THE YALE LAW JOURNAL

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The Constitutional Duty To Supervise

ABSTRACT. The IRS targets Tea Party organizations' applications for nonprofit tax-exempt status for special scrutiny. Newly opened online federal health exchanges fail to function. Officials at some Veterans Administration hospitals engage in widespread falsification of wait times. A key theme linking these examples is that they all involve managerial and supervisory failure. This should come as no surprise. Supervision and other systemic features of government administration have long been fundamental in shaping how an agency operates, and their importance is only more acute today. New approaches to program implementation and regulation mean that a broader array of actors is wielding broader discretionary governmental authority. 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, but it surfaces repeatedly in both structural and individual rights contexts.

This Article argues 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 the constitutional requirements imposed on exercises of governmental power. Just as importantly, the current doctrinal exclusion of administration stands at odds with the Constitution's text and structure, which repeatedly emphasize one particular systemic administrative feature: supervision. This emphasis on supervision is most prominently manifest in Article II's Take Care Clause, but it also surfaces more broadly as a constitutional prerequisite of delegation of governmental power. Whether it is rooted in Article II, general separation of powers principles, or due process, a duty to supervise represents a basic precept of our federal constitutional structure.

Moreover, concerns about judicial role do not justify the Court's refusal to engage with systemic administration, and judicial recognition of a constitutional duty to supervise is critical even if the duty is entirely politically enforced. Indeed, recognizing a constitutional duty to supervise is as central to the overall project of constitutional interpretation as it is to the aim of better keying constitutional law to the realities of contemporary governance. Recognizing this duty underscores the need for greater attention to how courts can support constitutional enforcement by the other branches and highlights the porous and critical relationship between constitutional and subconstitutional law.

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INTRODUCTION

The Internal Revenue Service (IRS) targets applications for nonprofit tax-exempt status by organizations using the name "Tea Party" for special scrutiny.[1] The National Security Agency (NSA) repeatedly violates governing privacy requirements and oversteps its authority in conducting surveillance.[2] Recently opened online federal health exchanges fail to function, preventing individuals from signing up for health insurance or determining their eligibility for benefits.[3] Officials at some Veterans Administration (VA) hospitals manipulate data to hide long delays in scheduling appointments, and there are allegations that some veterans died while on waiting lists.[4]

A key theme that links these examples is that they all involve managerial and supervisory failure. Most commonly, the problem is too little supervision,[5] but sometimes the concern is too much supervision or supervision of the wrong kind.[6] The Obama Administration's experience is hardly unique; simi-

1. *See* Jonathan Weisman, *Management Flaws at I.R.S. Cited in Tea Party Scrutiny*, N.Y. TIMES, May 14, 2013, http://www.nytimes.com/2013/05/15/us/politics/report-on-irs-audits-cites-ineffective-management.html [http://perma.cc/C4FN-FL6M].

2. Barton Gellman, *NSA Broke Privacy Rules Thousands of Times Per Year, Audit Finds*, WASH. POST, Aug. 15, 2013, http://www.washingtonpost.com/world/national-security/nsa-broke-privacy-rules-thousands-of-times-per-year-audit-finds/2013/08/15/3310e554-05ca-11e3-a07f-49ddc7417125_story.html [http://perma.cc/3U5B-TC6W].

3. *See* Robert Pear et al., *From the Start, Signs of Trouble at Health Portal*, N.Y. TIMES, Oct. 12, 2013, http://www.nytimes.com/2013/10/13/us/politics/from-the-start-signs-of-trouble-at-health-portal.html [http://perma.cc/JL7M-G6D6].

4. *See* Richard A. Oppel Jr. & Michael D. Shear, *Severe Report Finds V.A. Hid Waiting Lists at Hospitals*, N.Y. TIMES, May 28, 2014, http://www.nytimes.com/2014/05/29/us/va-report-confirms-improper-waiting-lists-at-phoenix-center.html [http://perma.cc/73JM-BR9F].

5. *See* Carol D. Leonnig, *Court: Ability To Police U.S. Spying Program Limited*, WASH. POST, Aug. 15, 2013, http://www.washingtonpost.com/politics/court-ability-to-police-us-spying-program-limited/2013/08/15/4a8c8c44-05cd-11e3-a07f-49ddc7417125_story.html [http://perma.cc/9XWB-4JJK] (discussing limits on the oversight capacity of the Foreign Intelligence Surveillance Court); Oppel & Shear, *supra* note 4 (noting that an investigation revealed VA hospital administrators were responsible for manipulating waiting lists); Pear et al., *supra* note 3 (noting the limited capacity of the agency overseeing development of the federal health exchange); Weisman, *supra* note 1 (reporting that a Treasury inspector general blamed the IRS's inappropriate tea party targeting on ineffective IRS management).

6. *See* Pear et al., *supra* note 3 (identifying the 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 TEX. L. REV. 781, 784-85 (2013) (faulting President Obama for initiating a policy that granted immunity to a large group of young illegal aliens).

lar 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, policy-setting, monitoring, resource allocation, institutional structures, personnel systems, and the like—are fundamental in shaping how an agency operates and its success in meeting its statutorily imposed responsibilities.[7] 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.[8] Moreover, if anything, the importance of administration is only more acute today than it has been historically, with new approaches to program implementation and regulation resulting in a broader array of actors wielding greater discretionary authority, often in contexts lacking external controls like judicial review.[9] 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.[10]

Multiple avenues exist for addressing management and supervisory failures. The recent IRS, NSA, VA, and Health and Human Services (HHS) debacles have triggered extensive media coverage, internal and independent investigations, resignations, proposed legislation, and lawsuits, and they may ultimately lead to criminal prosecutions.[11] One route of response that comes much less quickly to mind than these options, however, is constitutional law. Indeed, the centrality of systemic administration in practice contrasts starkly with its virtual exclusion from contemporary U.S. constitutional doctrine. The

7. *See* PATRICIA W. INGRAHAM ET AL., GOVERNMENT PERFORMANCE: WHY MANAGEMENT MATTERS 2, 8 (2003); Jerry L. Mashaw, *Foreword: 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").

8. Edward Rubin, *It's Time To Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 97, 100-37 (2003).

9. *See infra* Part I.B.

10. *See* Rubin, *supra* note 8, at 97; William Simon, *The Organizational Premises of Administrative Law* 6, 12 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 13-356, 2013), http://ssrn.com/abstract=2332079 [http://perma.cc/872T-PYUK].

11. *See, e.g.*, Richard A. Oppel, Jr., *Official Says Prosecutors Are Looking at V.A. Lists*, N.Y. TIMES, May 15, 2014, http://www.nytimes.com/2014/05/16/us/politics/veterans-secretary-shinseki-to-testify-on-long-waits-for-patients.html [http://perma.cc/S3J7-3QUQ].

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.[12] 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 the exceptions quite narrowly.[13]

In short, constitutional law stands largely aloft from the reality of administrative governance, with the Supreme Court refusing to subject systemic features of government operations to constitutional scrutiny. I use constitutional law here to refer to judicially determined constitutional doctrine. This is not to deny that 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.[14] Yet despite the scholarly attention paid to non-judicial constitutional law of late, the courts continue to play a dominant role as expositors of constitutional meaning. And their willingness to defer to constitutional interpretation by other branches appears, if anything, to be dwindling.[15] As a result, the courts' resistance to incorporating administration serves to exclude it from our most recognized form of

12. *See infra* Part I.C.

13. *See infra* notes 92-97, 121-127, 133-135 and accompanying text.

14. *See generally* JACK BALKIN, LIVING ORIGINALISM (2011); WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

15. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2686 (2013) (expressing concern that "the Supreme Court's primary role in determining the constitutionality of a law that has inflicted real injury on a plaintiff . . . would become only secondary to the President's" if the President's agreement that a challenged statute was unconstitutional were enough to preclude judicial review); Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (rejecting Congress's determination that the Voting Rights Act's trigger for requiring preclearance was an appropriate means of enforcing the constitutional prohibition on racial discrimination in voting); Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427-30 (2012) (rejecting the claim that the constitutionality of a statute regulating foreign relations represented a political question outside of the courts' purview). *But see* NLRB v. Noel Canning, 134 S. Ct. 2550, 2559-60 (2014) (emphasizing the weight given to historical political-branch practice in separation of powers disputes).

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.[16] This exclusion creates a deeply troubling disconnect between the realities of government and constitutional requirements imposed on exercises of governmental power. Authorizing and controlling governmental action, along with establishing the federal government's structure, are critical constitutional functions.[17] Incorporating systemic administration is essential if the Constitution is to perform these functions in ways that are responsive to modern governance.

Furthermore, the current doctrinal exclusion of administration stands at odds with the Constitution. The Constitution specifies few details of federal administrative government, but its text and structure repeatedly emphasize one particular systemic administrative feature: supervision. This emphasis on supervision manifests itself most prominently in Article II's imposition on the President of a duty to "take Care that the Laws be faithfully executed,"[18] 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 depending on how one conceives of its constitutional basis. A version of the duty based on Article II demands supervision by and within the executive branch, while a version based on principles of delegation extends supervisory obligations 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.

16. The same point is true of administration's exclusion from 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 10. In addition, some scholars have criticized the divide between administration and administrative-law doctrine 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: THE LEGITIMACY OF THE ADMINISTRATIVE STATE 15-53 (1986).

17. *See* Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CALIF. L. REV. 975, 987-95 (2009).

18. U.S. CONST. art. II, § 3.

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 Supreme 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 fashion as to comply with the laws and the Constitution."[19] The Court has elsewhere emphasized that "[t]he Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.'"[20] Moreover, the concern is not just with respecting the purview of the political branches but also with protecting the courts, because overseeing administration and managing government institutions are not tasks for which the courts have much institutional competence. Courts both lack political accountability and have little expertise in running administrative institutions or in navigating 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 judicial aggrandizement. 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 connecting constitutional law to the realities of contemporary governance. The judicial-role concerns implicated by the duty to supervise underscore the need for greater attention to ways in which 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 consti-

19. 518 U.S. 343, 349 (1996); *see also* Bell v. Wolfish, 441 U.S. 520, 548, 562 (1979) ("[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial.").

20. Allen v. Wright, 468 U.S. 737, 761 (1984).

tutional 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, and it is notable that President Obama recently referenced his "constitutional duty to supervise the executive branch" in a signing statement.[21] But recognition of the duty is particularly needed from the courts, given their preeminent role in constitutional interpretation and their current flawed rejection of administration's constitutional relevance. Critically, however, judicial recognition does not automatically translate into direct judicial enforcement. Judicial recognition fosters enforcement by Congress and the President by putting the political branches on notice of their constitutional obligations. Moreover, to the extent judicial enforcement occurs, it will commonly be indirect—by means of 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.

Part I of this Article describes 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 administration and supervision play by focusing on four major trends in contemporary federal government: (1) privatization, (2) cooperative federalism and federal reliance on the states, (3) crisis governance, and (4) presidential administration. In addition to transforming the shape of modern government, all four of these trends 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 undertakes 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. This Part focuses on two central constitutional bases, each of which

21. *See* Barack Obama, *Statement by the President on H.R. 4310*, WHITE HOUSE (Jan. 3, 2013), http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310 [http://perma.cc/KU3J-YYJG].

support a distinct version of the duty to supervise: (1) Article II and the Take Care Clause, and (2) structural principles governing delegation. Article II signals the mandatory nature of internal supervision within 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 evidenced by the emphasis elsewhere in the Constitution on hierarchical oversight in connection to delegation, as well as by the need for supervision in order 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 hierarchical control and accountability of governmental power. Importantly, a variety of different supervisory arrangements, ranging from traditional bureaucratic rule-bound over-oversight to more open-ended performance-and-monitoring-based regimes, will often suffice to satisfy the constitutional duty to supervise. The critical question then becomes whether 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 Supreme 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 an expansion of 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 it will entail substantial changes in existing doctrine. This Part concludes by examining non-judicial enforcement, considering possible implications of recognizing a duty to supervise 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. 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 systemic features 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 familiar concept. The term appears in a variety of contexts (not just in connection to government) and is used to describe generic phenomena—household or business administration, for example—as well as specific entities, such as the Obama Administration or the 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.[22] As this definition suggests, administration has a basic systemic character. Though the term is given substance through discrete acts and decisions, "administration" refers more to the overarching operations that underlie and frame these discrete phenomena than to the phenomena themselves. Key components of administration are planning and prioritization, policy creation, program design and evaluation, budgeting and resource allocation, internal organization and structure, intra-agency and interagency coordination, networking and collaboration, personnel systems, technology, and—of particular relevance here—supervision.[23]

22. *See, e.g.*, *Administration*, MERRIAM-WEBSTER (2015), http://www.merriam-webster.com/dictionary/administration [http://perma.cc/4626-3LD2]; *Administration*, OXFORD DICTIONARIES (2015), http://www.oxforddictionaries.com/us/definition/american_english/administration [http://perma.cc/Y7M6-8AZQ].

23. *See* Luther Gulick, *Notes on the Theory of Organization*, *in* PAPERS ON THE SCIENCE OF ADMINISTRATION 13 (Luther Gulick & L. Urwick eds., 1937) (stating core administration skills as POSDCORB: planning, organizing, staffing, directing, coordinating, reporting, and budgeting); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, *in* THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 1, 16-18 (Lester M. Salamon ed., 2002) (emphasizing collaboration and networking); Rubin, *supra* note 8, at 97.

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 ex ante, ex post, or on a continuous basis, and it can be more top-down or collaborative. The actual mechanisms of supervision are similarly varied, spanning formal complaint and appeals procedures for challenging specific decisions, ad hoc or peer review, or general monitoring through audits and performance assessment.[24] Agency managers adopt rules and requirements that bind agency personnel and also oversee lower-level decisionmaking through more informal guidance or revisable plans.[25] 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.[26] Supervision most frequently occurs within an agency, but sometimes a statute gives one agency power to supervise the actions of another agency or its employees, and some agencies and offices undertake supervision across the federal government as a whole.[27]

Bureaucracy represents the traditional model for modern public administration. In Max Weber's seminal account, "[B]ureaucracy consists of a hierarchically structured, professional, rule-bound, impersonal, meritocratic, appointed, and disciplined body of public servants with a specific set of competencies."[28] Supervision in a Weberian bureaucracy takes a decidedly hierarchical and rule-bound form, with "a clearly established system of super-

24. Kathleen G. Noonan et al., *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523, 535-48 (2009); Simon, *supra* note 10, at 2-3, 11-13, 25-26.

25. *See* Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 866-69, 884-86 (2009); Simon, *supra* note 10, at 2-3, 11-13.

26. *See* Donald F. Kettl, *Managing Indirect Government*, *in* THE TOOLS OF GOVERNMENT, *supra* note 23, at 490, 492-96, 505-08; Salomon, *supra* note 23, at 2-9.

27. *See, e.g.*, 5 U.S.C. § 1204 (2012) (Merit Systems Protection Board); 42 U.S.C. § 4526 (2012) (Government Accountability Office); Exec. Order 12,866, 3 C.F.R. 638 (1994) (Office of Information and Regulatory Affairs); *see also* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1158, 1160-61 (2012) (detailing examples of interagency consultation and approval requirements).

28. Fritz Sager & Christian Rosser, *Weber, Wilson, and Hegel: Theories of Modern Bureaucracy*, 69 PUB. ADMIN. REV. 1136, 1137 (2009). For a more recent account of bureaucracy's characteristics and dynamics, see JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (2000).

and subordination in which there is a supervision of the lower offices by higher ones," as well as "the possibility of appealing, in a precisely regulated manner, the decision of a lower office to the corresponding superior authority."[29]

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 and staffed substantially by career public servants with removal protection. In addition, agency modes of operation are frequently governed by detailed rules.[30] Yet the reality of power in modern government bureaucracies is much messier and more complex than the Weberian ideal, with lower-level staff and street-level employees often exercising substantial discretion over day-to-day implementation of government programs.[31] In any event, federal agencies have always been an amalgam, subject to sometimes dueling political principals and fragmented leadership, containing many more political 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]

29. MAX WEBER, ECONOMY AND SOCIETY 957 (Guenther Roth & Claus Wittich eds., 2013).

30. *See* DONALD F. KETTL, THE TRANSFORMATION OF GOVERNANCE: PUBLIC ADMINISTRATION FOR TWENTY-FIRST CENTURY AMERICA 8-9, 44-45 (2002); DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 20-26 (2008); PAUL C. LIGHT, THICKENING GOVERNMENT: FEDERAL HIERARCHY AND THE DIFFUSION OF ACCOUNTABILITY 6-15 (1995); Magill, *supra* note 25.

31. *See, e.g.*, MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 13-18 (1980); WILSON, *supra* note 28, at 33-49; *see also* NORMA M. RICCUCCI, HOW MANAGEMENT MATTERS: STREET-LEVEL BUREAUCRATS AND WELFARE REFORM 59-76, 115-17 (2005) (describing the role of managers and the greater importance of work cultures and professional norms in determining actions by street-level officials).

32. *See* LEWIS, *supra* note 30, at 27-43 (identifying methods of agency politicization); DAVID E. LEWIS & JENNIFER L. SELIN, ACUS SOURCEBOOK OF THE UNITED STATES EXECUTIVE AGENCIES 40-65 (2012) (detailing different executive-branch structures); Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 698-709 (2000) (describing the politicization of the American bureaucracy); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668-70 (2000) (describing federal agencies' reliance on state and local governments).

33. *See* H. GEORGE FREDERICKSON & KEVIN B. SMITH, THE PUBLIC ADMINISTRATION THEORY PRIMER 208 (2003); KETTL, *supra* note 30, at 51-54, 59-68, 90-96, 129; Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89

Supervision in such arrangements also takes a different guise, one characterized more by planning, audits, ongoing monitoring, performance assessment, and peer review than by rule-bound appeals to superior officials or review of specific decisions.[34] Evidence suggests that these new approaches have not displaced overarching hierarchical arrangements so much as supplemented them, with the net result 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. Four recent administrative developments demonstrate the enhanced importance of systemic administration and supervision: 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 hands.[37] 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, pri-

MINN. L. REV. 342, 343-47 (2004); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 55-56, 78-93 (2011); Salamon, *supra* note 23, at 11-18.

