement of a duty to supervise in this context. Uncabined by a requirement of privatization or other threshold constraints, such a duty could encompass a large swath of public administration, including many government programs outside of the traditional institutional settings where institutional reform litigation previously has been focused. The risk of intruding on political branch prerogatives thus appears significantly greater, as is the likelihood of exceeding judicial competency and the courts’ ability to provide coherent and consistent decisions. Another major complication is that institutional reform litigation overwhelming involves state and local institutions, requiring courts to assess how, if at all, the duty to supervise applies outside of the federal government.

To be sure, these dangers are easy to exaggerate. Over time, courts would likely develop context-specific standards of what constitutes adequate supervision, as scholars maintain has occurred in current institutional reform litigation.  In addition, although a duty to supervise may have a broader range of application, the remedies it supports would likely be a step removed from day-to-administration, with courts requiring officials to devise plans and structures to better oversee failing public institutions instead of imposing detailed requirements on how these institutions operate. If so, enforcing a duty to supervise might be in line with remedial trends in institutional reform litigation, under which courts are giving public officials more discretion to remedy identified institutional failures and remedial orders stipulate performance goals instead of mandating operational details.

338 See Sabel & Simon, supra note 88, at 1085, 1095-96 (identifying these obstacles to institutional reform litigation).


Nonetheless, the potential intrusion simply from greater instances of court involvement and the difficulty entailed in assessing what constitutes adequate supervision in different institutions and programs—not to mention the courts’ increasing resistance to undertaking reform of public institutions—suggests a limited role for direct enforcement of the duty to supervise in institutional reform litigation. Instead, in this context the duty to supervise may work best as a supplement to other constitutional and statutory claims in institutional contexts where there is substantial evidence of systemic failure. Although limited in scope, recognition of a duty to supervise here could still prove quite important. Doing so renders explicit an assumption underlying institutional reform litigation yet rarely voiced directly: that ensuring government institutions are adequately supervised and managed is a crucial element of what honoring constitutional and statutory rights means in an administrative state. Acknowledging the duty to supervise therefore also helps justify judicial authorization of systemic remedies. For instance, acknowledging that all prisoners have a right to be housed in institutions with adequately supervised medical and mental care facilities provides an additional basis in a case like *Plata* for allowing prisoners who have not yet suffered Eighth Amendment violations to sue and for granting broad systemic relief.

3. Bivens and Duty to Supervise Claims. *Bivens* actions are a third potential context of direct judicial enforcement of the duty to supervise. Indeed, *Bivens* actions represent the context in which supervisory obligations of federal officials most frequently surface today, with *Iqbal* being only one of several actions alleging supervisory failure by high level officials in the national security context. Nonetheless, they are a poor vehicle for asserting the duty to supervise. Part of the reason is the Supreme Court’s evident and recent resistance to addressing supervisory deficiencies in the *Bivens* context. But the bigger problem lies with a feature that goes to the heart of *Bivens* actions: the focus on individual officers and individual liability rather than government institutions. This feature—embodied in rejection of efforts to bring *Bivens* actions against government agencies, the prohibition on respondeat superior, and the fact that *Bivens* actions seek only money damages—fits poorly with the duty to supervise’s systemic and structural orientation. As a result, incorporating the duty to supervise would entail a fundamental reorientation of *Bivens* actions, potentially then undermining the availability of *Bivens* actions to obtain compensation for constitutional violations by individual federal officers. Given that the APA provides a right of action through which claims of duty to supervise violations often can be brought in federal administrative contexts, one that is institutional rather than individual by nature, little reason exists to use *Bivens* to target failed supervision.

341 See, e.g., Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011); Vance v. Rumsfeld, 701 F.3d 193, 203-05 (7th Cir. 2012) (en banc).


