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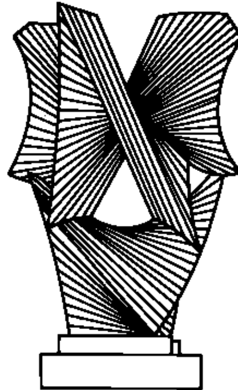

THE INSTITUTION MATCHING CANON

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THE LAW SCHOOL
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THE INSTITUTION MATCHING CANON

Aziz Z. Huq

ABSTRACT—This Article identifies and analyzes a transsubstantive tool of constitutional doctrine that to date has escaped scholarly attention. The Article terms this device the "institution matching" canon. It can be stated briefly as follows: When the government makes a decision that may impinge upon a liberty or equality interest—which may or may not be directly judicially enforced otherwise—a court should determine whether the component of government that made the decision has actual competence in and responsibility for the policy justifications invoked to curtail the interest. If not, the court should reject the government action but leave open the possibility of a "do-over" by a more appropriate component of government. First identified in an early written opinion of Justice John Paul Stevens, the institution matching canon continues to play an important if imperfectly articulated role in criminal law, administrative law, and national security doctrine. This Article provides a systematic survey of the ways that the Court has employed institution matching and develops a taxonomy of the canon's costs and benefits.

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INTRODUCTION

A central problem in American constitutionalism is the translation of abstract textual precommitments into stable and predictable doctrine—the "set of rules and methods . . . used to decide a particular class of cases."[1] Analyzing constitutional doctrine, scholars use two distinct lenses. Some limit their attention to a specific provision in the Constitution, such as the Commerce Clause[2] or the First Amendment's Free Speech Clause,[3] and explore optimal doctrinal specifications of that rule. Others employ a wider, transsubstantive lens to isolate devices found across different areas of the

[1] McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1639 (1995). This is a point of agreement among scholars of very different normative commitments. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 904 (1996) ("What matters to most constitutional debates, in and out of court, is the doctrine the courts have created, not the text."); *see also* Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1140 (1994) (making a case for the centrality of doctrine).

[2] *See, e.g.*, Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 15–20 (2010) (developing doctrinal framework from first principles); *see also* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1393–99 (1987) (deriving an alternative Commerce Clause framework from constitutional text and structure).

[3] *See, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Analysis*, 63 U. CHI. L. REV. 413, 416 (1996) (seeking to explain "a wide range of First Amendment rules"); *see also* Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562, 564–65 (1989).

law, such as the "strict scrutiny" test[4] or the "clear statement" rule.[5] Both kinds of inquiry assess the decision rules courts use to implement the Constitution. Does the work product of the Supreme Court, they ask, work to promote the Constitution's goals?[6]

This Article, working in the second vein of scholarship, identifies and analyzes a transsubstantive tool of constitutional law that to date has escaped scholarly attention. I label this device the "institution matching" canon. The institution matching canon can be stated briefly as follows: When the government makes a decision that may impinge upon a liberty or equality interest—which may or may not be directly judicially enforced otherwise—a court should determine whether the component of government that made the decision has actual competence in or responsibility for the policy justifications invoked to curtail the interest. Only if the relevant institution is in fact tasked with furthering the relevant policy goals, or if it can demonstrate that it has in fact applied expertise, should the court allow the liberty or equality interest to be narrowed. Otherwise, the court should reject the governmental action. In doing so, however, the court shall not imply or assert that the government cannot achieve the same policy goal through the use of a different component of government. Rather, the court shall leave it up to the government to decide whether to seek a "do-over" with a different governance instrument.

The institution matching canon emerges in the early jurisprudence of Justice John Paul Stevens. It is one of his many important contributions to U.S. public law across five years on the Court of Appeals for the Seventh Circuit and thirty-four years on the U.S. Supreme Court. Notably, it emerged in Justice Stevens's very first decisions as a Justice. It is evidence that, from his early days on the Court, Justice Stevens had a particularly clear grasp on the nettlesome problem of giving operational force to the lofty, often opaque commitments of the Constitution. Unlike other Justices, Justice Stevens has never confused the Constitution's terrain with the doctrinal map that the Court must develop in common law fashion to guide other judges and governmental actors.