34. *See* Noonan et al., *supra* note 24, at 535-48; Simon, *supra* note 10, at 3, 11-12.

35. *See* FREDERICKSON & SMITH, *supra* note 33, at 224; WILSON, *supra* note 28, at ix-xvi; Carolyn J. Hill & Laurence E. Lynn, Jr., *Is Hierarchical Governance in Decline? Evidence from Empirical Research*, 15 J. PUB. ADMIN. RES. & THEORY 173, 189 (2005).

36. *See generally* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

37. *See* Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1-2 (Jody Freeman & Martha Minow eds., 2009); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1370 (2003). Jon Michaels recently has argued that a second generation of privatization is emerging and becoming increasingly dominant, including "marketization of bureaucracy" and "government by bounty." Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L. J. 1023, 1025-27 (2013).

vate "service contracting is now ubiquitous in military combat, municipal policing, rule promulgation, environmental policymaking, prison administration, and public-benefits determinations."[38] Although current hard data on federal service contracting is difficult to obtain, 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."[39]

Privatization has many important effects on government programs and institutions. It can inject innovation and flexibility, as well as result in improved performance.[40] At the same time, private contractors gain day-to-day control over program implementation, institutional operation, and service delivery.[41] 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

38. Michaels, *supra* note 37, at 1025; *see also* PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 23-57 (2007) (providing examples of privatization); Freeman & Minow, *supra* note 37, at 1-2, 6 (defining privatization).

39. Louis Peck, *America's $320 Billion Shadow Government*, FISCAL TIMES, Sept. 28, 2011, http://www.thefiscaltimes.com/Articles/2011/09/28/Americas-320-Billion-Shadow-Government [http://perma.cc/4SDS-Y2FS]. The federal contractor workforce is estimated to have grown from "an estimated 4.4 million in 1999 to more than 7.5 million by the end of the 2005 fiscal year." Paul C. Light, Op-Ed, *The Real Crisis in Government*, WASH. POST, Jan. 12, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/01/11/AR2010011103255.html [http://perma.cc/52NZ-HMFR]. *But see* Peck, *supra* (noting that an association of government contractors argues that Peck's estimate is too high). Data on federal service contracting should become more readily accessible as a result of section 743(a) of the Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 743(a), 123 Stat. 3034, 3216-17 (2009), which requires most executive agencies other than the Department of Defense to submit an "annual inventory" on service contractors' activities to OMB. Those inventories will begin with service contracts issued in fiscal year 2014 worth $2.5 million or more. 48 C.F.R. § 4.1703 (2014).

40. *See* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1242-46 (2003); Michael J. Trebilcock & Edward M. Iacobucci, *Privatization and Accountability*, 116 HARV. L. REV. 1422, 1435-50 (2003). For skeptical views of privatization's benefits on government performance, see ELLIOTT D. SCLAR, YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION 9-11, 18-19, 92-93 (2000); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393 (2008).

41. *See* Metzger, *supra* note 37, at 1395.

in part to the inapplicability of freedom-of-information laws.[42] The result is that privatization poses a serious risk to "principle[s] of constitutional accountability" and "constitutionally constrained government."[43] Such concerns about undermining constraints on government arise in a range of contexts, from welfare privatization to national security, each with somewhat different features.[44] A core example of privatization in national security, for example, is private contractors' supplying key security and interrogation services.[45] But national-security privatization also extends to private companies' allowing the government to access massive amounts of privately held data on individuals' communications.[46] The latter type of arrangement—the scope of which was revealed by an independent national-security contractor—is not privatization in the sense of private entities' performing governmental functions. But it raises similar concerns about how reliance on the private sector can expand government power in ways that are not easily susceptible to traditional legal controls.[47]

Although traditional governmental controls are limited in privatization contexts, alternative accountability mechanisms may exist, particularly in the guise of contractually imposed remedies and requirements.[48] Critically, the ef-

42. *See* Nina A. Mendelson, *Six Simple Steps To Increase Contractor Accountability*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY, *supra* note 37, at 241, 244-53; Metzger, *supra* note 37, at 1411-37.

43. Metzger, *supra* note 37, at 1400-01; *see* VERKUIL, *supra* note 38, at 1-6; Minow, *supra* note 40, at 1246.

44. *See* Metzger, *supra* note 37, at 1396-1403.

45. *See* MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RES. SERV., R40764, DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS (2011), https://www.fas.org/sgp/crs/natsec/R40764.pdf [http://perma.cc/WA2N-4WNR] (describing extensive use of private military contractors in Iraq and Afghanistan in 2010); VERKUIL, supra note 38, at 23-42 (describing forms of national security privatization); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced, Government*, 16 STAN. L. & POL'Y REV. 549, 554-56 (2005) (describing the use of private contractors for interrogation).

46. *See* Jon D. Michaels, *All The President's Spies: Private-Public Intelligence Partnerships in the War On Terror*, 96 CAL. L. REV. 901, 908-22, 929-31 (2008); Barton Gellman & Ashkan Soltani, *NSA Infiltrates Links to Yahoo, Google Data Centers Worldwide, Snowden Documents Say*, WASH. POST, Oct. 30, 2013, http://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html [http://perma.cc/M483-82VD].

47. *See* Jon D. Michaels, *Deputizing Homeland Security*, 88 TEX. L. REV. 1435, 1452-66 (2010) (describing the legal uncertainties created by national security public-private partnerships).

48. *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 Is the Tech World's Envoy*, N.Y. TIMES, July 20, 2014, http://www.nytimes.com/2014/07/21/technology

fectiveness of these contractual mechanisms largely depends on the extent of supervision and contract oversight undertaken by government agencies.[49] As the botched rollout of the federal healthcare exchanges revealed, poor government oversight can fundamentally undermine government programs by allowing private contractor failures to go unidentified and unaddressed.[50] 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.[51] 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.[52] 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 serves as the main point of entry for assessing the operation of privatized programs.

2. Cooperative Federalism

Cooperative federalism is an even more familiar aspect of modern government than privatization is—one that some have traced back to the nation's early administrative arrangements, but one that became particularly prominent first with the New Deal and then with federal health and environmental regulatory initiatives in the 1960s.[53] Cooperative federalism denotes instances in which state and local governments undertake primary responsibility for implementing federal programs or enforcing federal law under the supervision and oversight of federal agencies.[54] Although the federal government imposes

/microsofts-top-lawyer-is-the-tech-worlds-envoy.html [http://perma.cc/2XKY-PXQB]. 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 choice about which contractor to use. *See* Freeman & Minow, *supra* note 37, at 2-5; Super, *supra* note 40, at 407-41.

49. *See* Freeman, *supra* note 48, at 608, 623-25, 634-36; Schooner, *supra* note 45, at 557-60.

50. *See* Pear et al., *supra* note 3.

51. *See* Metzger, *supra* note 37, at 1470-80.

52. *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 719-24 (2010).

53. *See* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 182-207 (2005); Weiser, *supra* note 32, at 668-71; *see also* Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619 (1978) (describing the debate over cooperative federalism's tenure).

54. *See* Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 472-75 (2012); Weiser, *supra* note 32, at 665, 671.

program requirements and conditions that states must meet 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."[55]

Major legislative and administrative initiatives of the last few years have significantly increased the scope of such federal-state cooperation. Not only is the federal government asking states to play new roles in federal programs, but it is also giving states broader discretion and control over the shape of their participation. The Affordable Care Act is a prime example. It relies partly 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.[56] Another manifestation of increased federal-state cooperation is the recent expansion in the use and scope of administrative waivers in a number of cooperative federalism programs, with the federal government's acceptance of state implementation plans that operate under terms notably different from those set out in governing federal statutes.[57]

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 doctrinal culprits here are many, including increased refusal to find implied statutory rights of action, new restrictions on Section 1983 suits to enforce federal statutes, heightened standing barriers, and pullbacks in institutional reform litigation.[58] Indeed, these two trends are mu-

55. Weiser, *supra* note 32, at 671. For similar views, see JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 172-93 (2009); Bulman-Pozen, *supra* note 54, at 478-86; Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1639 (2012). *But see* Nat'l Fed'n Indep. Bus. 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).

56. *See* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 576-94 (2011) (describing a variety of state-federal interactions in the Affordable Care Act); Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 571-93 (2011) (describing state roles in the ACA, Dodd-Frank, and Recovery Acts).

57. *See* Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 227 (Nathaniel Persily et al. eds., 2013); David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 277-91 (2013).

58. *See* Horne v. Flores, 557 U.S. 433, 447-50 (2009) (institutional reform litigation); Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) (litigation involving § 1983); Alexander v. Sandoval,

tually reinforcing, as greater state implementation discretion heightens the risk that courts will find barriers to reviewing the substance of state decisionmaking.[59] 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 to investigate state implementation directly.[60]

The net effect of these trends toward increased state discretion and reduced judicial review is to make federal administrative supervision an increasingly important means for ensuring accountability of state-implemented federal programs. Cooperative federalism can yield accountability gains as well: state administrative processes and state oversight mechanisms are significant 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 in developing new programmatic approaches for the federal government to adopt.[61] 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 that are at odds with core federal policies also need to be taken into account, and in any event federal administrative engagement and oversight will be a prime mechanism for changing federal requirements in response to state protests.[62] The Court's recent decision in *Douglas v. Independent Living Center*[63] underscores the growing centrality of federal administrative oversight in the cooperative federalism realm, with the Court there emphasizing the importance of federal agency approval of a challenged state policy to the nature and scope of judicial review.[64]

532 U.S. 275, 286-87 (2001) (implied private rights of action); *see also* Exceptional Child Ctr., Inc. v. Armstrong, 567 Fed. App'x 496, 497 (9th Cir. 2014) (upholding an implied right of action to challenge a state Medicaid program's reimbursement rates as preempted), *cert. granted*, 135 S. Ct. 44 (Oct. 2, 2014).

59. *See Alexander*, 532 U.S. at 288-90; Suter v. Artist M., 503 U.S. 347, 358-63 (1992).

60. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-1016, GRANTS TO STATE AND LOCAL GOVERNMENTS: AN OVERVIEW OF FEDERAL FUNDING LEVELS AND SELECTED CHALLENGES 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 54, at 496-98 (describing how states can monitor the executive branch for Congress).

61. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Gluck, *supra* note 56, at 564-76; Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014).

62. *See* Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83, 114-15 (2012).

63. 132 S. Ct. 1204 (2012).

64. *Id.* at 1210-11 (2012) (emphasizing how the federal agency's decision altered the posture of the case and remanding for reconsideration); *id.* at 1212-13, 1215 (Roberts, C.J., dissenting)

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.[65] Crisis governance—evident in national-security actions taken after the September 11th attacks and in the dramatic actions taken by the Federal Reserve and Department of the Treasury during the financial crisis of 2008—is less clearly a growing administrative phenomenon than 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.[66]

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 have imposed constraints on executive-branch national-security and financial-crisis initiatives.[67] 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.[68] Moreover, even post hoc judicial review is often quite limited as a result of the types of actions agencies take, statutory exemptions, and justiciability barriers.[69] *Clapper v. Amnesty International USA* provides a prime example of these barriers. There, the Supreme Court denied standing to individuals seeking to

(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, 557 U.S. 433, 456 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").

65. *See generally* Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613 (2009).

66. Barton Gellman & Laura Poitras, *U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program*, WASH. POST, June 7, 2013, http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html [http://perma.cc/7Y52-EKXH].

67. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *see also* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 513-25 (2009) (noting that Congress did impose constraints, albeit limited ones, on the new authorities delegated to the Treasury Department).

68. Posner & Vermeule, *supra* note 65, at 1643-50, 1654-59; *see also* Davidoff & Zaring, *supra* note 67, at 468, 534 (noting the lack of judicial review of executive branch actions during the financial crisis).

69. *See* 5 U.S.C. §§ 553(a), 554(a) (2012); Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013); David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 190-94 (2010).

challenge a national-security surveillance program on Fourth Amendment grounds because the plaintiffs could not show that interception of their own communications was "certainly impending."[70] Given the clandestine nature of the program and its targets, this was a nearly impossible task until the government began informing defendants when their trials involved evidence obtained through the program.[71]

Crisis governance is itself one manifestation of the fourth trend: expanding presidential administration. The President today plays a central lawmaking role, spurred by multiple causes, including the birth of the modern national administrative state; new economic, social, and global realities; divided government and changed political practices.[72] 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.[73] Recent examples include President Obama's immigration enforcement initiatives and his directive to the EPA on greenhouse gases,[74] but he is far from the only President to undertake major policy moves in this fashion.[75]

To note the President's de facto lawmaking role is not to contend that all such presidential assertions of authority accord with the Constitution.[76] Indeed, in *NLRB v. Noel Canning*, the Supreme Court last Term rejected President Obama's wielding of the recess appointment power during pro forma

70. 133 S. Ct. at 1147-48.

71. *See* Charlie Savage, *Warrantless Surveillance Continues To Cause Fallout*, N.Y. TIMES, Nov. 20, 2013, http://www.nytimes.com/2013/11/21/us/warrantless-surveillance-continues-to-cause-fallout.html [http://perma.cc/SDS8-VSHP].

72. *See* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION 4-8, 10-15 (2003); KENNETH R. MAYER, WITH THE STROKE OF A PEN 10-11 (2002); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281-2319 (2001); Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG. 132, 133-38 (1999).

73. *See* HOWELL, *supra* note 72, at 6-7, 16-19; MAYER, *supra* note 72, at 4-7.

74. *See* Barack Obama, Remarks by the President in Address to the Nation on Immigration, Nov. 20, 2014, http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [http://perma.cc/ABE9-9BFW]; Barack Obama, *A Nation of Laws and a Nation of Immigrants*, TIME, June 17, 2012, http://ideas.time.com/2012/06/17/a-nation-of-laws-and-a-nation-of-immigrants [http://perma.cc/FLP3-S6AD]; Barack Obama, *Presidential Memorandum—Power Sector Carbon Pollution Standards*, WHITE HOUSE (June 25, 2013), http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards [http://perma.cc/9ZS7-8673].

75. *See* HOWELL, *supra* note 72, at 6; Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 686 (2014).

76. For an argument against inherent presidential authority or lawmaking power, see Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 22-24, 39-61 (1993).

Senate sessions.[77] Realistically, however, presidential lawmaking and unilateralism represent a central feature of contemporary federal government.[78] 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, which encompasses 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.[79] 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.[80]

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.[81] Often, however, these measures escape judicial scrutiny—either because they are expressly not judicially enforceable or involve actions that are presumptively nonreviewable, or because courts tend to ignore presidential involvement when reviewing agency actions.[82] 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.[83]

77. 134 S. Ct. 2550, 2574-77 (2014).

78. *See* Kagan, *supra* note 72, at 2246.

79. *See* Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 238, 244-63 (John E. Chubb & Paul E. Peterson eds., 1985); *see also* LEWIS, *supra* note 30, at 89 (discussing politicization techniques).

80. *See* Exec. Order No. 12,866, 3 C.F.R. 638 (1994); LEWIS, *supra* note 30, at 6-8, 30-43; Kagan, *supra* note 72, at 2284-3303; Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2579-94 (2011).

81. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583-89 (1952) (reviewing and overturning President Truman's executive order that seized steel mills).

82. *See, e.g.*, Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (holding that presidential actions are not reviewable for abuse of discretion under the APA); Heckler v. Chaney, 470 U.S. 821, 831-33 (1985) (holding that agency nonenforcement is presumptively not reviewable); Exec. Order No. 12,866, 3 C.F.R. 638 (1994) § 10 (1994) (stating that executive orders do not create rights or duties enforceable in court).

83. *See* HOWELL, *supra* note 72, at 43-64, 101-27; *see also* Josh Gerstein, *5 Questions About John Boehner's Lawsuit Against Barak Obama*, POLITICO, July 6, 2014, http://www.politico.com

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 is sometimes called the internal separation of powers: internal review structures, involvement of multiple agencies, inspectors general, agency-generated procedural and substantive limitations, professional commitments and reputational concerns, and executive branch adherence to governing law.[84] In other words, systemic features of internal administration are again critical to ensuring accountable government.

Moreover, it bears emphasizing that presidential administration and supervision themselves can be key mechanisms for ensuring executive branch accountability. Justice (then-Professor) 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.[85] In some instances, such as the Obama Administration's instructions to agencies to grant same-sex couples equal rights in a range of contexts after *United States v. Windsor*, presidential direction helps enforce legal constraints.[86] Hence, assessing the constitutionality of the President's expanded role entails close attention to systemic administrative features and their full impact on how the government operates.

/story/2014/07/john-boehner-barack-obama-lawsuit-108968.html [http://perma.cc/TM69-QK9W] (noting significant legal obstacles to Congress's suit).

84. *See* Davidoff & Zaring, *supra* note 67, at 537-38; Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Shirin Sinnar, *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* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010) (arguing that internal legal offices impose little constraint), *and* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 15 (2010) (arguing that the constraints come from politics and public opinion, not law), with Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1403-09 (2012) (reviewing POSNER & VERMEULE, *supra*) (arguing that presidents have strategic reasons to comply with law and there is little empirical support for the claim they do not).

85. *See, e.g.*, Kagan, *supra* note 72, at 2331-46; Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1361-77 (2013); Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840-42 (2013).

86. Memorandum from Attorney Gen. Eric Holder to President Barack Obama (June 20, 2014), http://www.justice.gov/iso/opa/resources/9722014620103930904785.pdf [http://perma.cc/9P7D-AJY3].

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 largely excluded from judicial analysis. 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."[87] This separation takes a multitude of doctrinal guises, but they combine to make resistance to incorporating systemic administration into an indelible feature of current constitutional law.