343 See Reinert, supra note 277, at 846-50

344 To be sure, the APA route has its limitations—in particular, it is only available to target constitutional violations that are ongoing and thus not an option for those no longer subject to challenged exercises of governmental authority, as in *Iqbal*. On the other hand, recognition of a
B. Administrative Law and the Duty to Supervise

Rather than direct constitutional enforcement, a better mechanism for implementing the duty to supervise in publicly-administered programs and institutions often will be administrative law. In many ways, administrative law seems ideally situated to enforcing a duty to supervise with respect to federal agencies. The ostensible statutory, regulatory, and common law bases of administrative law doctrines allows room for interbranch dialogue and political branch tailoring even when administrative law is serving, as it often does, as a constitutional surrogate. Statutory and regulatory enactments already reflect attention to supervision, frequently setting up mechanisms for oversight and internal agency review. In turn, judicially-developed administrative law is built around the need to enforce legal requirements while acknowledging agencies’ primacy in law implementation, which better accommodates executive branch discretion than direct constitutional enforcement. As an example, the standard administrative law remedy for an identified violation is a remand to the agency—even invalidation of administrative statutory interpretations as contrary to statutory requirements can end up with a remand so that agencies can rethink their regulatory policy in light of statutory demands. Moreover, the target of administrative review is expressly institutional, with the APA affording review only of actions by agencies, not individuals.

Hence, administrative law offers an important means by which courts could require that agencies pay greater attention to their supervisory obligations without assuming responsibility for enforcing those obligations in the first instance. The vehicle would be the standard APA challenge to agency action as arbitrary and capricious, but the agency action being challenged would be internal supervision mechanisms such as plans, oversight arrangements, program review structures, and the like. Yet efforts to use administrative law in this fashion would run into significant obstacles absent changes to current doctrine. In particular, the Court would need to allow systemic aspects of administration to come under judicial review and no longer insist that only discrete agency actions can qualify as final agency action subject to challenge under the APA.

Insofar as agencies would now need to explain and justify broader programmatic, structural, and policy choices as well as specific actions, using administrative law to enforce the duty to supervise risks worsening the burdens that administrative law judicial review already imposes on agencies, burdens that many more systemic duty to supervise may itself expand the category of ongoing violations. See TAN 338.

See supra TAN 326-329; Metzger, Embracing, supra note 271, at 1310-16, 1343-52. See, e.g., supra TAN 144; Shapiro, Fisher & Wagner, supra note 241 at 493-96 (describing process of internal oversight used by EPA in setting CAA standards). See, e.g., 5 U.S.C. §§ 551, 706(2). See supra TAN 145-150.
administrative law scholars argue already severely constrain agency action. On the other hand, focusing on agency oversight structures and supervision might also justify limitations or deferral of judicial review in some circumstances when it currently occurs. Such a focus is consistent with greater insistence on exhausting administrative remedies, so that agency supervision mechanisms can be allowed to work. Similarly, courts should give agencies more leeway to issue informal guidance without running afoul of the APA’s notice and comment requirements, on the grounds that such guidance is a crucial part of agency efforts to fulfill their internal oversight responsibilities and curtail lower-level discretion. And courts could incentivize greater agency oversight efforts by deferring more strongly to agency decisions that demonstrate high level internal agency oversight. Courts could also defer substantially to specific agency determinations when those determinations represent implementation of a general plan or policy that an agency has adequately justified.

As a result, incorporating a duty to supervise into administrative law could produce a fundamental reorientation of judicial review of agency action. Under this reframing, judicial review of agency action would become the inverse of the current administrative model. Rather than targeting specific decisions or actions, judicial review would scrutinize programmatic structures and broader aspects of agency policy and functioning.

A clearer sense of how administrative law enforcement of a duty to supervise might work in practice can be gleaned by examining what such an approach would entail in the contexts of federal-state cooperative programs, crisis
governance, and current debates over presidential oversight.

1. Federal-State Cooperative Programs. As mentioned, federal administrative oversight increasingly represents the key mechanism of control over state implementation of federal law. The availability of such federal oversight at a retail level varies widely. For example, state agency determinations that an individual applicant is not medically disabled and not entitled to social security disability benefits are reviewed by federal administrative law judges if the applicant appeals. By contrast, in the education context, federal law requires that local