The standard narrative in the scholarship about Justice Stevens's early efforts is one of missed opportunity.[7] It suggests that Justice Stevens's

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[4] *See, e.g.*, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798–801 (2006); *see also* Aziz Z. Huq, *Protecting Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16 (2012), http://www.columbialawreview.org/assets/sidebar/volume/112/16_Huq.pdf (exploring the use of strict scrutiny in the Roberts Court).

[5] *See, e.g.*, John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406–17 (2010).

[6] *Cf.* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 51 (2004) (distinguishing "constitutional decision rules" from "constitutional operative propositions").

[7] *See infra* Part II.B (collecting early critical commentary on Justice Stevens's jurisprudence employing the institution matching canon).

institution matching canon was never picked up by other Justices and instead proved a "legal Lohengrin," lost in the case reporters.[8] The standard account is wrong. Institution matching is not lost to the law. To the contrary, the canon plays a significant role ranging across domains of public law from administrative law to criminal law to national security law. Despite its portability across scholarly bailiwicks—or perhaps because of it—the institution matching canon has been largely ignored.[9] Scholars have missed important commonalities between lines of cases. Opportunities for the canon's extension are ignored. The canon's potential costs accrue without attracting attention. And the subtly but importantly distinct ways in which different judges operationalize institution matching have gone without comparative study.

This Article aims to fill a gap in the literature by providing a comprehensive descriptive account of the institution matching canon. It also provides a detailed analysis of the canon's formulations, its strengths, and its weaknesses. One of my purposes here is to illuminate familiar precedent from a new perspective, identifying commonalities that have gone unnoticed to date. My evaluative aim is more modest. I do not claim to furnish a final reckoning of institution matching. Rather, I hope to situate institution matching among the more familiar elements of the Court's doctrinal toolkit, and to specify both its different forms and its potential advantages and costs. In the final analysis, a normative judgment about the canon turns on larger, and more disputed, questions about how vigorous courts should be in enforcing the Constitution. Skeptics of judicial authority are unlikely to be enamored of the institution matching canon. Those more comfortable with the concept of judicial review, by contrast, may discern an appropriately defined and delimited space for the canon in the judicial toolkit. My aim here is not to settle these larger disputes about the role of the federal courts in constitutional enforcement. Rather, I aim here to isolate one possible tool for judges in sufficient detail that readers with different normative priors about judicial review can reach their own conclusions about institution matching.

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[8] IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

[9] One important exception is the work of Professor Dan Coenen. Professor Coenen identifies what he calls a set of "constitutional 'who' rules" that "steer policy choices away from one decisionmaker to another, on account of institutional capacities with regard to particular constitutional choices." Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1370 (2002) [hereinafter Coenen, *Rehnquist Court*]; *see also* Dan T. Coenen, *The Pros and Cons of Politically Reversible "Semisubstantive" Constitutional Rules*, 77 FORDHAM L. REV. 2835, 2851–52 (2009) [hereinafter Coenen, *Pros and Cons*] (developing the argument that rules can turn on institutional identity); *cf.* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2793 (2003) (identifying what is called here institution matching as a kind of "weak-form" judicial review). Professor Coenen's goal is to identify and defend a class of doctrinal measures used to promote constitutional entitlements indirectly. He therefore aims to demonstrate the commonalities of several diverse doctrinal tools rather than exploring the genealogy and consequences of one particular implement. This Article takes up the latter task as to institution matching.

The analysis proceeds as follows. Part I explores the modern origins of the institution matching canon. I focus on the first occasion the canon was applied, Justice Stevens's majority opinion in *Hampton v. Mow Sun Wong*.[10] To make clear *Hampton*'s contribution from the beginning, I distinguish its institution matching logic from some close doctrinal cousins, such as the avoidance canon and the clear statement rule. Part II turns to *Hampton*'s post-history, and rehearses the standard account of its legacy as Supreme Court precedent, which is largely pessimistic. Part III then challenges that standard story by identifying three recent lines of cases in which the institution matching canon is alive and well (albeit laboring incognito) in the fields of criminal law, administrative law, and national security law. In each line of cases, the Court has deployed institution matching as a way of determining whether claimed policy justifications for narrowing a liberty or equality interest "fit" or "match" in the case at hand. In each case, the identity of the decisionmaker is employed as a proxy for the robustness of the government's reasons. Part IV turns from description to evaluation. It asks whether the institution matching canon is likely to achieve its putative goals and, if so, at what cost. That evaluation employs two perspectives: a static analysis of discrete uses of institution matching, and a dynamic analysis of how institution matching fits into a broader landscape of political institutions interacting in predictable and sequential ways. I conclude that the attractiveness of institution matching depends on one's priors about judicial review, but tentatively suggest some reasons to think it will continue to play some substantial role in the Court's doctrinal toolkit given its superiority in some instances to other currently employed doctrinal devices.