1. Structural Constitutional Law: Standing Doctrine and the Separation of Powers

Standing doctrine serves as the front line in precluding judicial consideration of systemic administration, with its requirement of individualized injury and connected prohibition on suits raising generalized grievances.[88] 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.[89] So the generalized grievance prohibition does not operate as a categorical bar to considering challenges to administrative structures.[90] 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*, "[S]uits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations . . . are rarely if ever appropriate for federal-court adjudication."[91]

87. 5 U.S. (1 Cranch) 137, 170 (1803); *see* Henry P. Monaghan, *Constitutional Litigation: The Who and the When*, 82 YALE L.J. 1363, 1365-67 (1973).

88. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74, 576-77 (1992).

89. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007); *Lujan*, 504 U.S. at 563.

90. *See* Cass R. Sunstein, *What's Standing After* Lujan*?: Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 212-13 (1992).

91. 468 U.S. 737, 759-60 (1984); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147-48 (2013); 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 promul-

Institutional reform litigation might seem at first glance to be 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.[92] Nonetheless, courts allow institutional reform litigation to proceed despite its systemic edge. A recent striking example is *Brown v. Plata*, a case involving class actions on behalf of California prisoners with serious medical and mental health disorders.[93] 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 court's remedial order.[94]

Yet the facts of *Plata* were extreme, and it would be a mistake to read the decision as signaling broad availability of systemic challenges.[95] 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.[96] Nor has the Court demonstrated much sympa-

gated absent identification of a specific timber sale authorized by the regulation that injured its members); *Lujan*, 504 U.S. at 564.

92. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1018-19 (2004). Institutional or structural reform litigation thus became one of the most prominent intersections of constitutional rights and internal administration. *See* John C. Jeffries, Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1412-15 (2007) (describing structural reform litigation and noting the preeminence of constitutional claims in this context).

93. 131 S. Ct. 1910, 1926-27 (2011).

94. *Id.* at 1925 n.3, 1940-41; *see also id.* at 1952 (Scalia, J., dissenting) ("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.").

95. *Id.* at 1923-28, 1932-37 (majority opinion) (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).

96. 518 U.S. 343, 350 (1996); *see* City of Los Angeles v. Lyons, 461 U.S. 95, 105-11 (1983) (holding that the plaintiff lacked standing to challenge the Los Angeles police department's practice of using chokeholds absent threat of deadly force); Rizzo v. Goode, 423 U.S. 362, 365, 371-73 (1976) (denying equitable standing to challenge a police department procedure for handling citizen complaints); *see also* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 11-12 (2009) (noting that structural reform litigation is a weaker tool to force police department change as a result of *Lyons* and *Rizzo*); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court*

thy for institutional reform litigation of late, criticizing such litigation as entailing judicial assumption of responsibility for administrative choices that should be made by the political branches or state governments.[97] Hence, institutional reform litigation 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.[98] More recently,

Orders, 81 N.Y.U. L. REV. 550, 564-67 (2006) (noting broader changes under the Rehnquist Court and limitations by Congress on structural reform litigation).

97. *See* Horne v. Flores, 557 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 & Rutherglen, *supra* note 92, at 1408-12 (offering a brief history of structural reform litigation); *see also* Schlanger, *supra* note 96, 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). 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 as a plaintiff, pursuant to congressional authorization. *See* 42 U.S.C. § 14141 (2012); Erica Goode, *Some Chiefs Chafing as Justice Department Keeps Closer Eye on Policing*, N.Y. TIMES, July 27, 2013, http://www.nytimes.com/2013/07/28/us/some-chiefs-chafing-as-justice-department-keeps-closer-eye-on-policing.html [http://perma.cc/7LDF-YAAL]. Moreover, the shape of institutional reform litigation appears to have changed even when successful, with consent decrees now framed more narrowly and containing weak enforcement provisions. *See* Sabel & Simon, *supra* note 92, at 1018-21 (arguing that decrees have become more flexible and provisional, with a move towards more experimentalist remedies and procedures for ongoing stakeholder participation); Schlanger, *supra* note 96, at 589-90, 602-05, 612-21, 623-26 (arguing that the main change is in weaker enforcement provisions).

98. *See* Lichter v. United States, 334 U.S. 742, 777-78, 783 (1948) (emphasizing administrative practices in implementing the Renegotiation Act); Fahey v. Mallonee, 332 U.S. 245, 252-253

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; self-limitation by an agency is constitutionally insufficient.[99] 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 provisions for government ratification of private decisionmaking, however perfunctory.[100]

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.[101] Similarly, removal challenges focus on the extent to which a removal restriction unconstitutionally limits the President's ability to oversee the executive branch.[102]

Yet many important aspects of systemic administration are often excluded from analysis even in the Article II context. Again, courts place emphasis largely on formal oversight mechanisms rather than on the extent to which an officer's decisions are actually reviewed or controlled. The Court's 2010 decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* 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.[103] Moreover, removal is an individualistic

(1947) (emphasizing rules the Federal Home Loan Bank Board had promulgated); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 759 (D.D.C. 1971) (emphasizing standards promulgated by the agency restricting its own discretion).

99. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

100. *See, e.g.*, Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397-401 (1940); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1440-41 (2003).

101. *See* Edmond v. United States, 520 U.S. 651, 662-63 (1997); *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 481 (2010) (reiterating the *Edmond* test as determinative of an officer's status).

102. *See Free Enter. Fund*, 561 U.S. at 483-84 (holding that multiple levels of for-cause removal protection rendered the President's control too attenuated); 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 opportunity for presidential oversight).

103. *See Free Enter. Fund*, 561 U.S. at 504 ("Broad power over Board functions is not equivalent to the power to remove Board members. . . . The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it."); *id.* at 529 (Breyer, J., dissenting) (criticizing the majority for ignoring the "virtually absolute" control the

mechanism of supervision. It focuses on controlling a particular official and assumes that the 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 *Free Enterprise* described the President as subject to a nondelegable duty to "active[ly] . . . supervise," the concept of a presidential duty to supervise received no further development there or in other decisions.[104]

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; examples include administrative licensing systems in First Amendment challenges and internal administrative procedures in the habeas and *Bivens* contexts.[105] But there are many other instances in which the Court has refused to accord constitutional salience to administration despite its seeming relevance.[106] More importantly, the Court has developed substantive standards that restrict constitutional consideration of systemic administration and have largely eviscerated supervisory liability.

SEC wielded by virtue of its control of the PCAOB's budget and review of its decisions); *see also* Krotoszynski, *supra* note 55 (underscoring *Free Enterprise*'s formalism). *But see Morrison*, 487 U.S. at 695-96 (considering limits on the independent counsel separate from removal in concluding that opportunities for presidential oversight were adequately preserved).

104. 561 U.S. at 496 (quoting 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.")).

105. *See* Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 488-89, 498 (2010).

106. *See id.* at 483-84, 500, 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 use 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 21-22 (unpublished manuscript) (on file with author) (noting the suggestions of an administrative model in some Fourth Amendment jurisprudence).

a. 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.[107] 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.[108] 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.[109]

Two decisions, *Wilson v. Seiter*[110] and *Farmer v. Brennan*,[111] demonstrate the resulting exclusion of administration from judicial review. *Wilson* involved a Section 1983 action alleging systemic failures in Ohio's operation of a state prison.[112] 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.[113] But as Justice White noted in concurring in the judgment, "Inhumane prison 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."[114] 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.[115] To be subject to liability,

107. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (recognizing an Eighth Amendment claim against unconstitutional conditions based on inadequate healthcare).

108. 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).

109. Wilson v. Seiter, 501 U.S. 294, 298, 303 (1991) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)); *Estelle*, 429 U.S. at 106.

110. 501 U.S. 294 (1991).

111. 511 U.S. 825 (1994).

112. 501 U.S. at 296.

113. *Id.* at 300-03.

114. *Id.* at 310.

115. 511 U.S. 835-37.

therefore, "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."[116] As in *Wilson*, the opinion in *Farmer* focuses 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.[117]

In the due process realm, the reigning *Mathews v. Eldridge* analysis—under which the court balances the individual's private interest at stake against the government's interest and the potential accuracy benefits from different or additional procedures—has a decidedly systemic and managerial cast.[118] The relevant governmental interests are overall administrative concerns, and accuracy is also defined systemically.[119] Even the individual interest at stake is often abstracted away from the particulars of the plaintiff's situation.[120] Still, substantial aspects of government administration are denied constitutional relevance even here. A prime culprit is limitation on the types of property interests that trigger due process protection to those to which an individual has "a legitimate claim of entitlement."[121] This limitation precludes procedural due process scrutiny of the numerous administrative arrangements under which administrators

116. *Id.* at 837. In truth, Justice Souter's majority opinion appears to waver 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) (criticizing the individualistic focus of *Farmer*).

117. 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, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 243 (1991))).

118. 424 U.S. 319, 335 (1976). *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 311 (1993).

119. *See, e.g.*, Wilkinson v. Austin, 545 U.S. 209, 227-28 (2005) (ensuring governments' ability to control prisons); *Mathews*, 424 U.S. at 345 (1976) (characterizing written procedures as adequate, despite evidence of the potential benefit of an oral hearing in Eldridge's own case).

120. Fallon, *supra* note 118, 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 . . . .").

121. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

exercise broad discretion and such entitlements are deemed lacking.[122] Moreover, in restricting the scope of interests that trigger due process protection, the Court has invoked the same concern with inappropriate intervention of the federal courts in "day-to-day management" that is evident elsewhere in its case law.[123]

Failure-to-train claims represent another interesting linkage between due process—here, substantive due process—and systemic administration. For example, *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 persons with whom [its employees] come into contact."[124] *Canton* rests on recognition of the role that general administrative measures such as training and oversight play in preventing constitutional violations, and thus, like *Mathews*, constitutes a rare acknowledgment of systemic administration's constitutional significance.[125] 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.[126] 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

122. *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." Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998).

123. Sandin v. Conner, 515 U.S. 472, 482-83 (1995); *see also* Collins v. City of Harker Heights, 503 U.S. 115, 128-29 (1992) ("[T]he administration of government programs is based on a rational decisionmaking process that takes account of competing social, political, and economic forces.").

124. 489 U.S. 378, 388 (1989); *see also Collins*, 503 U.S. at 117, 124 (reaffirming the potential availability of a failure-to-train challenge).

125. *See Canton*, 489 U.S. at 390 (indicating that a failure to train is actionable where inadequacy in training is so likely to lead to a constitutional violation that policymakers can be deemed to have been deliberately indifferent to the need for such training). 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 rather than under the Eighth Amendment. *See id.* at 389-90.

126. *See, e.g.*, Connick v. Thompson, 131 S. Ct. 1350, 1359-60 (2011) (emphasizing the stringency of the deliberate indifference test); Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 472, 476-86 (2004) (noting that "failure to train claims are very difficult to bring, and even more difficult to win"); *see also* Bd. of Cnty. 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").

rather on the prohibition on respondeat superior liability in suits brought under Section 1983.[127]

b. The Denial of Supervisor Liability

The Court famously articulated the prohibition on respondeat superior liability in *Monell v. Department of Social Services*, basing it on the language and legislative history of Section 1983.[128] Scholars and jurists have criticized this rationale, but the Court has shown little inclination to revisit the issue.[129] Instead, it has often reaffirmed the prohibition on respondeat superior liability[130] and extended it to the context of *Bivens* suits against federal officers—even though the availability of *Bivens* suits is inferred directly from the Constitution and thus is not limited by any underlying statute.[131] 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 it denied respondeat superior liability, *Monell* ruled that a municipality could be liable under Section 1983 if "a municipal 'policy' or 'custom' . . . caused the plaintiff's injury," as liability in such a case would be direct rather than vicarious.[132] 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

127. 42 U.S.C. § 1983 (2012); 489 U.S. at 389-92.

128. 436 U.S. 658, 691 (1978). As to language, the Court argued that § 1983's imposition of liability on "any person who, under color of law . . . subject[s], or cause[s] to be subjected, any person," 42 U.S.C. § 1983, to a deprivation of federal rights "cannot be easily read to impose liability vicariously." 436 U.S. at 691-92. 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.

129. For a sampling of these criticisms, see, for example, *Brown*, 520 U.S. at 431-33 (Breyer, J., dissenting) (criticizing both the textual and legislative history arguments); and David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2196-2216 (2005).

130. *See, e.g.*, *Brown*, 520 U.S. at 403; City of St. Louis v. Praprotnik, 485 U.S. 112, 121-22 (1988).

131. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 63 (2001) (declining to allow a *Bivens* claims "against a private corporation operating a halfway house under contract with the Bureau of Prisons"). Judicial preclusion of respondeat superior liability for federal employees in common law suits dates back to the nineteenth century. *See* Robertson v. Sichel, 127 U.S. 507, 515-16 (1888).

132. *Brown*, 520 U.S. at 403-04 (quoting *Monell*, 436 U.S. at 694).

high level of culpability; and to require tight causation "between [a] policymaker's inadequate decision and the particular injury alleged."[133] 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.[134] 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."[135]

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.[136] In addition, "the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[137] Whether respondeat superior liability would lead to better deterrence of constitutional violations, overdeterrence, or even any measurable deterrence is a source of some debate.[138] But the key point for my purposes here

133. *Brown*, 520 U.S. at 410, 415; City of Canton v. Harris, 489 U.S. 378, 391-92 (1989); Pembaur v. City of Cincinnati, 475 U.S. 469, 482-84 (1986); *see also* Achtenberg, *supra* note 129, at 2190-91.

134. *See* Peter H. Schuck, *Municipal Liability Under Section 1983: Some Lessons from Tort Law and Organization Theory*, 77 GEO. L.J. 1753, 1777-79 (1989).

135. Owen v. City of Independence, 445 U.S. 622, 652 (1980); *see also* Schlanger, *supra* note 96, at 558-62 (discussing causation requirements).

136. *See, e.g.*, Armacost, *supra* note 126, at 455-56, 507-14 (arguing that police misconduct often arises from mismanaged public safety organizations and discussing the impact of organizational culture on police behavior); Schuck, *supra* note 134, at 1778; Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 587-89, 592-95, 598-99 (2011).

137. *Owen*, 445 U.S. at 652.

138. *Compare* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 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* Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 854-58 (2001) (arguing that tort damages against government officials have a deterrent effect), *and* Larry Kramer & Alan O. Sykes, *Municipal Liability Under §1983: A Legal and Economic Analysis*, 1987 SUP CT. REV.

is that the Court has largely excluded judicial consideration of such incentives on agency behavior by categorically prohibiting respondeat superior liability.[139] To the extent the Court considers the incentive effects of liability, the Court maintains an individualistic focus in the context of developing immunity doctrines that limit government officers' personal liability.[140] And strikingly, in doing so, the Court does not consider administrative features such as near universal indemnification of governmental employees, which likely affects how individual officers respond to the possibility of being sued.[141]

The related denial of supervisory liability under Section 1983 and *Bivens* serves to further exclude consideration of administration in individual rights enforcement. Supervisory liability claims represent an effort to avoid *Monell*'s ban on respondeat superior and vicarious liability by charging high-level government officials with direct liability for their deficient supervision of subordinates.[142] A recent assertion of supervisory liability appeared in *Ashcroft v. Iqbal*, in which the plaintiffs brought suit against the Attorney General and FBI Director for, among other things, knowing of 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.[143] Appellate courts had allowed the possibility of 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."[144] Nonetheless, the Court rejected such deficient supervision as a basis

249, 287 (arguing that government liability is likely to produce better deterrence and training than officer liability).

139. The Court occasionally has discussed the comparative deterrent effect of direct officer liability and governmental liability in the *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 that a *Bivens* action would have more deterrent effect than a tort suit against the federal government because officers themselves would face financial liability).

140. *See* Harlow v. Fitzgerald, 457 U.S. 800, 800 (1982).

141. *See* Armacost, *supra* note 126, at 473; Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65 (1999).

142. *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).

143. 556 U.S. 662, 668-69 (2009).

144. *Id.* at 690 (Souter, J., dissenting) (quoting Petition for a Writ of Certiorari at 29, *id.* (No. 07-1015)); *see also* Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 LEWIS & CLARK L. REV. 279, 292-93 (2010) (describing supervisory liability standards in the lower courts before *Iqbal*).

for liability in terms that suggested elimination of supervisory liability altogether, stating that "[i]n a § 1983 suit or a *Bivens* action — where masters do not answer for the torts of their servants — the term 'supervisory liability' is a misnomer."[145] As a result, in order for the defendant officials to be liable, the plaintiff had to plead and prove that the officials had acted with discriminatory purpose.[146]

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 Section 1983 and *Bivens* in individualized rather than institutional terms. Having done that, and having developed the deliberate indifference standard in other contexts,[147] the Court's preclusion of supervisory liability claims subject to this standard is difficult to defend.

D. 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, courts emphasize specific, identified practices rather than overall institutional functioning and 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 to whether such oversight actually occurs, and the Court is extremely reluctant to fault high-level officers for failed supervision. The net effect is that systemic admin-

145. *Iqbal*, 556 U.S. at 677.

146. *Id.* at 676.

147. *Cf.* Nahmod, *supra* note 144, 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).

istrative functioning is denied constitutional relevance, and no constitutional 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. Courts sometimes voice these concerns in terms of an 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, at most, the Court states that the Constitution assigns responsibility for shaping administration and overseeing law execution to the President and Congress.[148]

E. 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.[149]

148. *See* Lewis v. Casey, 518 U.S. 343, 349 (1996) ("[I]t is not the role of the courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution."); Allen v. Wright, 468 U.S. 737, 761 (1984).

149. Exec. Order No. 13,563, § 6, 3 C.F.R. 215, 217 (2012); Exec. Order No. 12,866, §§ 4-6, 3 C.F.R. 638, 642-48 (1994). Plans and high-level oversight are also at the heart of White House initiatives to increase transparency and address expanded agency reliance on informal guidance. *See* Office of Mgmt. & Budget, *Final Bulletin for Agency Good Guidance Practices*, 72 Fed. Reg. 3432, 3439-40 (2007), http://www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf [http://perma.cc/QX6H-SNUL]; *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 that the agency would take to encourage greater transparency and participation).