350 For an instance when a court failed to do so, see Chamber of Commerce v. Dep’t of Labor, 174 F.3d 206, 208 (D.C. Cir. 1999).
351 See Barron & Kagan, supra note 152, at 235-36, 241-46
353 See supra TAN 56-Error! Bookmark not defined.
354 See 42 U.S.C. § 421 (detailing requirements for federal supervision and provision of review on applicant’s request).
school districts provide hearings at which students and parents can challenge unfavorable decisions relating to education disability services and further provides that states must have a complaint process at which local decisions can be challenged. But the federal Department of Education investigates only complaints of discrimination and oversees state and local performance generally, as part of its role in distributing federal grants.\textsuperscript{355} In the environmental context, EPA has authority to review, reject, and override specific state permitting decisions, but also enjoys broad discretion over whether to exercise this authority.\textsuperscript{356}

Instead of reviewing individual determinations, federal agency oversight predominantly takes a broader, more systemic cast. Governing federal statutes require federal agencies to review and approve state implementation plans and processes before states can receive federal funds or exercise regulatory authority, and also to oversee agency implementation generally once approval is granted.\textsuperscript{357} Although statutes specify criteria that must be met for approval, federal agencies wield substantial discretion in determining when those criteria are met and even more in determining whether approval should be rescinded.\textsuperscript{358} Recently this discretion was prominently on display when the Department of Education granted waivers to over 43 states and other jurisdictions, exempting them from basic requirements of the federal No Child Left Behind Act.\textsuperscript{359} In some instances, these federal agency oversight decisions take the form of discrete decisions and agency rules that are subject to judicial review, but quite often judicial review is lacking.\textsuperscript{360} Realistically, moreover, agencies almost never try to rescind state authority or significantly cut funding.\textsuperscript{361}

Some scholars contend that cooperative federalism programs are unconstitutional because they “essentially transfer broad and effectively

\textsuperscript{355} See 34 CFR 300.151-153 [20 U.S.C. 1221e-3] (state complaint procedures); [34 CFR 300.507-516] [20 U.S.C. 1415] (due process hearing requirements and right to sue); see also 34 C.F.R. §§ 100.1-13 (regulations implementing prohibition on discrimination based on race, color, or national origin); \textit{id.} §§ 106.1-71 (same, for sex discrimination); \textit{id.} §§ 104.1-61 (same, for discrimination based on handicap). To the extent it occurs, federal oversight of individual state and local disability education decisions takes a judicial rather than administrative form, with individuals allowed to file suit in federal or state court once state and local administrative proceedings are exhausted. 20 U.S.C. §1215(i)(2)(A).

\textsuperscript{356} See e.g. 40 C.F.R. § 123.44.


\textsuperscript{358} See \textit{CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP 93-111, 116-19 (2003).}


\textsuperscript{360} See, e.g., Douglas v. Independent Living Ctr., 132 S. Ct. 1204, 1210-11 (2012); \textit{RECHTSCHAFFEN & MARKELL, supra note 358, at 95-96; Markel & Meazell, supra note 356, 63, at 335-42.}

\textsuperscript{361} See Krotoszynski, supra note 98, at 1635-39;
unsupervised responsibility for the administration of federal law to state agencies.\footnote{Krotoszynski, supra note 98, at 1639.} Insofar as this claim rests on the unitary executive view that the President must be able to exercise direct formal control of all federal law enforcement, it goes too far.\footnote{See supra TAN181-186. Professor Ronald Krotoszynski bases his argument about the unconstitutionality of cooperative federalism on the formalist bent in recent Supreme Court separation of powers decisions like Free Enterprise Fund, see Krotoszynski, supra note 98, at 1607-1611, but those decisions are also striking in their unwillingness to call the constitutionality of well-established administrative arrangements, like cooperative federalism, into question.} In addition, questions exist as to whether state agencies are best viewed as implementing federal or state law (or some combination thereof) and whether an agency head’s statutory power to approve proposed state implementation plans suffices to meet constitutional requirements for selection of inferior officers.\footnote{See, e.g., U.S. Dep’t of Educ.. ESEA Flexibility, June 7, 2012, available at http://www.ed.gov/esea/flexibility/documents/esea-flexibility.doc (describing requirements for obtaining a NCLB waiver).}