I. THE DOCTRINAL ORIGINS OF INSTITUTION MATCHING

A. *Hampton v. Mow Sun Wong*

On June 1, 1976, Justice John Paul Stevens handed down his first opinions, a pair, for the U.S. Supreme Court. Both addressed claims by aliens that their exclusion from a federal program violated the equality component of the Fifth Amendment.[11] In one case, the Court upheld the

[10] 426 U.S. 88 (1976). It is arguable that the idea of institution matching can be linked to the institutional focus of the so-called "Princeton school" of constitutional theory. For an introduction to that approach, see generally the essays collected in CONSTITUTIONAL POLITICS (Sotirios A. Barber & Robert P. George eds., 2001). I am grateful to Professor Troy McKenzie for stressing this connection to me.

[11] *Cf.* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954) (finding an equality rule in the Fifth Amendment).

government's facially discriminatory action; in the other it invalidated it. The difference in outcomes turned on the institution matching canon.[12]

The first case, *Matthews v. Diaz*, concerned the eligibility rules for the Medicare Part B supplemental medical insurance program.[13] A three-judge District Court had invalidated on equal protection grounds the program's categorical exclusion of aliens who were not lawful permanent residents and who had lived in the United States less than five years.[14] A unanimous Supreme Court, with Justice Stevens writing, reversed. Justice Stevens began by emphasizing the "heterogen[eity]" of the domestic alien population, which had "a wide-ranging variety of ties" to the United States.[15] Congress, explained Justice Stevens, could reasonably respond to such variation by awarding benefits to some, but not all, aliens.[16] Moreover, the Court explained, the "political" nature of immigration policy made it peculiarly unfit for judicial resolution and "more appropriate to either the Legislature or the Executive."[17]

In the second case decided that day, *Hampton v. Mow Sun Wong*, the Court invalidated a rule of the Civil Service Commission (CSC) barring all persons except American citizens and natives of Samoa from federal employment.[18] The CSC rule was challenged by five Chinese nationals, including a janitor, a file clerk, an evaluator of educational programs, and a postal worker.[19] Writing for a five-Justice majority, Justice Stevens invalidated the CSC rule.[20] Justice Stevens might have developed the heterogeneity point of *Matthews* to conclude that the categorical nature of the CSC rule rendered it indiscriminately overbroad. (Indeed, the Court of Appeals rested its judgment in favor of the alien plaintiffs on that logic.)[21] But Stevens instead pursued what he termed a "narrower inquiry" into the manner in which the alienage exclusion had been adopted[22]—a logic that did not entail a decision on the bare ground of constitutional text.

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[12] *See* Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 277–78 (explaining context of cases).

[13] 426 U.S. 67, 70 & n.1 (1976).

[14] *Id.* at 73–74.

[15] *Id.* at 78–79.

[16] *Id.* at 80.

[17] *Id.* at 81.

[18] 426 U.S. 88, 90 & n.1 (1976) (quoting 5 C.F.R. § 338.101 (1976) and explaining that it had been construed to permit the employment of American Samoans).

[19] *Id.* at 91.

[20] *Id.* at 116–17. Is the *Hampton* opinion based on due process grounds or equal protection concerns? In dissent, Justice Rehnquist complained that the Court was not clear but "inexplicably melds together the concepts of equal protection and procedural and substantive due process." *Id.* at 119 (Rehnquist, J., dissenting).

[21] *Id.* at 96 (majority opinion).

[22] *Id.* at 103.