Nonetheless, judicially enforced administrative law excludes many systemic aspects of agency functioning in ways very similar to constitutional law.[150] Much of this exclusion occurs through jurisdictional doctrines, with the Court reading the Administrative Procedure Act's (APA) provision for review of "final agency action" to require that suit be brought against discrete agency actions rather than against the agency's broader policies or programs that those actions reflect.[151] Although this line of cases ostensibly turns on the text of the APA, the Court's separation of powers concerns with judicial involvement in administration plainly fuel 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."[152]

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 over agency failures to act.[153] The Court's 2004 decision in *Norton v. Southern Utah Wilderness Alliance* underscored this point, holding that the APA's provision for suit to "compel agency action unreasonably withheld or unreasonably delayed"[154] was available "only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it *is required to take*."[155] 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,

150. *See* Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 37-43 (2011); *see also* Shapiro, *supra* note 16, 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).

151. 5 U.S.C. § 702 (2012); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891-94 (1990). Ripeness doctrine has also served to preclude challenges to general policies prior to actual application. *See* Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57-61, 64-65 (1993).

152. *Lujan*, 497 U.S. at 891.

153. *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 the grounds that causation between government nonenforcement of prohibitions on discrimination in granting schools tax-exempt status and plaintiffs' injury was too attenuated).

154. 5 U.S.C. § 706 (2012).

155. 542 U.S. 55, 64 (2004).

and "[g]eneral deficiencies in compliance . . . lack the specificity requisite for agency action."[156]

The exclusion of systemic administration from administrative law is not total, and sometimes courts will accord weight to more general aspects of agency functioning. One prominent instance is *United States v. Mead*, where the Court tied the deference accorded agency statutory interpretations to the procedures by which the agencies promulgated them and the extent to which they were subject to centralized agency review.[157] Even *Mead*'s engagement with administrative structure, however, was limited. 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 relatively formal procedures, and it gave no weight to the fact that the interpretation in question had been made by central headquarters.[158] 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 as a de facto rule), notwithstanding the fact that guidance is a central mechanism by which higher agency officials control lower-level discretion.[159]

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.[160] 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.[161]

156. Veterans for Common Sense v. Shinseki, 644 F.3d 845, 870 (9th Cir. 2011) (vacated on other grounds) (quoting *Norton*, 542 U.S. at 66).

157. 533 U.S. 218, 233-34 (2001); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1062-63 (2011); *see also* Nat'l Automatic Laundry & Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971) (emphasizing the decision maker'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).

158. *Mead*, 533 U.S. at 237-38; *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).

159. *See* Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 805 (D.C. Cir. 2006); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1482-83 (1992).

160. Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. (forthcoming 2015) (manuscript at 1-2) (on file with author).

161. Farber & O'Connell, *supra* note 16, at 1140.

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 supervision or 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 analyzes the scope of the duty to supervise that results from each ground. This Part then turns to the question of whether 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.[162] But the preeminent basis is constitutional structure, with the duty to supervise inferred from the hierarchical ordering and accountability relationships evident in the Constitution.[163] 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 supervision's constitutional underpinnings. Moreover, structural reasoning is well-suited to instances such as the duty to supervise, where, as I argue below, primary enforcement may often lie with the political branches.[164]

162. For two leading accounts of these standard forms of constitutional argument, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 1-119 (1982); and Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194-1209 (1987).

163. For the classic exposition of structural inference as a method of constitutional interpretation, see CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

164. In an important recent article, John Manning criticized the Court's reliance on structural analysis in separation of powers challenges, contending that the Constitution contains "no freestanding principle of separation of powers," only a grant of general power to Congress in the Necessary and Proper Clause to structure the federal government subject only to specific constitutional limitations. *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944-47 (2011) (emphasis omitted). But these concerns about judicial use of structural analysis are not implicated when the focus is on identifying separation of powers precepts to guide the political branches.

A. Article II and the Duty To Supervise

Article II provides 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, but 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 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.[165] 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 to Congress but "all other Powers vested . . . in the Government of the United States, or in any Department or Officer thereof."[166] Congress acts, however, subject to some structural limitations, largely specified in Article II.[167] 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 Officer in each of the executive Departments, upon 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."[168]

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

165. MASHAW, *supra* note 36, at 30.

166. U.S. CONST. art. I, § 8, cl. 18; *see* Manning, *supra* note 164, at 1947-48, 1986-93, 2023-24.

167. Other important constraints housed outside Article II are that no member of Congress can simultaneously be 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).

168. U.S. CONST. art. II., §§ 1-3.

any other result, is that the actual execution of the laws will be done by others.[169] Despite vesting the executive power in the President, the Framers did not expect that the President would be personally implementing the laws, with advocates of strong executive power even acknowledging that "[w]ithout [key] ministers[,] the Executive can do nothing of consequence."[170] 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.[171] 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.'"[172]

The second point is that the presidential oversight role is mandatory.[173] 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.[174] Those defending a more constrained account of presidential power counter by arguing that the fact that the Clause

169. *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.").

170. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 54 (Max Farrand ed., 1911); *see also* 1 ANNALS OF CONG. 492 (1789) (Joseph Gales ed., 1834) (statement of Rep. Fisher Ames) ("[C]ould [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.").

171. U.S. CONST. art. II, § 2; *see also* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

172. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010) (quoting 30 THE WRITINGS OF GEORGE WASHINGTON 334 (John Fitzpatrick ed., 1939)); *see also* Saikrishna B. Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 993 (1993) ("The Framers recognized that the President could not enforce federal law alone; he would need the help of others.").

173. *See* Delahunty & Yoo, *supra* note 6, at 799.

174. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 484 ("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?").

is phrased as imposing a duty counsels against reading it to support assertions of broad presidential authority.[175] In short, both camps use the obligatory nature of the 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.[176] 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 a commitment to "preserve, protect, and defend the Constitution," thereby "impl[ying] a . . . duty to try to prevent others from undermining it through maladministration of the law."[177]

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's having power or authority to execute the laws, and the transformation into the ultimate duty phrasing occasioned little discussion.[178] This suggests that the Framers did not attach

175. *See* Myers v. United States, 272 U.S. 52, 295 (1926) (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 (1994) ("[T]here is something quite odd about the structure of the Take Care Clause if it was conceived by the framers as the 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 rather than a power.").

176. 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.

177. *Id.* at 84, 86; *see also* CHARLES C. THATCH, JR., THE CREATION OF THE PRESIDENCY 1775-1789 at 92, 99 (1923) (describing support of Morris and Hamilton for strengthening the executive); THE FEDERALIST NO. 72, at 436 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that executive officers should be subject to presidential "superintendence").

178. 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 the National laws." 1 Farrand, *supra* note 170, at 21; *see also 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." *Id.* at 63; *see also* 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 Pinckney's plan. 3 *id.* at 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

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.[179] Much also turns on what faithful execution of the laws means—itself a source of debate.[180] 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.[181]

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) <to the best of his ability>." 2 *id.* at 171. The Committee opted for the take care formulation, with the slight change of "be duly and faithfully executed." *Id.* at 185. The additional "duly and" were ultimately removed by the Committee of Style. *Id.* at 600; *see also* Prakash, *supra* note 172, at 1001-02 (recounting the drafting history of the Take Care Clause). 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 177, at 36-37, 176 (quoting art. XIX of the New York Constitution and noting its importance in shaping the federal executive).

179. 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 175, at 66-68. Although the simultaneity of this change is suggestive, Lessig and Sunstein's account fails to explain why the alteration triggered no discussion, if indeed it wrought as significant a change as transferring power to structure administration from the President to Congress.

180. 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 (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, 261-62 (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).

181. *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1313 (1996) ("[T]he most important, if not the sole, aspect of [the Take Care Clause] is to make clear that '[t]he executive Power' does not include a power analogous to a royal prerogative of suspension."); *see also* Calabresi & Prakash, *supra* note 174, at 582-84, 589-90, 616-17, 620-22 (arguing that the 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 175, at 69 ("[T]he Take Care Clause . . . obliges the President to follow the full range of laws that Congress enacts, [including] . . . laws regulating execution . . . .").

2. *Hierarchical 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 hierarchical structure for federal administration, under which lower government officials act subject to higher-level superintendence. Article II's other provisions echo that hierarchy. A prime example is the Appointments Clause, with its differentiation between "Officers of the United States" and "inferior Officers," the latter subject to appointment by (and thus implicitly subservient to) Heads of Department.[182] This implication of hierarchical 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."[183] Similarly, as David Barron and Martin Lederman have argued, "[T]he textual designation of the President as the Commander in Chief . . . establishes a particular hierarchical relationship within the armed forces and the militia . . . at least for purposes of traditional military matters."[184] The Opinion Clause also conveys the importance of oversight, 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.[185] To be sure, the Opinion Clause is permissive rather than mandatory; it stipulates that the President "may require" opinions rather than that the President must.[186] But that phrasing does not undermine the hierarchical oversight dynamic signaled by the Clause so much as indicate that requesting opinions is just one method that the President can use to fulfill the Take Care supervisory duty.[187] Finally, although

182. U.S. CONST. art. II, § 2, cl. 2.

183. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 510 (2010) (quoting Edmond v. United States, 520 U.S. 651, 663 (1997)).

184. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 768 (2008).

185. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 646-48 (1984).

186. U.S. CONST. art. II, § 2, cl. 1.

187. *See* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 658-61 (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, 8 (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

the Vesting Clause of Article II less clearly addresses the shape of internal executive structure, this clause's identification of "a President" in whom "[t]he executive Power shall be vested" makes clear that the Article II supervisory hierarchy takes a general pyramidal form, narrowing to an apex at the top.[188]

In short, despite leaving open most of the federal government's administrative organization, Article II's text signals that hierarchical supervision within the executive branch is an important structural principle. This hierarchical 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.[189] But such a claim of broad presidential authority mistakenly elides the President's *right and duty* to supervise law execution with the *scope* of such supervision.[190] The structural principle of hierarchy entails that supervision up to the President must occur; it does not require that such supervision take the form of full presidential decisionmaking control. Only if supervision could not otherwise occur – a dubious proposition, given the variety of forms supervision takes today[191] – would such a broad claim of presidential power necessarily follow.

Similarly, although the Supreme Court has tied the Take Care duty closely to the President's power to remove principal officers,[192] it is not obvious that

superior and his inferiors, whereas the State of the Union Clause governs an information exchange between two equals").

188. *See* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1006 (2007).

189. For unitary executive arguments emphasizing Article II hierarchy, see Calabresi & Prakash, *supra* note 174, at 559, 584, 663; and 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 175, at 4, 9-10, 84-85 (describing hierarchical account of Article II though rejecting it as a matter of original meaning).

190. Although distinct from the unitary executive debate in general, acknowledging Article II's hierarchical structure is at odds with Lessig and Sunstein's contention that the Constitution distinguishes between executive and administrative power and requires presidential oversight only of the former. *See* Lessig & Sunstein, *supra* note 175, 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 id.* at 93-99. 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 in Part II.B.

191. *See supra* notes 24-27 and accompanying text.

192. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 503-04 (2010) (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.[193] The Court recently dismissed these mechanisms as "bureaucratic minutiae" lacking constitutional significance,[194] yet in practice such bureaucratic minutiae are central to day-to-day implementation of the laws. Indeed, removal's constitutional centrality seems to be a further manifestation of constitutional law's rejection of systemic administration – bureaucracy – in favor of the individualistic model of a chief personally firing an assistant.[195]

Better clues for divining the Article II approach to supervision come from the Appointments Clause. It indicates that the supervision envisioned by Article II extends more broadly than just presidential oversight. The Clause's distinction between principal and inferior officers reveals that supervision was expected to occur at lower 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.[196] This further reinforces the concept that supervision should not be equated with removal. Removal is a mechanism best targeted to the top of an agency, given the difficulty of tracing particular institutional policies to specific lower officials, well-entrenched civil service protections, and the public outcry that removal often

193. *See id.* at 527–30 (Breyer, J., dissenting) (arguing broad oversight of functions made removal less important).

194. *Id.* at 501.

195. *See id.* at 496 (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").

196. Charles Pinckney'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, *supra* note 170, at 335-36. Of similar effect is Pinckney'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 the means in time not only of preventing and correcting errors, but of detecting and punishing mal-practices." 3 FARRAND, *supra* note 170, at 111.

triggers.[197] At middle and lower levels, the other oversight methods detailed above, along with more indirect measures such as professional norms, agency culture, or reputational concerns, may be more effective mechanisms for controlling administrative behavior.[198]

3. Hierarchical Oversight and Executive Branch Supervision in Practice

Given the textual and structural emphasis on hierarchical 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."[199] Although this lack of formal hierarchy did not preclude presidential supervision and direction, it certainly limited the occasions when such supervision would occur.[200] A second example involves reliance on state courts and state officials for some federal law enforcement, a reliance that the Framers clearly anticipated.[201] 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. . . . [The-

197. *See* Richard J. Pierce, *Saving the Unitary Executive Theory from Those that Would Distort and Abuse It: A Review of* The Unitary Executive*, by Steven G. Calabresi and Christopher Yoo*, 12 U. PA. J. CONST. L. 593, 605-10 (2010) (book review) (describing legal protections and political fallout).

198. *See* Shapiro & Wright, *supra* note 136, at 602-03 (citing studies indicating that civil servants are strongly motivated by nonpecuniary incentives beyond fear of demotion or other punishment).

199. Lessig & Sunstein, *supra* note 175, at 16-17 (citations omitted). 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 hierarchical structure. *See* MASHAW, *supra* note 36, at 40, 50-51.

200. 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).

201. *See* Printz v. United States, 521 U.S. 898, 905-11 (1997) (acknowledging early federal reliance on state enforcement but concluding that the federal government lacked the power to compel state executive officers to enforce federal law); Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1995-2006, 2013-30 (1993) (detailing historical references to state enforcement of federal law).

se] state officials . . . were far removed from control of the executive branch."[202] A third instance is the widespread delegation of responsibility to nongovernmental actors, such as the 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.[203]

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 subordinates and through which they can call them to account for their actions."[204] A key instance was the Treasury Department. Mashaw documents the way in which two early Secretaries of the Treasury, Alexander Hamilton and Albert Gallatin, exercised close oversight of customs officials through daily correspondence and frequent circulars.[205] A similar pattern of central oversight and instruction of field office personnel is evident in the Land Office context, albeit with a more uneven record.[206] 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."[207] 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 con-

202. Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 303 (1989).

203. MASHAW, *supra* note 36, at 36-38; Lessig & Sunstein, *supra* note 175, at 30-31.

204. MASHAW, *supra* note 36, at 7. Bruce Wyman first coined the term "internal administrative law" over one hundred years ago. *See* BRUCE WYMAN, THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS 4, 14-18 (1903).

205. MASHAW, *supra* note 36, at 54-57, 91-104; *see also* LEONARD D. WHITE, THE FEDERALISTS 202-09 (5th prtg. 1964) (detailing mechanisms of internal control used during the Washington and Adams administrations).

206. MASHAW, *supra* note 36, at 124-37; *see also* MALCOLM J. ROHRBOUGH, THE LAND OFFICE BUSINESS 33-70 (1968) (detailing internal mechanisms of control in the Land Office).

207. Act of May 8, 1794, ch. 23, § 3, 1 Stat. 354, 357; *see also* Act of Apr. 2, 1792, ch. 16, § 3, 1 Stat. 246, 247 ("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 36, at 56-57.

trol.[208] 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."[209]

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 was not uniformly required, nor was it the only means of ensuring effective government and checking overreach.[210] Still, according to Mashaw, "[T]he 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."[211] 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.[212] Frequently, moreover, such oversight was informal, taking the form of lower officials' consulting with their superiors and their superiors' seeking the President's ad-

208. 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, ch. 7, § 1, 1 Stat. 49, 49-50 (creating the Department of War headed by a principal officer, "to be called the Secretary," wherein "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 27, 1789, ch. 4, § 1, 1 Stat. 28, 28-29 (using the same language in creating 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").

209. THE FEDERALIST No. 68, *supra* note 177, at 414 (Alexander Hamilton) (Clinton Rossiter ed., 1961); ROHR, *supra* note 16, at 1-3; *see also* THE FEDERALIST Nos. 76, 77, *supra* note 177 (Alexander Hamilton) (justifying the Constitution's appointment process in terms of its ability to select good officials and support administrative stability).

210. *See* MASHAW, *supra* note 36, at 40-41, 64-78 (noting judicial review and congressional oversight as other techniques). *See generally* NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013) (emphasizing reliance on private expertise and private financial incentives as a means of improving governmental performance).

211. MASHAW, *supra* note 36, at 140.

212. *See id.* at 57 (quoting an Alexander Hamilton circular).

vice—and the President in turn requesting to be kept informed and consulted on departmental matters.[213]

One final aspect of historical practice worth considering is the development of the civil service. Beginning with the 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.[214] The result today is a system criticized as limiting managers' ability to fire employees or reduce salaries in response to poor performance.[215] Development of the civil service therefore 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 nineteenth century. Under this "spoils system," control over government employment lay with the political party of the President.[216] The emergence of the civil service supported a broader transfer of authority to administrative officials, with bureau chiefs gaining the ability to select personnel and exercise control over agency activities—a development that Daniel Carpenter has termed the emergence of bureaucratic autonomy.[217] Indeed, the broadest reach of the federal civil service occurred at the heyday of modern federal administrative bureaucracies, with their characteristic of tight internal hierarchical control.[218] Hence, development of the civil service helps to illuminate 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.[219]

213. *See* NOBLE E. CUNNINGHAM, JR., THE PROCESS OF GOVERNMENT UNDER JEFFERSON, 27-47, 87-133 (1978); MASHAW, *supra* note 36, at 54.

214. *See* RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY: THE ECONOMICS AND POLITICS OF INSTITUTIONAL CHANGE 48-73 (1994); LEWIS, *supra* note 30, at 17-18.