The problem thus is less that insufficient formal mechanisms exist for control of state implementers, but more that federal agencies do not wield the available mechanisms adequately. Put differently, the real issue is enforcing federal agencies’ constitutional duty to supervise their state partners. This is not an instance where the courts should play a major role, given the extent to which federal oversight of state implementation turns on agency resources, priorities, and determinations about how best to realize programmatic goals.\footnote{Cf Heckler v. Chaney, 470 U.S. 821, 831-33 (1985).} Courts will need to accord broad deference to agency choices about the best mechanisms for state oversight. Still, courts can play an important function by requiring federal agencies to explain their oversight choices or justify widespread practices of failing to enforce statutory or regulatory requirements on their state partners. In the context of waivers, for example, courts could require agencies to explain their policies on when waivers will be granted and the grounds on which they may be rescinded.\footnote{See, e.g., Dodd–Frank §§ 202(a)(1)(A)(iii), (v), 12 U.S.C. 5382(a)(1)(A)(iii), (v) (limiting scope of standard of review and providing that after 24 hours, if the court has not made a determination, “the Secretary shall appoint the Corporation as receiver”); Posner & Vermeule, supra note 63, at 1654-59.}

2. Crisis Governance. A similar emphasis on internal agency processes appears well-suited to address concerns raised by crisis governance. Here, too, judicial involvement will be highly limited, given time pressures, statutory constraints, and general unwillingness to sue, and courts will defer strongly when suits do appear.\footnote{See, e.g., U.S. Dep’t of Educ.. ESEA Flexibility, June 7, 2012, available at http://www.ed.gov/esea/flexibility/documents/esea-flexibility.doc (describing requirements for obtaining a NCLB waiver).} Congressional and other forms of oversight are also often minimal. Hence, internal constraints and internal oversight will be the core mechanisms for ensuring that the duty to supervise is met.

\footnote{Krotoszynski, supra note 98, at 1639.}

\footnote{See supra TAN181-186. Professor Ronald Krotoszynski bases his argument about the unconstitutionality of cooperative federalism on the formalist bent in recent Supreme Court separation of powers decisions like Free Enterprise Fund, see Krotoszynski, supra note 98, at 1607-1611, but those decisions are also striking in their unwillingness to call the constitutionality of well-established administrative arrangements, like cooperative federalism, into question.}


\footnote{See, e.g., Dodd–Frank §§ 202(a)(1)(A)(iii), (v), 12 U.S.C. 5382(a)(1)(A)(iii), (v) (limiting scope of standard of review and providing that after 24 hours, if the court has not made a determination, “the Secretary shall appoint the Corporation as receiver”); Posner & Vermeule, supra note 63, at 1654-59.}
The urgency of agency decisions in crisis governance contexts means that they often receive substantial high-level executive branch oversight. Accounts of recent crisis governance decisions, such as determinations by the Federal Reserve and the Department of Treasury on how to respond to bank failures or the authorization of different national security actions ranging from drone attacks to communication interception programs, reveal heavy involvement by agency heads, political appointees, and the White House. Yet as crisis governance regimes become a more familiar aspect of agency operations, there is a risk that such high-level oversight will dissipate. Moreover, the nature of crisis decisionmaking creates a danger of inconsistent and arbitrary determinations that ad hoc internal supervision may not abate. And high-level officials may be more inclined to urge actions that push at the limits of agency authority in response to immediate problems than career officials who have a longer-term perspective.

The inevitable pressures of crisis governance contexts suggests the benefits of encouraging agencies to develop strong decisionmaking structures or address key issues about the scope of their authority ahead of time. Public guidelines developed by Treasury officials helped provide clarity and consistency to its Capital Purchase Program, under which the federal government bought substantial equity stakes in banks. In a similar vein, the Dodd Frank Act requires the Federal Deposit Insurance Corporation to promulgate rules that would govern its decisions to put banks deemed too big to fail into receivership. Scholars have proposed better administrative oversight systems as critical to ensure accountability of national security data collection. And current proposals to address concerns raised by the U.S. government’s use of drones to kill suspected terrorists center on constructing governing rules and strong internal processes to guide specific drone decisions.