215. *See, e.g.*, JOHNSON & LIBECAP, *supra* note 214, at 1-5; P'SHIP FOR PUB. SERV. & BOOZ ALLEN HAMILTON, A NEW CIVIL SERVICE FRAMEWORK 7-10 (2014).

216. *See* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928, at 40-51 (2001). *See generally* ARI HOOGENBOOM, OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT 1865-1883 (1961).

217. CARPENTER, *supra* note 216, 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 the development of legitimacy and reputation on an agency-by-agency basis. *Id.* at 10-11.

218. *See* Jon Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. (forthcoming 2015) (manuscript at 17-18) (on file with author); *see also supra* notes 28-29 (identifying merit selection as a core characteristic of modern bureaucracy).

219. *See* LEWIS, *supra* note 30, at 5-8, 20-37.

Yet the fact that internal oversight and hierarchical supervision were viewed as important and 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 hierarchical supervision from the President down to be a constitutional imperative across the board.[220] Still, that variation leaves the possibility that internal executive-branch oversight was understood to have constitutional underpinnings, even if not required in all instances. Early Attorney General opinions offer some suggestions of such a view. 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.[221] Wirt's distinction of honest and corrupt decisions suggests that he saw presidential oversight as needed in order to police intentional misuse of governmental power rather than as a broader requirement, but his invocation of a constitutional obligation of presidential oversight even in this context is noteworthy.

B. Delegation, Accountability, and the Duty To Supervise

Although the Take Care Clause and Article II's provision for hierarchical 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 the delegation of governmental power—both legislative delegations to the executive branch and further subdelegation of authority from the top of an agency to lower officials. The connection between

220. *See* MASHAW, *supra* note 36, at 82-83; Lessig & Sunstein, *supra* note 175, at 22-32.

221. The President and Accounting Officers, 1 Op. Att'y Gen. 624 (1823), *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. Att'y Gen. 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); Office and Duties of Attorney General, 6 Op. Att'y Gen. 326 (1854), *reprinted in* POWELL, *supra*, at 78, 86-88 (rejecting Wirt's view of presidential power over heads of department and subordinate officers as too narrow and arguing that "common sense . . . assumes that the superior shall overrule the subordinate").

delegation and supervision is supported both by constitutional references to hierarchical supervision 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 hierarchical supervision within the executive branch, but it potentially has a wider and more flexible import.

1. Delegated Authority and the Hierarchical Oversight Model

The hierarchical 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 echoes Article II's distinction between principal and inferior officers by vesting the judicial power "in one supreme Court, and in such inferior Courts" as Congress may establish.[222] 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."[223]

A number of scholars have argued that Article III's "coordinate requirements of supremacy and inferiority" give the federal judiciary a "pyramidal structure" and "hierarchical nature."[224] According to James Pfander, "Supremacy 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."[225] 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."[226] Although others are skeptical that Article III es-

222. U.S. CONST. art. III, § 1, cl. 1. Article I strikes a similar theme in authorizing Congress to "constitute Tribunals inferior to the supreme Court." *Id.* art. I, § 8, cl. 9.

223. *Id.* art. III, § 2, cl. 2.

224. JAMES E. PFANDER, ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES xii, xv (2009); *see also* Plaut v. Spendthrift Farm, 514 U.S. 211, 227 (1995) (characterizing Article III as creating a "hierarchy").

225. PFANDER, *supra* note 224, at xi, xiv.

226. Calabresi & Lawson, *supra* note 188, at 1022-23 (emphasis added) (citations omitted); *see also* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 828-34 (1994); Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 66-73 (2007) (articulating a similar definition of supremacy to Calabresi and Lawson's definition).

tablishes such a strict requirement of subordinancy,[227] general agreement exists that the Court cannot be denied review authority in all cases from the lower federal courts presenting constitutional questions.[228] 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."[229]

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 has granted review of state court decisions rejecting federal law claims going back to the 1789 Judiciary Act.[230] 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 by insisting that lower federal courts follow its precedents.[231] 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 hierarchical 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 houses and expressly providing that "Each House" shall choose its own officers, judge the elections and qualifications of its own members, determine its

227. For example, some scholars argue 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. *See* Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 329-30, 344-53 (2006); Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 983-94 (2000); David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 466-72 (1991); *see also* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 229-30, 254-59 (1985) (arguing that Article III requires only that some federal court have the power to hear federal questions and that "supreme" means only that the Supreme Court is the court of last resort).

228. *See* Richard J. Fallon, *Jurisdiction-Stripping Reconsidered,* 96 VA. L. REV. 1043, 1089 (2010); Barrett, *supra* note 227, at 362-63, 365-66 (acknowledging limited support for a hierarchical model in Article III to the extent of limiting Congress and rejecting "across-the-board subordination").

229. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

230. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87. For an overview of the development of federal court jurisdiction, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 294-305 (6th ed. 2009).

231. Barrett, *supra* note 227, at 332-33; Bhagwat, *supra* note 227, at 977-82.

own rules, police and expel its own members, and keep its own journal.[232] 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.[233] More common is a model of reciprocal checking, seen perhaps most clearly in the distinct role each house plays in impeachment.[234] 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 *Nixon v. United States*, 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.[235]

This contrast between the hierarchical structure created for the executive and judicial branches and Congress's internal equality is instructive. One explanation for the equal stature and independence of the House and the Senate 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 two houses' respective powers.[236] 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.[237] By comparison, 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,

232. U.S. CONST. art. I, §§ 5, 7.

233. *Id.* art. I, § 5, cl. 4; *see also id.* art. I, § 7, cl. 1 (requiring bills for raising revenue to originate in the House); *id.* art. II, § 2, cl. 2 (describing the Senate's role in approving treaties and appointments).

234. *See id.* art. I, § 2, cl. 5 (granting the House of Representatives sole power to initiate impeachment proceedings); *id.* art. I, § 3, cl. 6 (granting the Senate sole power to try all impeachments).

235. 506 U.S. 224, 229-30 (1993).

236. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 57-93 (1996).

237. U.S. CONST. art. I, § 7; *see also* INS v. Chadha, 462 U.S. 919, 951 (1983) (discussing the purposes of the bicameral requirement and Presentment Clause).

whereas it was understood that there would be many executive officials and judges other than the President and the Justices of the Supreme Court.[238]

These differences in the branches' organization suggest 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 theme evident in the Constitution, and embodied in longstanding practice, suggests recognition of oversight and internal hierarchy as important ways to control delegated federal power.

2. *Supervision and Accountability of Delegated Authority*

Further support for a relationship between delegation and supervision comes from accountability principles implied by the Constitution's structure. Accountability, which is often identified as a core constitutional concern,[239] is a broad and malleable concept. It suggests answerability, and, in public law, the focus is often on the answerability of governmental officials. But that focus still leaves key questions open: in particular, which officials, answerable to whom, through which mechanisms, for what actions or decisions, and measured by what metric?[240] Not surprisingly, therefore, accountability surfaces in a variety

238. This view of Congress underlies the argument that broad congressional delegation is 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).

239. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497–98 (2010) (expressing concern that "diffusion of power carries with it a diffusion of accountability" in holding a removal restriction unconstitutional); New York v. United States, 505 U.S. 144, 168-69 (1992) (expressing concern that "where the Federal Government compels States to regulate, the accountability of state and federal officials is diminished," in concluding that such federal compulsion is unconstitutional).

240. *See* Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 118 (Michael W. Dowdle ed., 2006). According to Ed Rubin, "Accountability 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 its explanation." Edward 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 in 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").

of constitutional guises.[241]

Perhaps the most obvious guise is political or electoral accountability, with officials' need 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. It is evident in the stipulation of electoral selection for members of Congress and the President, political appointment of principal officers, and removal of officers via congressional impeachment.[242] 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.[243] Political accountability concerns also underlie many constitutional doctrines, such as the nondelegation doctrine, the federalism anti-commandeering rule, and jurisprudence on the presidential removal power.[244]

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,"[245] 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.[246] The principle of legal accountability, which was famously articulated in *Marbury v. Madison*'s defense of judicial review and repeatedly underscored by subsequent judicial decisions, is often identified as entailing court enforcement.[247] But the principle of adherence to governing law has broader reach and applies even when governmental actions lie outside the ambit of judicial scrutiny.[248]

241. For different taxonomies of accountability, see Michael W. Dowdle, *Public Accountability: Conceptual, Historical, and Epistemic Mappings*, *in* PUBLIC ACCOUNTABILITY, *supra* note 240, at 1, 3-8; and Mashaw, *supra* note 240, at 118-29. *See also* Romzek & Dubnick, *supra* note 240, at 228-29 (identifying bureaucratic, legal, professional, and political accountability as central to public organizations).

242. U.S. CONST. art. I, §§ 2, 3; *id.* art. II, §§ 1, 2, 4.

243. *See, e.g.*, U.S. CONST. amend. XVII (establishing direct election of U.S. Senators by popular vote); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 752-53 (1999).

244. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 497-501; Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472-73 (2001); *New York*, 505 U.S. at 169.

245. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

246. Metzger, *supra* note 37, at 1400-01.

247. *See id.* at 1401-02; *see also* Mashaw, *supra* note 240, at 120, 128.

248. This marks something of a change in view from my earlier scholarship, in which I identified legal accountability as more closely tied to judicial review, although as in this Article, I emphasized that governmental supervision was important for ensuring that legal constraints were enforceable. Metzger, *supra* note 37, at 1401-02.

A third form of constitutionally salient accountability is accountability through supervision and oversight—sometimes referred to as bureaucratic or managerial accountability.[249] This form of constitutional accountability is far less commonly acknowledged, despite its embodiment in the textual references to supervision detailed above.[250] Indeed, as Ed Rubin has noted, bureaucratic accountability is often portrayed as being at odds with political accountability, a growing phenomenon that, he argues, reflects resistance to the legitimacy of administrative government.[251] A striking recent example is *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.[252]

Such a suggestion of opposition between political and bureaucratic accountability is deeply misguided. Most critically, this argument fails to account for the reality of delegation that lies at the heart of modern administrative government. Delegation does not only run from Congress to the executive, 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 officials.[253] Such delegations to and within 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 oversight is equally required to ensure that policies and priorities specified by elected

249. *See* Mashaw, *supra* note 240, at 120-21, 128; Rubin, *supra* note 240, at 2120-25.

250. *See supra* notes 165-168, 183-188 and accompanying text.

251. Rubin, *supra* note 240, at 2091-98.

252. 561 U.S. 477, 499 (2010).

253. *See* Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J. L. & PUB. POL'Y 87, 91-93 (2010) (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 the scope of presidential subdelegation authority).

leaders are actually carried out on the ground.[254] *Free Enterprise Fund* 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.' . . . [W]here [in the administrative system at issue] is the role for oversight by an elected President?"[255]

Internal supervision and oversight are also central to political accountability for other reasons: they allow the public to be informed about administrative actions and provide a mechanism for public participation in administration.[256] 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 that their interests are addressed.[257] Instead, the focus is often on direct involvement by affected groups and other interested parties in administrative decisionmaking.[258] Agency oversight structures help achieve transparency and opportunities for participation,[259] for example, by requiring advance notice, creating disclosure presumptions, reviewing decisions for responsiveness to identified concerns, and monitoring of agency actions 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

254. *See* ROHR, *supra* note 16, at 85-88, 137-43; Ronald C. Moe & Robert S. Gilmour, *Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law*, 55 PUB. ADMIN. REV. 135, 138-39 (1995); Rubin, *supra* note 240, at 2120-22, 2134-36.

255. 561 U.S. at 498-99 (internal quotations and citations 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. 463 (1789))).

256. *See* Farina, *supra* note 253, at 100-101.

257. *See* Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 254, 259-60 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

258. *See* Lobel, *supra* note 33, at 371-79 (noting increased stakeholder participation). Some argue that such participation offers more chance for meaningful influence on policy than traditional electoral methods. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511 (1992).

259. *See* Sidney Shapiro et al., *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463 (2012); *see also* Exec. Order No. 13,563, 3 C.F.R. § 189 (2012) (requiring broad disclosure and participation in rulemaking); Office of Mgmt. & Budget, *supra* note 149 (detailing requirements for disclosure and oversight of agency guidance); Orszag, *supra* note 149 (imposing open government requirements on agencies).

such judicial review.[260] Internal supervision is free of many of these obstacles and thus plays a critical role in guaranteeing administrative adherence to governing legal requirements.[261] Reliance on internal supervision and oversight to achieve legal accountability, instead of solely on courts, also minimizes the risk that enforcing legal constraints will undermine managerial control and accountability.[262] Despite its resistance to according supervision much constitutional significance, the Court has noted the role that bureaucratic supervision plays in ensuring legal adherence. For example, it has emphasized the availability of internal administrative complaint mechanisms that can uncover and address constitutional violations in refusing to infer a *Bivens* right to challenge such violations in court.[263] 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.[264] 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.[265] Indeed, the Take Care Clause formally links supervision and legal accountability by tying supervision to faithful execution of the laws.[266]

260. *See* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 438-39 (2009).

261. *See* Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1562, 1576-79, 1595-97 (2007); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1691-93 (2011); *see also* Anthony M. Bertelli & Laurence E. Lynn, Jr., *A Precept of Managerial Responsibility: Securing Collective Justice in Institutional Reform Litigation*, 29 FORDHAM URB. L.J. 317, 332-33 (2001) (arguing that responsible managers should be given discretion to balance demands of collective and individual justice in institutional contexts).

262. Jerry Mashaw has analyzed the complicated relationship between legal and managerial accountability exceptionally well. *See* Jerry L. Mashaw, *Bureaucracy, Democracy, and Judicial Review*, *in* THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY 569 (Robert F. Durant ed., 2010).

263. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 67-70, 72-74 (2001).

264. *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 delegated administrative power through substantive, structural, and procedural constraints); Metzger, *supra* note 100, at 1400-06, 1471-73 (emphasizing importance of government supervision in ensuring governmental power remains constitutionally accountable in privatization contexts).

265. *See* MASHAW, *supra* note 36, at 53-60.

266. *See supra* Parts II.A.1-2.

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 powers principles. That debate will no doubt continue, but it has been eclipsed by reality; modern delegation is here to stay.[267] The more pressing question today is how best to integrate the inevitable phenomenon of delegation into the Constitution's structure. The answer, as I argue, lies in 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 with respect to 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. To give just one example: The Department of Justice's (DOJ) requirement of approval by a high-level DOJ official before U.S. attorneys can use wiretaps, contained in DOJ's U.S. Attorneys' Manual, plays an important role in enforcing constitutional and statutory limits on federal law enforcement.[268] 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.[269] Indeed, substantial disagreement exists about the degree to which

267. *See* Gillian E. Metzger, *Delegation, Accommodation, and the Permeability of Constitutional and Ordinary Law*, *in* THE OXFORD HANDBOOK ON THE UNITED STATES CONSTITUTION (forthcoming 2015) (manuscript at 1-2, 5-6, 8-9) (on file with author) (describing scholarly debate over delegation and the Court's acceptance).

268. *See U.S. Attorneys' Manual, Title 9: Criminal Resource Manual*, U.S. DEP'T JUST. §§ 9-7.010-9-7.500 (2006), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/title9.htm [http://perma.cc/SUM3-ZKBF].

269. *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 496-97, 508-09 (2010) (upholding an arrangement under which the President can only control PCAOB decisionmaking by removing a member of the SEC, after excising a provision granting

political oversight of administrative decisionmaking is even constitutionally required.[270]

Yet these factors have more to do with limiting the extent of supervision that political accountability may require than with 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.[271] If the principle of political accountability has any constitutional heft beyond its specific express constitutional manifestations—and the Court often has suggested it does[272]—then the functionalist and diffuse nature of a relationship between supervision and political accountability should not preclude its recognition.

As described, the link between delegation, accountability, and supervision is a structural one, but it can also 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 considered to require that delegations be structured so as to prevent delegated power from being used arbitrarily.[273] Moreover, arbitrary action is understood to include not only unreasonable actions, but also actions that are at odds with constitutional ac-

PCAOB members for-cause protection); Morrison v. Olson, 487 U.S. 654, 661, 697 (1988) (upholding a 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).

270. 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 174, and others countering that more minimal presidential supervision satisfies the Constitution's demands for political control, *see* Strauss, *supra* note 185, at 648-50.

271. *See, e.g.*, Metzger, *supra* note 267, at 9-11.

272. *See, e.g.*, *supra* text accompanying note 244; *see also* Chevron v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865-66 (1984) ("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.").

273. *See* Bressman, *supra* note 264, at 516-19, 523-25, 529-33 (emphasizing the constitutional connection between delegation and concerns with arbitrary action); Criddle, *supra* note 264, 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, *supra* note 37.

countability requirements.[274] Other administrative mechanisms help prevent arbitrary decisionmaking, and judicial review of administrative action plays a starring role in this context as well.[275] Due process, therefore, 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 2001 strongly rejected the suggestion that agencies' interpretation of the scope of their delegated authority may affect the constitutionality of the delegation.[276] Yet even the earlier delegation jurisprudence, which did acknowledge the relevance of internal constraints on delegated authority, viewed any constitutionally required oversight in quite limited terms.[277] Moreover, the need for supervision to preserve legal accountability, by preserving among other things the applicability of constitutional requirements to those wielding governmental power, is not now part of private delegation analysis.[278] Current doctrine does suggest a link between delegation and supervision in one context: due process claims for failure to train.[279] 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.

The lack of development of the supervisory implications of delegation is puzzling. If delegation does indeed present such a challenge to the accountabil-

274. *See* Bressman, *supra* note 264, at 499 (connecting the prohibition on arbitrary action to requirement of political accountability); Criddle, *supra* note 264, at 179 (arguing that due process requires that delegations be structured to preserve political accountability); Dripps, *supra* note 273, at 659-60, 675 (identifying a due process right "to protection against exercise of legislative power except as the Constitution provides").

275. *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 136, 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 10, at 5-6 (emphasizing transparency and participation as accountability mechanisms and rejecting administrative law's traditional focus on delegation).

276. *See supra* notes 98-100 and accompanying text.

277. *See supra* note 100 and accompanying text.

278. For the argument that it should be, see Metzger, *supra* note 37, at 1444-45, 1457-61.

279. *See supra* notes 124-127 and accompanying text.

ity 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 of 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.[280] Indeed, the deference doctrines that courts have constructed to guide their review of administrative action can be viewed as efforts to mediate control of agency action by two political principals—Congress and the President.[281]

Interestingly, direct judicial review of administrative action is a modern phenomenon, developed only at the outset of the twentieth century under particular statutory schemes.[282] Although such review was subsequently codified in the trans-substantive 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.[283] Yet the absence of direct legal challenges to administrative decisions did not mean that 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.[284] Individuals could also assert lack of legal authority or jurisdiction as a defense to suits by government officers to enforce the law.[285]

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

280. *See* Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1322-32 (2012) (arguing that judicial review of administrative action can serve congressional interests).

281. *Id.*; *see also* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1753 (2007) (identifying the need for mediation between Congress and the President).

282. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 953 (2011).

283. *See* MASHAW, *supra* note 36, at 249-50, 301-308; Stuart J. Land, *Judicial Control of Administrative Action*, 75 YALE L.J. 1208 (1966) (book review).

284. MASHAW, *supra* note 36, at 66-73, 301-08.

285. *Id.* at 68.

suits under 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.[286] 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 substitute for internal supervision.

C. The Scope of the Duty To Supervise

This Article has demonstrated that two alternative bases support recognition of a constitutional duty to supervise: the Take Care Clause and repeated suggestions of hierarchy in Article II; and the 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 an emphasis on hierarchy and accountability. The duty to supervise identifies 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: the duty requires internal executive-branch supervision sufficient to ensure that this hierarchical structure is honored and that 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 officers,[287] 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 hierarchical structures in the Constitution entail—is simply levels of authority,

286. *See* David Zaring, *Three Models of Constitutional Torts*, 2 J. TORT L. 1, 5, 7-9, 10 & n.39 (2008) (describing the broad immunity standard for government officials, obstacles that *Bivens* plaintiffs face, the low likelihood that the plaintiffs will be awarded damages, and the almost guaranteed indemnification of government officials). *But see* Alexander A. Reinert, *Measuring the Success of* Bivens *Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 837, 851 (2010) (offering empirical evidence to show that *Bivens* actions are more successful than commonly acknowledged, though noting the role of indemnification in limiting actual officer liability).

287. *See supra* notes 28-29 and accompanying text.

with lower-level officials controlled by and accountable to those higher up.[288] In other words, the principle of hierarchy 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 hierarchical 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 generally employed. Moreover, given the systemic and structural character of the duty to supervise, this duty is fundamentally possessed by government institutions even if it is 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.[289] 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.

288. *See* Rubin, *supra* note 240, at 2082-83, 2120-22; *Hierarchy*, MERRIAM-WEBSTER (2015), http://www.merriam-webster.com/dictionary/hierarchy [http://perma.cc/T2PD-ACLC] (defining hierarchy as a "group that controls an organization and is divided into different levels").

289. *See supra* text accompanying notes 142-146. 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 to senior management and to the board itself timely, accurate information sufficient to allow management and the board . . . to reach informed judgments concerning both the corporation's compliance with law and its business performance." *In re* Caremark Int'l Inc. Derivative 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 (stating that directors can be liable for failing to attempt in good faith to assure a reasonable information and reporting system exists). This private law analog for the duty to supervise differs significantly from the public law version in that it is only triggered by a finding that "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. RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment."). So the bad faith requirement seems intended to limit the possibility directors will be found personally liable, a concern that is less applicable in the constitutional context given immunity doctrines and the systemic aspect of the duty to supervise. *See supra* notes 136-138, 286 and accompanying text.

Exactly which types of supervisory systems satisfy the duty will no doubt depend on context, as is currently true for the duty to train.[290] Additional supervision may be needed for agency actions that are critical to an agency's functioning or that implicate important private interests.[291] There may be occasions and contexts in which only one or a few methods of supervision will satisfy the duty. Much of the time, however, a variety of supervisory approaches should suffice, ranging from detailed review of specific actions to more general monitoring or guidance.[292]

The appropriateness of a variety of approaches provides a response to concerns that recognizing a duty to supervise is in tension with the contemporary governance trends toward 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.[293] The duty to supervise does not preclude such lower-level and nongovernmental discretion, provided that systems exist to ensure a minimum level of hierarchical oversight as well.[294] 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. A potential example is found in privatization arrangements that involve private entities' exercising significant control over program participants without any mechanism by which participants can obtain government review of decisions that centrally affect the government services participants receive.[295] The Central Intelligence Agency's (CIA) detention and interrogation program provides another instance. A recent Senate report concluded that meaningful high-level executive-branch oversight of the CIA's use of enhanced interrogation techniques was lacking due to the agency's failure to provide the White House with full and accurate data on its interrogation activities.[296] Given the contentiousness, ques-

290. *See* City of Canton v. Harris, 489 U.S. 378, 390-91 (1989).

291. *Cf.* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (stating that due process protections depend on the extent to which private and governmental interests are affected).

292. *See supra* text accompanying notes 24-32 (noting different forms of supervision).

293. *See supra* text accompanying notes 33-35; *see also* Simon, *supra* note 10, at 11-13 (comparing the old view of administration as a hierarchy with the new view that deemphasizes hierarchy and in which supervision changes depending on context).

294. So the duty would appear to be satisfied by systems in which supervision takes the form of requiring explanations to peers and supervisors for deviations from agreed-upon approaches and monitoring of results, *see* Noonan et al., *supra* note 24, at 536, or that incorporate staff independent judgment and peer review, *see* Shapiro et al., *supra* note 259, at 493-501.

295. *See* Metzger, *supra* note 37, at 1471-72.

296. *See* S. REP. NO. 113-288, at xv-xvi (2014).

tionable legality, and tremendous potential for harm associated with enhanced interrogation, a strong constitutional case can be made for close presidential supervision in this context.[297]

The acceptability 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.[298] But insistence on such broad presidential supervision does not follow from the President's supervisory obligation to ensure faithful execution of the laws.[299] The general phrasing of "faithful execution of the Laws" seems to be satisfied by oversight that ensures overall or systematic legal adherence, rather than by presidential policing of individual decisions.[300] 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 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."[301] 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 requiring that an inferior officer's work be "directed and supervised at some level" by other officers.[302]

297. By comparison, such direct presidential oversight is present with respect to the selection of targets for CIA drone strikes. *See* Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html [http://perma.cc/K8L2-2FXT].

298. *See supra* note 189 and accompanying text.

299. *See* Strauss, *supra* note 185, at 648-49 (stating that the responsibility of the President to faithfully execute the laws does not necessarily provide information about the extent of his authority to supervise, but he has at least some oversight power); *see also* Morrison v. Olson, 487 U.S. 654, 692-93 (1988) (holding that the Attorney General's power to remove independent counsel for good cause does not impede the President's duty to faithfully execute the laws); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 501-08 (2010) (reading a good cause provision not to allow removal for disagreement with an officer's policies and priorities, and sustaining the statute that contained one level of for-cause protection).

300. Indeed, this limited scope helps explain why strong unitary executive theorists ultimately find support for their theory in Article II's Vesting Clause, though they also argue that the Take Care Clause supports their theory. *See, e.g.*, Calabresi & Prakash, *supra* note 174, at 570-85.

301. *Morrison*, 487 U.S. at 696.

302. *Free Enter. Fund*, 561 U.S. at 510 (quoting Edmond v. United States, 520 U.S. 651, 663 (1997); *see also Morrison*, 487 U.S. at 671-73 (holding an independent counsel to be an inferi-

The core meaning of the duty to supervise—a mandate of actual supervision or at least supervisory systems adequate to preserve overall hierarchical 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 uses of governmental power, it might seem to be 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 safeguard against 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.[303] An even clearer instance of differences between the two bases for the duty comes from the use of judicial review to prevent abuse of delegated power, which seemingly foregoes internal supervision altogether in favor of external constraints.[304] 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 that the delegation account requires some hierarchical supervision.

The more salient difference between the two accounts concerns the individuals 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 to Congress and not just to the President or the executive branch. Indeed, congressional supervision not only is necessary to ensure political accountability but can also be an important mechanism for reinforcing legal accountability by investigating allegations that agencies have violated governing law.[305] 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 sys-

or officer notwithstanding that "she possesses a degree of independent discretion to exercise the powers delegated to her").

303. *See* Shapiro & Wright, *supra* note 136, at 596-97 (describing economic and political science analysis disputing the reliability of government employees to serve in the public interest).

304. *See supra* Part II.B.3.

305. Metzger, *supra* note 260, at 437-38.

tem.[306] 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.[307] Perhaps the most relevant implication of the duty vis-à-vis Congress, therefore, is to sanction such extensive congressional oversight.

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, which is also the focus of the delegation and accountability approach – resting heavily as it does on federal separation of powers. But the legal accountability principles underlying the delegation basis for the duty, to the extent that they are rooted in due process prohibitions on arbitrary uses of governmental power, are not so limited.[308] Whether this means that the same duty to supervise applying to federal executive officers also applies to state and local executive officers is a much harder question. Such a conclusion seems dubious, given not only the duty's separation-of-powers basis but also the longstanding understanding that constitutional separation-of-powers principles do not apply to state governments.[309] 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 likely the concern that articulating and enforcing such a duty would exceed the judiciary's proper role and violate constitutional separation of

306. *See* U.S. CONST. art. I, § 6; Bowsher v. Synar, 478 U.S. 714, 721-23 (1986).

307. Joel D. Aberbach, *What's Happened to the Watchful Eye?*, 29 CONG. & PRESIDENCY 3, 18-19 (2002); *see also* Brian D. Feinstein, *Avoiding Oversight: Legislator Preferences and Congressional Monitoring of the Administrative State*, 8 J.L. ECON. & POL'Y 23, 25-28 (2011); Douglas Kriner & Liam Schwartz, *Divided Government and Congressional Investigations*, 33 LEGIS. STUD. Q. 295, 313-14 (2008); Thomas O. McGarity, *Administrative Law As Blood Sport: Policy Erosion in A Highly Partisan Age*, 61 DUKE L.J. 1671, 1673-82 (2012).

308. Metzger, *supra* note 100, at 1400-02.

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

powers.[310] Administrative arrangements for overseeing actions by government officials are deemed not to fall within the courts' proper realm.[311]

A central question, then, is whether Article III or the separation of powers precludes 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. Such recognition would illuminate the complexities of how constitutional demands are met and how constitutional understandings are 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,[312] the Court frequently invokes standing requirements rooted in Article III's "case or controversy" requirement as the basis for rejecting efforts to challenge systematic aspects of administrative functioning. A separate Article III-based concern, which has been incorporated into current political question doctrine and which also serves 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.[313] Yet another barrier invoked to preclude judicial consideration of systemic administration is that such consideration would lead the courts to intrude in contexts that are reserved for the political branches. Again, this concern connects to the 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."[314]

310. *See supra* Part I.C; *supra* note 148 and accompanying text. The Court also has invoked federalism concerns as a reason to limit federal judicial intervention in some state and local contexts, *see, e.g.*, Horne v. Flores, 557 U.S. 433, 448 (2009), but my focus here is federal judicial enforcement of a duty to supervise against federal officers, a context in which federalism concerns would not arise.

311. *See* Lewis v. Casey, 518 U.S. 343, 349 (1996).

312. *See supra* Part I.C.1.

313. *See* Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (plurality opinion).

314. Baker v. Carr, 369 U.S. 186, 217 (1962).

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.[315] 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.[316] 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 participants in the inadequately supervised institution or program at issue, or potentially when they would benefit from better supervised governmental action.[317]

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 the prerequisites of constitutionally inadequate supervision, as well as identifying the forms of supervision that suffice to remedy violations, will often be quite difficult. Myriad forms of supervision exist, and the level of supervision required likely varies in different contexts. Judges are ill-equipped to identify which techniques are best suited for a particular administrative context, and they are not likely to have any particular expertise or competence in identifying when the supervision 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 con-

315. *See supra* notes 96-97 and accompanying text.

316. *See* Bond v. United States, 131 S. Ct. 2355, 2361-62, 2364-65 (2011).

317. In the beneficiary context, more of a question might be raised as to whether the failure to supervise 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.

sistent results, avoid overextending the courts' capacities, or guide remedial awards.[318]

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 *Allen v. Wright*, rejecting a challenge to the IRS's implementation of charitable deduction limitations on standing grounds: "The Constitution . . . assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.'"[319] Assessing claims that high-level agency officials failed to adequately supervise lower-level officials can involve the courts in second-guessing central features of executive branch functions. The scope and nature of supervision reflect policy choices about how to structure agencies and administrative regimes; an agency's decision to pursue more discretionary and flexible implementation, for instance, will entail a different form of supervision than the choice to pursue a heavily rule-bound approach.[320] 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 that limits the exercise of judicial process against the President.[321] All of this supports viewing the duty to supervise as textually committed to the political branches in at least some contexts. Indeed, in *Gilligan v. Morgan*, the Court held as much with respect to military force, concluding that "[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."[322]

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 in which government employees have an obvious capacity to inflict

318. *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1287-93 (2006).

319. Allen v. Wright, 468 U.S. 737, 761 (1984).

320. *See supra* note 34 and accompanying text.

321. *See* Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (refusing to find the President subject to the APA); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 499 (1866) ("An attempt on the part of the judicial department of the government 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 [sic], as 'an absurd and excessive extravagance.'").

322. Gilligan v. Morgan, 413 U.S. 1, 10-11 (1973).

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 constitutional duty to supervise could be manageable. Acute instances of institutional failure, like deep inadequacies in prison medical and mental-health services that have deadly consequences and go unremedied by state corrections agencies over many years, are an example.[323] Moreover, 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[324] or to spending measures as unduly coercive on the states.[325] 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 on the merits may lie, a challenged measure crosses it.[326]

Similarly, enforcement of the President's own Take Care duty or Congress's supervision obligations seems most clearly assigned to the political branches. *Gilligan* signals a similar conclusion for supervision in the military context, and other areas may seem to be sufficiently entrusted to the political branches 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.[327] 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.[328] In fact, the Court has shown itself to be quite willing to police the

323. Such failures existed in the California prison system prior to imposition of a special master and receiver, and continued after as well. *See* Brown v. Plata, 131 S. Ct. 1910, 1923-27 (2011).

324. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001).

325. *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987).

326. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606-07 (2012).

327. *See* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1424-25 (2012) (rejecting a claim that the constitutionality of a statute governing the wording of passports issued to Americans born in Jerusalem was a political question over which the courts could not assert jurisdiction).

328. *See* United States v. Nixon, 418 U.S. 683, 686 (1974) (upholding a lower court opinion compelling President Nixon "to produce certain tape recordings and documents relating to his conversations with aides and advisers" and "reject[ing] the President's claims of absolute executive privilege [and] of lack of jurisdiction"); Little v. Barreme, 6 U.S. (2 Cranch) 170, 176-79 (1804) (invalidating a presidential executive order as being a "misconstruction" of an act of Congress). *See generally* Kevin M. Stack, *The Reviewability of the President's Statutory*

constitutionality of governmental structures on separation-of-powers grounds, even when neither of the political branches is complaining.[329] 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, although they are 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"[330] or the President with respect to the appropriate form and scope of supervision. Put differently, the duty to supervise is primarily given over to the political branches to enforce:

> 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.[331]

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.[332]

Powers, 62 VAND. L. REV. 1171 (2009) (providing an account of when the President's actions are reviewable).

329. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 497 (2010) (explaining that "separation of powers does not depend on the views of individual Presidents," because one President "cannot . . . choose to bind his successors by diminishing their powers").

330. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474-75 (2001) (quoting Mistretta v. United States, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

331. Stark v. Wickard, 321 U.S. 288, 310 (1944).

332. *Cf.* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (arguing that "we should treat . . . 'underenforced' constitutional norms as valid to their conceptual limits, and understand the contours of federal judicial doctrine regarding these norms to mark only the boundaries of the federal courts' role of enforcement").

2. *Departmentalism in a World of Judicial Supremacy*

The real question is then not 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 does judicial articulation of the duty to supervise gain 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 cognizing issues relating to systemic administration and its 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 such subconstitutional means as administrative law. At a minimum, judicial recognition of a duty to supervise would create a counter to existing precedent suggesting that statutory measures such as the APA should be narrowly read to preclude systemic challenges. I explore these benefits in Part III, along with a more detailed account of what recognizing a constitutional duty to supervise might mean in practice.

The second benefit is more intangible and relates to the increasingly dominant role the courts play in constitutional interpretation in the United States.[333] Ours is a world of judicial constitutional supremacy, with the Court recently reemphasizing its "primary role" in determining constitutionality: "[W]hen an Act of Congress is alleged to conflict with the Constitution, '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"[334] To be sure, opportunities exist for constitutional interpretation by the political

333. For history and different accounts of the growth of judicial supremacy, see Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137 (2011); Larry D. Kramer, *We the People: Who Has the Last Word on the Constitution?*, 29 BOS. REV. 15 (2004); and Keith E. Whittington, *The Political Foundations of Judicial Supremacy*, *in* CONSTITUTIONAL POLITICS: ESSAYS ON CONSTITUTION MAKING, MAINTENANCE, AND CHANGE 261, 271 (Sotirios A. Barber & Robert P. George eds., 2001).