368 See, e.g., DAVID WESSEL, IN FED WE TRUST (2010) (describing close involvement of Secretary of the Treasury and Chair of the Federal Reserve in financial bailout measures); Davidhoff & Zaring, supra note 65, at 465 (same); see also Peter Baker, In Terror Shift, Obama Took A Long Path, N.Y. Times, May 28, 2013, at A1 (noting extensive involvement by President Obama, key White House personnel, and agency heads in setting drone policy).

369 Concerns of this kind were raised about some of the decisions made during the financial crisis. See Davidhoff & Zaring, supra note 65, at 499-500, 529-31.

370 See Stavros Gadinis, From Independence to Politics in Financial Regulation, 101 Cal. L. Rev. 327, 386-88 (2013) (describing the disparity between short-term political interests and long-term bailout outcomes to argue that independent bureaucrats are best positioned to respond to financial crises).


373 See Renan, supra note 101, at 18-40.

Courts could use administrative law to encourage such proactive supervisory actions. For instance, they could allow individuals greater room to challenge agency failure to promulgate rules or issue guidance in instances in which judicial review of specific agency decisions is likely to be lacking. Alternatively, courts could make clear that they will defer more to agency actions undertaken with strong internal processes when those actions are reviewed ex post, an approach the Supreme Court suggested outside of the administrative law context in Boumediene.\(^{375}\) Needless to say, such efforts to tie administrative law review to general aspects of agency functioning, rather than the substantive merits of particular agency decisions, are at odds with current doctrine. But these approaches could be justified as means of ensuring agencies adhere to the duty to supervise in crisis governance contexts.

3. Presidential Administration. Finally, it is worth considering how a duty to supervise approach might affect administrative law’s treatment of presidential oversight. The most frequent judicial response to presidential oversight of administrative decisionmaking is to ignore it. Agencies rarely acknowledge presidential involvement in explanations of agency decisions, and courts rarely invoke it on their own.\(^{376}\) This approach is in some ways a sensible compromise, allowing presidential oversight to occur but guarding against abuse by requiring agency decisions to be independently defensible. It also avoids the difficult task of having courts determine which political influences are acceptable and which are not—a determination that risks politicization of the judiciary and pushes at the limits of its institutional competence.\(^{377}\) But the lack of transparency about presidential involvement undermines public awareness of the realities of administrative decisionmaking and can have an insidious influence on supposedly apolitical agency processes.\(^{378}\) And for my purposes here, it provides little guidance about when presidential influence is an appropriate manifestation of the duty to supervise and when it crosses the line. Such a line is unquestionably difficult to draw, and determining where it lies will largely be a responsibility of the political branches. Yet some judicial engagement on the proper bounds of presidential oversight seems a necessary corollary of acknowledging a constitutional duty to engage in internal executive branch supervision.

Administrative law again appears the best medium for courts to address this issue, for example in suits challenging presidentially-directed agency policies as unauthorized or arbitrary.\(^{379}\) Using administrative law allows courts to play a

---

\(^{375}\) See Metzger, Ordinary, supra note 101, at 497-98.


\(^{378}\) See Watts, supra note 376, at 40-45; see also Mendelson, supra note 376, at 1159-75 (noting costs of lack of transparency, but advocating for greater agency disclosure rather than acknowledgement of politics in judicial review).

\(^{379}\) See Watts, supra note 376, at 57-60, 72-73.
secondary policing role rather than the prime articulators of the proper bounds of presidential oversight. In addition, administrative law’s capaciousness and common law character allows more flexibility in addressing different forms of oversight and greater responsiveness to political branch views. Once more, this approach to the duty to supervise would require changes in current administrative law doctrines, particularly insofar as the presidential policy involves nonenforcement. Suits challenging overall policies absent specific enforcement actions currently run into ripeness and finality barriers, while failures to enforce are presumptively nonreviewable and courts often are reluctant to order agencies to formulate policy even when statutorily required. Notably, however, courts often appear to respond to presidential involvement in their application of administrative law scrutiny without being open about doing so or offering a justification for their approach. As a result, although acknowledging the duty to supervise might entail changes in stated doctrine with respect to presidential administration, it may not require much change in current administrative law practice.