334. United States v. Windsor, 133 S. Ct. 2675, 2688 (2013) (quoting Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1427-28 (2012) (second alteration in original)).

branches, but these opportunities are sometimes vanishingly thin.[335] In a world in which 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 by all the branches. 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.[336] One way to counter this risk is for courts to indicate explicitly that their constrained enforcement reflects specifically judicial limitations that do not extend to the political branches.[337] Alternatively, courts could expressly acknowledge that their enforcement of the duty to supervise takes an indirect form; it occurs largely through subconstitutional mechanisms and incentivizes 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.[338] But it has been far more reticent in other contexts, most notably about the ways in which ordinary administrative law serves to address constitutional concerns.[339] For example, courts developed the APA's initially modest prohibition on arbitrary agency actions into a robust reasoned decisionmaking

335. *See, e.g.*, *id.* at 2683-84, 2689 (noting the President's refusal to defend the constitutionality of a statute based on a theory yet to gain judicial recognition); *Zivotofsky*, 132 S. Ct. at 1427-28 (emphasizing that it is the judicial branch's task to assess the constitutionality of statutes); Bd. of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356 (2001).

336. *See* Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220 (2006).

337. Richard Fallon has suggested that in some contexts the practical barriers that limit judicial enforcement of certain constitutional requirements, in particular the difficulty of 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 318, at 1323-27. Others have criticized the suggestion that the reasons for limiting judicial enforcement extend to the political branches. *See* Berman, *supra* note 336. 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 so lacks the liabilities that courts encounter.

338. *See, e.g.*, Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2593-94 (2012).

339. *See* Metzger, *supra* note 105, at 506, 534-36.

requirement and similarly strengthened the statute's minimal rulemaking demands. A major factor underlying these transformations was constitutional concerns with unchecked agency power and the breadth of modern rulemaking. Yet the Court has never acknowledged this constitutional basis.[340] Similarly, the Court has at times sought to incentivize greater agency attention to the constitutional dimensions of agency actions through deference doctrines and has indicated that adequate administrative proceedings can substitute for constitutionally mandated habeas review.[341] But it has failed to identify these incentivizing efforts as a form of constitutional enforcement and has rejected the suggestion that agencies should be particularly sensitive to constitutional values in their decisionmaking.[342]

The net result is too limited an understanding of how constitutional demands are met, and constitutional understandings generated, in the modern administrative state. Failure to articulate administrative law's constitutional underpinnings 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.[343] 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, particularly concerning the issue of 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 could yield real benefits. The difficult tasks that remain are to identify how a duty to supervise should be implemented in practice: what would such a duty look like, who would enforce it, and how would recognition of such a duty address the mismatch between current doctrine and contemporary administrative practice?

340. *Id.* at 490-94.

341. *Id.* at 497-501.

342. *See, e.g.*, FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516-17 & n.3 (2009). *But see* Arizona v. Inter Tribal Council of Ariz., 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.").

343. *See* Metzger, *supra* note 14, at 1914.

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 reframing of judicial analysis, 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 the courts, through presidential and congressional action.

A. Direct Judicial Enforcement

As indicated earlier, 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 in which direct judicial enforcement may be appropriate. Extreme instances of supervisory failure are one such context. Three other instances, 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. Privatization implicates delegation because many forms of privatization—in particular, instances when the government contracts with private entities to provide services to third parties or to manage government programs on its behalf—are best understood as instances in which the government is delegating government power to private hands.[344] Privatization also implicates due process because often these private delegates have their own financial and institutional interests in the decisions they make about which services an individual receives or how programs will be run.[345] In addition, such private decisions substantially affect whether these aspects of government operate in a consistent, non-arbitrary fashion and adhere to governing legal requirements. Yet as noted, the government's private partners are frequently exempted from due process and other constitutional constraints.[346]

344. *See supra* notes 37-41 and accompanying text.

345. *See* Gillian E. Metzger, *Private Delegations, Due Process, and the Duty To Supervise*, *in* GOVERNMENT BY CONTRACT, *supra* note 37, at 291, 299-306.

346. *See supra* note 42 and accompanying text.

I have elsewhere proposed addressing the deficiency in the current constitutional treatment of privatization through a delegation approach that emphasizes the government's duty to supervise its private delegates.[347] 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. The judiciary could directly enforce such supervision requirements by hearing challenges seeking invalidation of privatization arrangements as unconstitutional private delegations or challenges seeking direct application of constitutional constraints to private actors.

The challenge for courts will be to determine what qualifies as constitutionally adequate supervision. No doubt this determination would vary depending on the extent of control that a private entity wields over others and the significance of its determinations. But a core aspect of the supervision 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 that are taken on the government's behalf, but they also preserve constitutional accountability by providing governmental action—the government's decision on review—against which constitutional claims can be lodged.[348] Adequate supervision might additionally 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 if the program were 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.[349] 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 would then be delegated.

Such variability might raise a question about whether judicially manageable standards exist to implement the duty to supervise. However, the fact that this approach would be tied to instances of privatization should mitigate the man-

347. *See* Metzger, *supra* note 37, at 1457-86.

348. *See id.* at 1471-73.

349. *See* Metzger, *supra* note 345, at 306-09.

ageability concern. Privatization 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 identify the constitutional danger of public power being wielded over third parties for private gain, as well as the importance of government supervision in mitigating that risk. Although private delegation and due process precedent often have focused on formal oversight instead of the active oversight proposed here, moving from formal to active oversight is less draconian than asking courts to consider the adequacy of supervision when supervision 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.[350] Forthright recognition of a duty to supervise may therefore seem particularly fitting and would allow such litigation to directly target those systemic administrative features leading to violations 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 institutional reform cases, because requiring reformed administrative structures is closely tied to remedying violation of a constitutional duty to supervise. Acknowledging a duty to supervise could also mitigate doctrinal obstacles such as standing, since plaintiffs should be able to call upon a broader range of evidence to demonstrate injury and causation due to an allegedly unconstitutionally supervised institution than if they had 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 need to demonstrate that unconstitutional actions by street level officials are attributable to policy or actions of higher-level officers.[351]

350. *See supra* note 92 and accompanying text.

351. *See* Sabel & Simon, *supra* note 92, at 1085, 1095-96 (identifying these obstacles to institutional reform litigation).

These benefits of a duty to supervise in the institutional reform context are, however, double-edged; 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 in which institutional reform litigation previously has been focused. The risk of intruding on political branch prerogatives thus appears significantly greater, as does the likelihood of exceeding judicial competency, particularly the courts' ability to render coherent and consistent decisions. Another major complication is that institutional reform litigation overwhelmingly 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 for what constitutes adequate supervision, as scholars maintain has occurred in current institutional reform litigation.[352] 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-day administration, with courts requiring officials to devise plans and structures to oversee failing public institutions more effectively instead of imposing detailed requirements on how these institutions operate. If so, then 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 with remedial orders stipulating performance goals instead of mandating operational details.[353]

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 re-

352. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 149-71 (1998) (documenting the emergence of agreement on acceptable practices in prisons); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 873 (2007) (explaining that a consensus on institutional best practices gradually emerged in such litigation); David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1038-42 (emphasizing how a standard set of remedial options in institutional reform litigation emerged from collaboration among officials, advocates, and experts across cases).

353. *See* Sabel & Simon, *supra* note 92, at 1018-19, 1067-73. Focusing on systemic issues rather than individual challenges might also limit the degree of federal court intervention in contexts where a private right to demand federal court review exists. *See, e.g.*, Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 3 (2010).

form litigation. Instead, here 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. Recognition of even a limited duty to supervise in these contexts could still prove quite important. Doing so renders explicit an assumption that underlies institutional reform litigation but is rarely voiced directly: ensuring that government institutions are adequately supervised and managed is a crucial element of honoring constitutional and statutory rights in an administrative state. Acknowledging the duty to supervise therefore also helps to 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 for allowing prisoners who have not yet suffered Eighth Amendment violations to sue and for granting broad systemic relief in *Plata*, where the record demonstrated widespread failure in the California prisons' provision of medical and mental care.

3. Bivens *and Duty-To-Supervise Claims*

Bivens actions are a third potential context for 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.[354] Nonetheless, *Bivens* actions are a poor vehicle for asserting the duty to supervise. Part of the reason is the Supreme Court's recent resistance to addressing supervisory deficiencies in the *Bivens* context.[355] 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 the Court's 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[356]—fits poorly with the systemic and structural orientation of the duty to supervise. As a result, incorporating the duty to supervise would entail a fundamental reorientation of *Bivens* actions, potentially undermining the availability of *Bivens* actions to those seeking to obtain compensation for

354. *See, e.g.*, Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2079-80 (2011); Vance v. Rumsfeld, 701 F.3d 193, 203-05 (7th Cir. 2012) (en banc).

355. *See supra* text accompanying notes 130-131, 140-146.

356. *See* FDIC v. Meyer, 510 U.S. 471, 483-86 (1994); *supra* notes 128-147 and accompanying text. On the issue of *Bivens*'s individual focus and the possibility for a more hybrid individual-institutional approach, see Reinert, *supra* note 286, at 814-18, 846-50.

constitutional violations committed by individual federal officers.[357] 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—suits that are brought against agencies directly and are therefore institutional rather than individual in nature—there is little reason to try to use *Bivens* to target failed supervision.[358]

B. Administrative Law and the Duty To Supervise

Administrative law will often be a better mechanism than direct constitutional enforcement for implementing the duty to supervise in publicly administered programs and institutions. In many ways, administrative law seems ideally situated to enforce a duty to supervise with respect to federal agencies. The ostensible statutory, regulatory, and common law bases of administrative-law doctrines allow room for interbranch dialogue and political-branch tailoring even when administrative law is serving, as it often does, as a constitutional surrogate.[359] Statutory and regulatory enactments already reflect attention to supervision; frequently, they set up mechanisms for oversight and internal agency review.[360] Judicially developed administrative law is in turn built around the need to enforce legal requirements while acknowledging agencies' primacy in law implementation. In this way, administrative law better accommodates executive-branch discretion than direct constitutional enforcement. For example, the standard administrative law remedy for an identified violation is a remand to the agency; even the invalidation of administrative statutory interpretations as contrary to law can result in a remand so that agencies can rethink their regulatory policy in light of statutory demands.[361] Moreover, the

357. *See* Reinert, *supra* note 286, at 846-50.

358. To be sure, the APA route has its limitations. In particular, it is only available to target constitutional violations that are ongoing and thus is not an option for those no longer subject to challenged exercises of governmental authority, as in *Iqbal*. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009). On the other hand, recognition of a more systemic duty to supervise may itself expand the category of ongoing violations. *See supra* text accompanying note 351.

359. *See* Metzger, *supra* note 280, at 1310-16, 1343-52; *supra* notes 339-342 and accompanying text.

360. *See, e.g.*, Shapiro et al., *supra* note 259, at 493-96 (describing the process of internal oversight used by EPA in setting Clean Air Act standards); *supra* note 149 and accompanying text (collecting federal oversight orders and memoranda governing agency review).

361. *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 514, 523-24 (2009) (concluding that the Board of Immigration Appeals misapplied governing precedent in promulgating statutory interpretation under review and remanding "for the agency to interpret the statute, free from the error, in the first instance," stating that such a remand is the "the proper course, except in rare circumstances" when an agency "has not yet exercised its Chevron discretion to interpret the statute in question") (internal quotations omitted).

target of administrative review is expressly institutional, with the APA affording review only of actions by agencies and not individuals.[362]

Administrative law therefore offers an important means by which courts could require agencies to 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 in the absence of changes to current doctrine. In particular, the Court would need to allow systemic aspects of administration to come under judicial review and could no longer insist that only discrete agency actions qualify as final agency action subject to challenge under the APA—or Congress would need to amend the APA to make clear that systemic aspects of administration can be challenged in court.[363]

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 administrative law scholars argue already severely constrain agency action.[364] On the other hand, focusing on agency oversight structures and supervision might also justify limitations or deferral of judicial review in some circumstances where judicial review 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 responsibili-

362. *See, e.g.*, 5 U.S.C. §§ 551, 706(2) (2012).

363. *See supra* notes 150-156 and accompanying text.

364. *See, e.g.*, Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1019-57 (2000) (describing the "discrete pathological effects" of judicial review on agency action, including agenda disruption and forced ossification); Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1749, 1752-56, 1760, 1771-72 (2012) (discussing an empirical study of judicial review's negative impact on the EPA's agenda). For a more optimistic view of judicial review of administrative action, see Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414, 1422 (2012) (suggesting that agencies still "propose and promulgate historically large numbers of regulations, and . . . do so relatively quickly").

ties and curtail lower-level discretion.[365] And courts could incentivize greater agency oversight efforts by deferring more strongly to agency decisions that demonstrate high-level internal agency oversight.[366] 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.[367] 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.[368] By contrast, in the education context, federal law requires that local 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, as part of its role in distributing federal grants, investigates only complaints of discrimination and oversees state and local

365. For an instance when a court failed to do so, see *Chamber of Commerce v. Department of Labor*, 174 F.3d 206, 211-13 (D.C. Cir. 1999).

366. *See* Barron & Kagan, *supra* note 158, at 235-36, 241-46 (advocating such an approach and expounding on its normative basis).

367. *See supra* text accompanying notes 58-64.

368. *See* 42 U.S.C. § 421 (2012) (detailing requirements for federal supervision and provisions for administrative and judicial review of a state agency's disability determination on an applicant's request).

performance generally.[369] In the environmental context, the EPA has authority to review, reject, and override specific state permitting decisions, but it also enjoys broad discretion over whether to exercise this authority.[370]

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; federal agencies are also required to oversee agency implementation generally once approval is granted.[371] Although statutes specify criteria that must be met prior to approval, federal agencies wield substantial discretion in determining when those criteria are met and even more discretion in determining whether approval should be rescinded.[372] Recently this discretion was prominently on display when the Department of Education granted waivers to forty-three states and other jurisdictions exempting them from basic requirements of the federal No Child Left Behind Act.[373] 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 unavailable.[374] Real-

369. *See* 34 C.F.R. §§ 100.1 to .13 (2014) (regulations implementing prohibition on discrimination based on race, color, or national origin); *id.* §§ 104.1 to .61 (2014) (regulations implementing prohibition on discrimination based on handicap); *id.* §§ 106.1 to .71 (2014) (regulations implementing prohibition on discrimination based on sex); *id.* §§ 300.151 to .153 (2014) (mandating state complaint procedures); *id* §§ 300.507 to .516 (2014) (due process hearing requirements and right to sue). 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. *See* 20 U.S.C. § 1415(i)(2)(A) (2012).

370. *See, e.g.*, 40 C.F.R. § 123.44 (2014).

371. *See, e.g.*, Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 42 U.S.C. §§ 1003, §1321(c)(1)(B)); 45 CFR §§ 154.210, 155.105 (requiring HHS to determine the adequacy of state premium increase review processes and to approve state health benefit exchanges); Clean Air Act (CAA) §§ 7410(a)(1)-(3), (k), 42 U.S.C. § 7401 (2006) (requiring federal approval of state plans in the CAA); Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside Out*, 37 HARV. ENVTL. L. REV. 313, 330-32 (2013).

372. *See* CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP 93-111, 116-19 (2003).

373. *See* U.S. DEP'T EDUC., *ESEA Flexibility*, http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html [http://perma.cc/8UMM-BR6J] (listing jurisdictions receiving waivers from the basic requirements of the NCLB).

374. *See, e.g.*, Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204, 1210-11 (2012); RECHTSCHAFFEN & MARKELL, *supra* note 372, at 95-96; Hammond & Markell, *supra* note 371, at 335-42.

istically, moreover, agencies almost never try to rescind state authority or significantly cut funding.[375]

Some scholars suggest that cooperative federalism programs may be unconstitutional because they "essentially transfer broad and effectively unsupervised responsibility for the administration of federal law to state agencies."[376] 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. As discussed earlier, this claim for direct presidential control overreads the constitutional requirement of adequate supervision, which could take a variety of forms, as mandating the possibility of complete presidential direction.[377] In addition, there are questions 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 the selection of inferior officers.[378]

The problem is therefore 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 duties to supervise their state partners. Courts should not play a major role here, given the extent to which federal oversight of state implementation turns on agency resources, priorities, and determinations about how best to realize programmatic goals.[379] 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

375. *See* Krotoszynski, *supra* note 55, at 1635-39; Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 252-53 (2014).

376. Krotoszynski, *supra* note 55, at 1639.

377. *See supra* notes 189-191 and accompanying text. Ronald Krotoszynski bases his argument about the potential unconstitutionality of cooperative federalism on the formalist bent in recent Supreme Court separation of powers decisions like *Free Enterprise Fund*, *see* Krotoszynski, *supra* note 55, at 1607-1611, but those decisions are also striking in their unwillingness to call into question the constitutionality of well-established administrative arrangements, like cooperative federalism.

378. *See* Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075, 1078, 1102-03 (1997) (arguing that in some instances state agencies in cooperative federalism arrangements are better viewed as implementing state law); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 95-96 (1990) (arguing that a delegation of authority outside the federal government might pass Article II muster if the executive retains some practical or supervisory authority).

379. *Cf.* Heckler v. Chaney, 470 U.S. 821, 831-33 (1985) (explaining why the courts are generally unsuited to review agency decisions not to take enforcement action).

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 the policies regarding circumstances under which waivers will be granted and the grounds on which they may be rescinded.[380]

2. *Crisis Governance*

A similar emphasis on internal agency processes appears to be 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 arise.[381] Congressional and other forms of oversight are also often minimal. Internal constraints and internal oversight will therefore be the core mechanisms for ensuring that the duty to supervise is met.

The urgency of agency decisions in crisis governance contexts means that they often are subject to substantial high-level executive-branch oversight. Accounts of recent crisis governance decisions, such as determinations by the Federal Reserve and the Department of the 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.[382] 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

380. For an example of the sort of document courts might force agencies to produce, see U.S. DEP'T EDUC., *supra* note 373, which describes the requirements for obtaining an NCLB waiver.

381. *See*, *e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended at 12 U.S.C. § 5382(a)(1)(A)(iii), (v) (2012)) (limiting the scope of standard of review and providing that after twenty-four hours, if the court has not made a determination, "the Secretary shall appoint the Corporation as receiver"); Posner & Vermeule, *supra* note 65, at 1654-59.

382. *See*, *e.g.*, DAVID WESSEL, IN FED WE TRUST: BEN BERNANKE'S WAR ON THE GREAT PANIC (2009) (describing the close involvement of the Secretary of the Treasury and the Chair of the Federal Reserve in financial bailout measures); Davidoff & Zaring, *supra* note 67, at 465 (same); *see also* Peter Baker, *In Terror Shift, Obama Took a Long Path*, N.Y. TIMES, May 27, 2013, http://www.nytimes.com/2013/05/28/us/politics/in-terror-shift-obama-took-a-long-path.html [http://perma.cc/KBC9-DTLH] (noting the extensive involvement of President Obama, key White House personnel, and agency heads in setting drone policy).

determinations that ad hoc internal supervision may not alleviate.[383] And high-level officials may be more inclined to support actions that push the limits of agency authority in response to immediate problems than career officials with a longer-term perspective.[384]

The inevitable pressures of crisis governance contexts suggest there are benefits to encouraging agencies to develop strong decisionmaking structures or to address key issues about the scope of their authority ahead of time. Public guidelines developed by Treasury officials have helped provide clarity and consistency to the Department's Capital Purchase Program, under which the federal government bought substantial equity stakes in banks.[385] 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.[386] Scholars have proposed that better administrative oversight systems are critical to ensure that national security data collection is accountable.[387] 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.[388]

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 when judicial review of specific agency decisions is likely to be unavailable. 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. The Supreme Court recently suggested such an approach outside of the administrative-law

383. Concerns of this kind were raised about some of the decisions made during the financial crisis. *See* Davidoff & Zaring, *supra* note 67, at 499-500, 529-31.

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

385. *See* William Perdue, Note, *Administering Crisis: The Success of Alternative Accountability Mechanisms in the Capital Purchase Program*, 29 YALE L. & POL'Y REV. 295, 333 (2010).

386. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 209, 124 Stat. 1376 (2010) (codified as amended at 12 U.S.C. § 5389 (2012)).

387. *See, e.g.*, Renan, *supra* note 106, at 18-40.

388. *See* President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university [http://perma.cc/XS2H-9JMF] (describing proposals to expand the oversight of drone strikes, including an independent oversight board in the executive branch).

context, in *Boumediene*.[389] Needless to say, such efforts to tie administrative-law review to general aspects of agency functioning, rather than to the substantive merits of particular agency decisions, are at odds with current doctrine. But these approaches could be justified as ways to ensure that agencies adhere to the duty to supervise in crisis governance contexts.

3. Presidential Administration

Finally, it is worth considering how a duty to supervise 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.[390] This approach is in some ways a sensible compromise; it allows presidential oversight to occur but guards against excessive presidential influence 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 the limits of its institutional competence.[391] 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.[392] And for my purposes here, opacity about presidential involvement provides little guidance about when such 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 to be a necessary corollary of acknowledging a constitutional duty to engage in internal executive-branch supervision.

389. *See* Boumediene v. Bush, 553 U.S. 723, 781 (2008) ("[T]he necessary scope of habeas review in part depends upon the rigor of any earlier proceedings. . . ."); *see also* Metzger, *supra* note 105, at 498 (discussing this dimension of *Boumediene*).

390. *See* Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1146-59 (2010); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 15-32 (2009).

391. *See* Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141, 158-60, 171-95 (2012).

392. *See* Watts, *supra* note 390, at 40-45; *see also* Mendelson, *supra* note 390, at 1159-75 (noting the costs of a lack of transparency, but advocating for greater agency disclosure rather than acknowledgement of politics in judicial review).

Administrative law again appears to be the best vehicle for courts to address presidential oversight—for example, in suits challenging presidentially directed agency policies as unauthorized or arbitrary.[393] Using administrative law allows courts to play a secondary policing role instead of serving as the primary articulators of the shape that presidential oversight should take. In addition, administrative law's capaciousness and common-law character allow for more flexibility in addressing different instances of presidential oversight and greater responsiveness to political-branch views.[394] Once more, an administrative law 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; failures to enforce are presumptively nonreviewable, and courts often are reluctant to order agencies to formulate policy even when statutorily required.[395] 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.[396] 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.

393. *See* Watts, *supra* note 390, at 57-60, 72-73.

394. *See* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2086-89 (2008) (discussing the "doctrinal capaciousness" of administrative law).

395. *See, e.g.*, Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004) ("[A] claim under [the governing statute] can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."); Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 56-60 (1993) (holding that a class action challenging INS regulations lacked jurisdictional ripeness); Heckler v. Chaney, 470 U.S. 821, 831-33 (1985) (stating that "judicial review of agency decisions to refuse enforcement" is "generally unsuitabl[e]"). *But see* Massachusetts v. EPA, 549 U.S. 497, 522, 527, 534 (2007) ("EPA has offered no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change. Its action was therefore 'arbitrary, capricious, . . . or otherwise not in accordance with law.'").

396. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 107 (suggesting that even though "it is inevitable that political considerations will come into play in executive agencies headed by political appointees who are accountable to the President," the Court in *Massachusetts v. EPA* may have believed that administrative law had crept "too far . . . in the direction of strong presidential administration, and . . . wished to nudge it in the other direction").

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 enforcement of the duty will often fall to the President, executive branch, and Congress. A full account of the duty's implementation therefore requires examination of what such political-branch enforcement would look like.

Actual supervision of administration is, of course, ubiquitous in the political branches; it is a constant focus of centralized presidential staff and congressional hearings as well as agency managers.[397] Moreover, executive-branch and congressional oversight centrally focuses on policing the quality of agency supervision by investigating and responding to agency managerial failures.[398] Political-branch enforcement of supervisory responsibilities is thus already a common phenomenon. The question here is therefore whether and how recognition of a constitutional duty to supervise might alter the nature of such enforcement.

The Obama Administration's recent immigration enforcement initiatives offer an interesting context in which to assess this question. In 2012, the Obama Administration and the Department of Homeland Security adopted a

397. *See* Gene A. Brewer, *In the Eye of the Storm: Frontline Supervisors and Federal Agency Performance*, 15 J. PUB. ADMIN. RESEARCH & THEORY 505, 506-07 (2005) (describing the role of agency managers); Kriner & Schwartz, *supra* note 288, at 523-24 (identifying 3,507 congressional hearings representing committee investigations into alleged executive branch misconduct in the period 1953-2006); Mendelson, *supra* note 390, at 1146-55 (describing presidential oversight of agency rulemaking).

398. *See, e.g.*, Juliet Eilperin & Ed O'Keefe, *White House Sends Obama Aide To Investigate Deaths Linked to VA Center in Phoenix*, WASH. POST, May 20, 2014, http://www.washingtonpost.com/politics/as-outrage-over-va-allegatons-grows-obama-and-aides-scramble-to-respond/2014/05/19/2b01ed3c-df71-11e3-810f-764fe508b82d_story.html [http://perma.cc/R3X3-YLEP] (describing a top White House aide being sent to investigate problems at Veterans Administration hospital in Phoenix); U.S GEN. ACCOUNTING OFFICE, GAO-14-694, HEALTHCARE.GOV: INEFFECTIVE PLANNING AND OVERSIGHT PRACTICES UNDERSCORE THE NEED FOR IMPROVED CONTRACT MANAGEMENT (2014) (a report prepared at Congress's request assessing the Center for Medicare and Medicaid Services' management of federal health exchange website development); Memorandum from Michael E. Horowitz, Inspector General, to the Attorney General and Deputy Attorney General, *Top Management and Performance Challenges Facing the Department of Justice – 2014* (Nov. 10, 2014), http://www.justice.gov/oig/challenges/2014.htm [http://perma.cc/9RXU-SPUS] (the Office of the Inspector General's annual report on management issues at the Department of Justice); Eric Katz, *Obama Announces Plans To Reform and Modernize the Senior Executive Service*, GOV'T EXEC. (Dec. 9, 2014), http://www.govexec.com/management/2014/12/obama-announces-plans-reform-and-modernize-senior-executive-service/100818 [http://perma.cc/9TQM-N3SM] (detailing Obama administration initiatives to strengthen the top level of career federal managers).

policy of using prosecutorial discretion to defer immigration enforcement actions against several million individuals brought here illegally as children who have done well academically and avoided criminal involvement.[399] In November 2014, President Obama and DHS Secretary Jeh Johnson expanded this policy and announced a further deferred-action program, this one aimed at parents of U.S. citizens and lawful permanent residents.[400] Under both programs, eligible individuals must apply for deferred action status, but if it is granted, they are protected from deportation for three years and granted work authorization.[401] The new actions are estimated to shield another five million people from deportation.[402]

On the one hand, such broad programs, provided on a prospective and essentially categorical basis, might seem to cross the line from legitimate nonenforcement discretion to unconstitutional suspension of the immigration laws and thus violate the President's Take Care Clause obligation.[403] In line with this view, Zachary Price has argued that constitutionally legitimate exercises of enforcement discretion must occur only in a case-by-case manner or on the basis of clear statutory authorization, with categorical and prospective nonen-

399. *See* Remarks by the President in Address to the Nation on Immigration, *supra* note 74; Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [http://perma.cc/8JWQ-7RNQ]. On the overlap of the group affected by the Obama Administration's policy and those covered by the Dream Act, see Delahunty & Yoo, *supra* note 6, at 787-91.

400. *See* President Barack Obama, Weekly Address in Las Vegas, Nevada (Nov. 22, 2014), http://www.whitehouse.gov/the-press-office/2014/11/22/weekly-address-immigration-accountability-executive-action [http://perma.cc/JV9D-WGQZ]; Memorandum from Jeh Charles Johnson to Leon Rodriguez et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals who are Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) at 3-5.

401. Exercising Prosecutorial Discretion, *supra* note 400, at 3-4.

402. *See* Michael D. Shear, *Obama, Daring Congress, Acts To Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html [http://perma.cc/43RD-W86F]. A federal district court in Texas preliminarily enjoined implementation of the November 2014 deferred action policies, in a suit brought by twenty-six states, on the ground that DHS violated the APA's requirements for notice-and-comment rulemaking. *See* Texas v. United States, Civil No. B-14-254, 2015 WL 648579, at *56, *62 (D. Tex. Feb. 16, 2015).

403. *See* Delahunty & Yoo, *supra* note 6, at 784-85; Price, *supra* note 75, 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 6, at 784, 789-91.

forcement approaches, such as those adopted in the recent immigration actions, being unconstitutional.[404]

Yet from another perspective, by openly stating a generally applicable policy and then instituting an administrative scheme to implement that policy, the President and DHS Secretaries Napolitano and Johnson 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.[405] 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 more transparent, thereby enhancing political accountability, as well as more consistent across the nation and among immigration personnel.[406] 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 as much at odds with constitutional structure as a presidential dispensation power.

Acknowledging 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.[407] And executive-branch implementation of the duty to supervise seems likely to result in greater and more overt instances of presidential direction. Importantly, however, recognizing the duty does not require acceptance of all instances of presidential direction and administration.[408] Given that a core part of the duty to supervise is ensuring legal accountability, such presidential policies must accord with governing statutory requirements or have a basis in the President's constitutional authority.[409]

404. Price, *supra* note 75, at 704-11.

405. *See* Delahunty & Yoo, *supra* note 6, at 788; *see also* Adam J. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 510-28 (2009) (detailing broad de facto delegation of authority to the President in the immigration context).

406. 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).

407. For a recent argument in support of 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 N.Y.U. L. REV. 1031, 1101-04 (2013).

408. *See supra* notes 298-302 and accompanying text.

409. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). The extent to which governing statutes constrain presidential direction will de-

In addition to the President and the executive branch, Congress also plays a role in enforcing the duty to supervise. Congressional oversight of administration is already quite energetic, as evidenced by the dramatic rise in congressional investigations over the last few decades.[410] This rise is tied to the phenomenon of divided government, when one party controls one or both houses of Congress and that party does not control the White House. In a regime of divided government, investigations of executive branch failures are a major way for one party to score political points.[411] 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.

Instead, the intriguing possibility here is whether such recognition might affect the focus and potentially the rhetoric of congressional oversight. Congressional investigations tend to focus on discrete high-profile scandals or government breakdowns, rather than on ongoing systemic administrative failures.[412] One systemic administrative issue needing congressional action concerns the recruitment and retention of a skilled federal workforce and particular talented managers. Scholars repeatedly identify problems in the federal government's management, ranging from increased politicization to lack of capacity in critical areas to recruitment and retention in the senior executive service, which largely contains high-level career managers.[413] Taken seriously,

pend 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 72, 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).

410. *See* Paul C. Light, *Investigations Done Right and Wrong: Government by Investigation, 1945-2012*, BROOKINGS INST. 2 (Dec. 2013), http://www.brookings.edu/~/media/research/files/papers/2013/12/04%20government%20investigations%201945%2012%20light/lightpaperdec2013.pdf [http://perma.cc/87NL-WRV9]; David C.W. Parker & Matthew Dull, *Divided We Quarrel: The Politics of Congressional Investigations, 1947-2004*, 34 LEGIS. STUD. Q. 319, 319, 334-35 (2009).

411. *See* Kriner & Schwartz, *supra* note 307 (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 410, at 321-22 (concluding that "[d]ivided government is clearly related to an increase in the number and intensity of congressional investigations in the House").

412. *See* PAUL C. LIGHT, GOVERNMENT BY INVESTIGATION: CONGRESS, PRESIDENTS, AND THE SEARCH FOR ANSWERS 1945-2012, at 30-31, Box 2-1 (2014) (listing the one hundred most significant investigations from 1945 to 2012).

413. *See* MAEVE P. CAREY, CONG. RESEARCH SERV., R41801, THE SENIOR EXECUTIVE SERVICE: BACKGROUND AND OPTIONS FOR REFORM 12-21 (2012) (detailing challenges facing the SES); 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

recognition of a constitutional duty to supervise should yield sustained congressional attention to the development of 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.[414] These clashes over government funding were deeply political and ideological, with Democrats and Republicans deeply divided on budgetary priorities, including within their own ranks.[415] The Constitution entered the debate in a limited fashion, primarily in relation to the debt ceiling crisis and the President's powers.[416] Largely absent was discussion of the constitutionality of Congress's actions or of whether Congress had a constitutional obligation to fund the government so it could meet its statutorily mandated responsibilities.[417]

Yet the duty to supervise arguably requires Congress to provide adequate funds for the government to function. On this view, Congress can alter the

that "reducing the number of political appointees is one means of improving performance"); 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 workforce oversight).

414. *See* Jonathan Weisman & Ashley Parker, *Republicans Back Down, Ending Crisis Over Shutdown and Debt Limit*, N.Y. TIMES, Oct. 16, 2013, http://www.nytimes.com/2013/10/17/us/congress-budget-debate.html [http://perma.cc/LR7Z-HVKP].

415. *See id.* (tying the 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 MAG., Mar. 28, 2012, http://www.nytimes.com/2012/04/01/magazine/obama-vs-boehner-who-killed-the-debt-deal.html [http://perma.cc/M7SF-WCZC] (describing disagreement that underlay the failure to reach a debt deal in 2011).

416. *See, e.g.*, Neil H. 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 to take on the debt ceiling issue and 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 Section 4 of the Fourteenth Amendment); Jack M. Balkin, *3 Ways Obama Could Bypass Congress*, CNN.COM (July 28, 2011), http://www.law.yale.edu/news/13484.htm [http://perma.cc/4DZE-VFWH] (arguing that President Obama should mint two one-trillion-dollar platinum coins).

417. *See, e.g.*, Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 725-35 (2012) (arguing that each house of Congress has the power to refuse to appropriate funds and shut down the government). Discussions of the constitutionality of Congress's actions tend to focus on the constitutionality of debt ceiling legislation. *See* Josh Hazan, Note, *Unconstitutional Debt Ceilings*, 103 GEO. L.J. ONLINE 29, 29-30 (2014), http://georgetownlawjournal.org/files/2014/09/Hazan-UnconstitutionalDebtCeilings.pdf [http://perma.cc/JCV6-VB6F].

government's substantive responsibilities, but it violates the duty if it leaves these responsibilities in place but sabotages the government's ability to meet them.

An account of the duty to supervise as mandating government funding is certainly contestable. The power of the purse—and thus the power to deny funding—is one of Congress's core constitutional powers.[418] Requiring Congress to provide adequate funding would be dramatically at odds with the endemic feature of budget constraints in government and would be at odds with contemporary legislative practice in which appropriations riders have replaced substantive enactments as the means for Congress to control the executive branch.[419] As a result, the notion 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 with regard to itself; no court will intervene to do so. It is therefore up to Congress to determine what level of funding is constitutionally required. 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 actually assigns to administration in the form of supervision. The neglect of systemic administration in constitutional doctrine is justified as necessary to ensure that 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 accom-

418. *See* HAROLD J. KRENT, PRESIDENTIAL POWERS 77-83 (2005) (discussing the scope and limits of the appropriations power); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84-91 (2006) (describing Congress's use of the appropriation power).

419. *See* Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 767-70 (2010) (documenting the use of hundreds of appropriations riders on an annual basis to overturn agency policy decisions); Thomas O. McGarity, *Deregulatory Riders Redux*, 1 MICH. J. ENVTL. & ADMIN. L. 33, 36-39, 51-70 (2012) (describing the use of appropriations riders to prohibit or delay regulatory initiatives instead of forestalling such initiatives through substantive legislation).

plished through mechanisms that largely assign to 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 that the federal courts' purview is simply discrete governmental actions and not the wider administrative contexts in which these actions occur, the current approach also casts judicial constitutional enforcement as operating independently of the wider contexts. Even if this portrayal were ever true, it would be 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 step in the development of 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 also in the reigning image of constitutional law. Constitutional law in the modern administrative state does not have hard edges allowing for a clear demarcation between that which is constitutional and that which is not. Rather, constitutional law today is a porous entity. Constitutional requirements mingle with numerous forms of subconstitutional law, often functioning more as background norms than as 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. Instead of insisting on an image of constitutional law that misleadingly excludes administration, courts need to turn to the task of crafting a constitutional law that properly reflects the contemporary administrative age.