C. The Duty to Supervise in the Political Branches

The discussion so far has focused on the forms and limits of judicial enforcement of the duty to supervise. Yet as enforcement of the duty will often fall to the President, executive branch, and Congress, a full account of the duty’s implementation requires examination of what such political branch enforcement would look like.

Actual supervision of administration is, of course, ubiquitous in the political branches, a constraint focus of centralized presidential staff and congressional hearings as well as agency managers. Moreover, a key focus of executive branch and congressional oversight is on policing the quality of agency supervision by investigating and responding to agency managerial failures. Political branch


384 Recent examples include executive branch and congressional investigations into the failed rollout of federal health exchanges, waiting periods at VA hospitals, and the IRS targeting of tea party groups seeking non-profit status. See. Richard A. Oppel, Jr., V.A. Official Acknowledges Link Between Delays and Patient Deaths, N.Y. Times, Sept. 18, 2014, at A17 (describing congressional hearing on VA investigation into VA wait times); Oppel & Shear, supra note 5, at A1 (describing agency inspector general report on VA wait times); Sandhya Somashekhar, Enrollment up, HealthCare.gov back on track, Sebelius testifies, Wash. Post, Dec. 11, 2013 (noting HHS Secretary testified at congressional hearing she had called for an investigation into the failed rollout of federal health exchanges by HHS’ inspector general);
enforcement of supervisory responsibilities is thus already a common phenomenon. Thus, the question here is whether and how recognition of a constitutional duty to supervise might alter the nature of such enforcement.

The Obama Administration’s recent immigration enforcement initiative offers an interesting window. In 2012, President Obama and the Secretary Napolitano of Homeland Security stated a policy of using prosecutorial discretion to avoid taking immigration enforcement actions against several million individuals brought here illegally as children who have done well academically and avoided criminal involvement. On the one hand, the President’s support for such a broad amnesty, provided on a categorical and prospective basis, might seem to cross the line from legitimate nonenforcement discretion to unconstitutional suspension of the immigration laws and thus a violation of his Take Care obligation. As a result, Zachary Price has argued that constitutionally legitimate exercises of enforcement discretion must occur only on a case-by-case basis or on the basis of clear statutory authorization, with categorical and prospective nonenforcement approaches, such as occurred here, being unconstitutional.

Yet from another perspective, by openly stating a generally-applicable policy and then instituting an administrative scheme to implement that policy, the President and Secretary Napolitano were actually fulfilling their constitutional duties to supervise. Given current budget and personnel constraints, full enforcement of the immigration laws is simply not a possibility. Hence, the alternative to the Obama Administration’s approach is not full enforcement, but rather case-by-case discretionary decisions by low level officials over which meaningful supervision is very hard to exercise. The public articulation of the administration’s policies ensured that enforcement choices would be transparent, thereby enhancing political accountability, as well as more consistent across the

---


386 See Delahunty & Yoo, supra note 7, at 784-85; Price, supra note 71, at 759-61. Concerns of presidential overstepping are further heightened by the fact that Congress failed to enact the Dream Act granting amnesty to this group shortly before President Obama acted. See Delahunty & Yoo, supra note 7, at 784, 790-91

387 Price, supra note 71, 704-11.

388 See Delahunty & Yoo, supra note 7, at 788; see also Adam J. Cox & Cristina M. Rodriguez, 510-28 (2009) (detailing broad de facto delegation of authority to the President in the immigration context).
nation and immigration personnel. Precluding prospective and categorical articulation of immigration enforcement policy and priorities is tantamount to insisting that nonenforcement decisions be made by lower-level officials, a requirement at much at odds with constitutional structure as a presidential dispensation power.

Acknowleding a constitutional duty to supervise thus indicates that presidential efforts to direct nonenforcement on a categorical, prospective, and transparent basis can have strong constitutional roots. And executive branch implementation of the duty to supervise seems likely to result in greater and more overt instances of presidential direction. Importantly, however, this does not mean that recognizing the duty requires accepting all instances of presidential direction and administration. Given that a core part of the duty to supervise ensuring legal accountability, such presidential policies must accord with governing statutory requirements or have a basis in the President’s constitutional authority. But within this constraint, an important aspect of executive branch implementation of the duty to supervise likely will be articulating policy and priorities to guide exercises of lower level discretion.

Congressional oversight of administration is already quite energetic, as evidenced by the dramatic rise in congressional investigations over the last few decades. This rise is tied to the phenomenon of divided government, when the party in control of one or both houses of Congress and that party does not control the White House. In a regime of divided government, congressional hearings on and investigations of executive branch failures are a major way for one party to score political points. It is hard to believe that recognition of a constitutional duty to supervise would trigger more congressional oversight of agencies and the executive branch than already occurs simply because of politics.

389 For data demonstrating serious inconsistency in immigration enforcement, focusing on immigration adjudication, see Jaya Ramji-Nogales et al., Refugee Roulette: Disparities in Asylum Adjudication, 60 Stan. L. Rev. 295 (2007).
390 For a recent argument for greater presidential attention to enforcement policy, and in particular of how focusing on policy can avoid troubling politicization in particular cases, see Kate Andrias, The President’s Enforcement Power, 88 NYU L Rev. 1031, 1101-04 (2013).
391 See TAN 286-290
392 See Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 635-68 (1952) (Jackson, J., concurring). The extent to which governing statutes constrain presidential direction will depend on whether statutes are read as allowing such direction unless it is expressly precluded or there is provision for independent decisionmaking. Compare Kagan, supra note 69, at 2326-31 (urging this approach as an interpretive default) with Kevin M. Stack, The President's Statutory Powers to Administer the Laws, 106 Colum. L. Rev. 263, 268 (2006) (rejecting this view).
394 See Kriner & Schwartz, supra note 295, at 306-07 (arguing that a shift from unified to divided partisan control of the House and the presidency increases the number of hearings and their duration five- and four-fold, respectively); Parker & Dull, supra note 394, 321-22 (concluding “[d]ivided government is clearly related to an increase in number and intensity of congressional investigations in the House”)
Instead, the intriguing possibility here is whether such recognition might affect the focus of congressional oversight. Congressional investigations in particular tend to target discrete high-profile scandals or government breakdowns, rather than broader aspects of government operations.\(^{395}\) One systemic administrative issue needing more sustained congressional attention concerns the recruitment and retention of a skilled federal workforce, and particular talented managers.\(^{396}\) Scholars repeatedly identify problems in the federal government’s management, ranging from increased politicization to lack of capacity in critical areas (such as contract management of information technology) to a looming retirement crisis in the senior executive service (SES), which contains high-level career managers.\(^{397}\) Good supervision requires good supervisors.\(^{398}\) Taken seriously, therefore, recognition of a constitutional duty to supervise should yield sustained congressional attention to developing adequate managerial capacity in the executive branch.

Recognition of a constitutional duty to supervise is also particularly relevant to debates over government funding. Recent years have witnessed a number of battles over the nation’s budget and debt ceiling. In 2013, this conflict led to a sixteen day shutdown of the federal government, when Congress did not enact the appropriation bills needed to keep the government running.\(^{399}\) These clashes over government funding were deeply political and ideological, with Democrats and Republicans deeply divided on budget priorities, including within their own ranks.\(^{400}\) The Constitution entered the debate in a limited fashion, primarily with respect to the debt ceiling crisis and the President’s powers.\(^{400}\) Largely lacking was

---


396 See Paul C. Light, Government Ill-Executed: The Decline of the Federal Service___ (2008); Schuck, supra note 8, at 315-26 (describing problems with federal civil service arrangements and agency management structures); Partnership for Public Service & Booz Allen Hamilton, A New Civil Service Framework preface, 7-13 (2013)(arguing that the current federal civil service is obsolete and that a “unified, whole-of-government approach” is critical to reform).

397 See Lewis, supra note 30, at 19-21, 137, 195-97 (noting increased politicization and finding lower performance ratings for political appointees compared to career managers and suggesting that “reducing the number of political appointees is one means of improving performance”); Light, supra note 396, at 135 (over 90% of SES eligible to retire by 2016); Maeve P. Carey, The Senior Executive Service: Background and Options for Reform 12-21 Cong. Res. Serv. Sept 6., 2012, (Rep. No. 7-5700) (detailing challenges facing the SES); Shelley Roberts Econom, Confronting the Looming Crisis in the Federal Acquisition Workforce, 35 Pub. Cont. L.J. 171, 173 (2006)(discussing inadequacies in the federal contractor oversight workforce);


399 See id. (tying government shutdown to an effort by congressional conservatives to repeal the Affordable Care Act); Matt Bai, Obama vs. Boehner: Who Killed the Debt Deal?, N.Y. Times, Mar. 28, 2012 (describing disagreement that underlay failure to reach a debt deal in 2011).

discussion of the constitutionality of Congress’s actions or whether Congress had a constitutional obligation to fund the government so it can meet its statutorily-mandated responsibilities. Yet arguably the duty to supervise requires Congress to provide adequate funds for the government to function. On this view, Congress can alter the government’s substantive responsibilities, but violates the duty if it leaves these responsibilities in place but sabotages the government’s ability to meet them.

Such an account of the duty to supervise as requiring government funding is certainly contestible. The power of the purse—and thus to deny funding—is one of Congress’s core constitutional powers. Mandating that Congress provide adequate funding would stand dramatically at odds with the endemic feature of budget constraints in government, and would stand at odds with contemporary legislative practice in which appropriations riders have replaced substantive enactments as the means by which Congress controls the executive branch. As that Congress must provide funding may be limited to the extreme circumstances of a government shutdown or funding crisis. Still, a critical point to bear in mind is that Congress is the branch charged with enforcing the duty to supervise on itself; no court will intervene to do so. It is therefore up to Congress to determine what level of funding is constitutionally required, and identifying a connection between the duty and government funding is perfectly compatible with acknowledging Congress’s preeminent role in appropriations.

CONCLUSION

Constitutional law’s current resistance to incorporating systemic administration is doubly mistaken. It creates a mismatch between the realities of government and our most fundamental legal framework for controlling governmental power. At the same time, it obscures the importance the Constitution

Buchanan & Michael C. Dorf, How To Choose The Least Unconstitutional Option: Lessons For The President (And Others) From The Debt Ceiling Standoff, 112 Colum. L. Rev. 1175, 1177-81 (2012) (discussing several options for President Obama, concluding that the least unconstitutional would be for President Obama to ignore the debt ceiling, relying on the protection for the federal government’s debt in §4 of the Fourteenth Amendment).


actually assigns to administration in the form of supervision. This doctrinal rejection to systemic administration is justified as necessary to ensure the federal courts stay within their constitutionally proper sphere. Yet judicial recognition of a constitutional duty to supervise need not entail a dramatic expansion in judicial review or intrusion into the constitutional responsibilities of the political branches. Instead, such recognition can be accomplished through mechanisms that largely assign the courts a secondary enforcement role.

Indeed, one of the most serious failings of constitutional law’s current exclusion of administration is that it has stymied development of more flexible models of constitutional interpretation and enforcement. By insisting the federal courts’ purview is simply discrete governmental actions and not the wider administrative contexts in which these actions occur, the current approach also portrays judicial constitutional enforcement as independent of those wider contexts. If ever true, this portrayal is false in the world of the modern administrative state. Instead, courts are dependent on administrative structures and oversight to ensure that judicial constitutional interpretations are actually enforced. And in this world, administrative agencies, along with Congress and the President, play crucial roles in generating constitutional understandings that reflect the needs of contemporary society.

Acknowledging the constitutional status of administration is thus a crucial element in developing models of constitutional interpretation and enforcement that better accord with the reality of administrative constitutionalism. Doing so will require changes not only in existing doctrine, but in the reigning image of constitutional law. Rather than having hard edges that allow a clear demarcation between that which is constitutional and that which is not, constitutional law in the administrative state is a porous entity. It intermixes with numerous forms of subconstitutional law, often functioning more as background norms than direct commands. This means that constitutional implementation will centrally involve other governance institutions. It also means that courts will inevitably engage in law creation as they seek to enforce constitutional concerns indirectly. Rather than insisting on an image of constitutional law that falsely excludes administration, courts need to turn to crafting a constitutional law that properly reflects the administrative age.