To begin, Stevens rejected as too "extreme" *Matthews*'s broadest reading—that the "federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."[23] Nor, Justice Stevens said, had Congress unequivocally barred the CSC from adopting the categorical alienage bar.[24] Instead, he found infirmity in the reasons the CSC supplied for aliens' exclusion, and more specifically in the mismatch between those reasons and the CSC's mandate.[25] Government lawyers had invoked foreign affairs and security justifications for the exclusion. But, Stevens explained, the CSC's "normal responsibilities" did not extend to such matters[26]:

> When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule. . . .
>
> The difficulty with [the Government's arguments] is that they do not identify any interest which can reasonably be assumed to have influenced the [CSC and other defendants] in the administration of their respective responsibilities . . . .[27]

Hampton explicitly left unanswered whether Congress or the President acting alone could adopt an exclusion based in some fashion on alienage. Hinting that the answer might be "no," Stevens drew the "fair" inference that both Congress and the President had already "acquiesced" to the alienage rule, which had been in effect since 1883, but cautioned that such

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23 *Id.* at 101. Justice Rehnquist's dissent endorsed this argument. *Id.* at 121–22 (Rehnquist, J., dissenting).

24 *Id.* at 109–10 (majority opinion).

25 *Id.* at 104–05.

26 *Id.* at 105.

27 *Id.* at 103–05. Justice Stevens also canvassed the rule's history since 1883, when it was first promulgated. Finding no explicit congressional and presidential sanction for the rule, notwithstanding its age, Justice Stevens made the anti-Burkean point that the rule's longevity yielded a paradoxical ground for distrust. *Id.* at 107–08. At the time the rule was adopted, he explained, "there was no doubt a greater inclination than we can now accept to regard 'foreigners' as a somewhat less desirable class of persons than American citizens." *Id.* at 107. This turns on its head the more typical invocation of tradition by both courts and the Executive Branch as a positive justification for an outcome. *See, e.g.*, Raines v. Byrd, 521 U.S. 811, 826–28 (1997) (emphasizing the importance of "historical practice"); Memorandum from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, to Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions 2 (July 16, 2010), *available at* http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf ("Particularly where the question relates to the authorities of the President or other executive officers or the allocation of powers between the Branches of the Government, precedent and historical practice are often of special relevance.").

acceptance was insufficient to save the rule.[28] (As we shall see, that hint was never followed.) At minimum, it seemed reasonably clear at the opinion's close that no component of the federal government lacking a statutory mandate for national security or foreign relations matters could promulgate a rule that facially discriminated on the basis of alienage to further those ends. It was also clear that a necessary, but perhaps not sufficient, requirement for categorical distinctions on alienage grounds was that the federal agency engaging in line drawing had competence respecting the policy justifications at issue.

On the day it was decided, *Hampton*'s generative potential was unclear. From one perspective, the decision only applied to the federal government, and only in challenges to alienage classifications. It could be posited that on matters of race, where the range of permissible justifications for classification was much narrower than on matters of alienage, there was no need for such an indirect judicial implement. The courts, however ineptly, could apply searching scrutiny to all race-based classifications.[29] If the logic of *Hampton* were confined to the federal context, and limited to alienage-based classifications, its significance would be small indeed.

But on another view, Justice Stevens's opinion could have been viewed as the seed of a more generally applicable canon. Recall that the Constitution's equality guarantee, like other constitutional rights, is not an absolute protection against governmental action.[30] Equality claims typically operate as partial "shields," not "trumps," in American constitutional law.[31] Even the most disfavored of intrusions on equality can be authorized if it satisfies the rigorous test of strict scrutiny.[32] *Hampton* can be understood as a mechanism for implementing the constitutional balancing test. Rather

[28] *Hampton*, 426 U.S. at 105, 116; *cf. id.* at 117 (Brennan & Marshall, JJ., concurring) (flagging that reserved question).

[29] The Court first examined a race-based federal action in *Hirabayashi v. United States,* in which it upheld a curfew applicable only to persons of Japanese ancestry on the ground that "circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made." 320 U.S. 81, 102 (1943). Only in *Korematsu v. United States,* a case concerning internment orders that followed the curfew, did the Court declare that it would apply "the most rigid scrutiny." 323 U.S. 214, 216 (1944). Of course, *Korematsu* upheld the internment legislation under that standard of review. *Id.* at 224.

[30] For a general statement of this claim as applied to all constitutional rights, see Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 344 (1993) ("[R]ights are conceptually interconnected with, and occasionally even subordinate to, governmental powers.").

[31] *See* Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 791–92 (2007) ("Rights are protective 'shields,' rather than peremptory 'trumps,' against conflicting, nonenumerated governmental interests, with courts balancing the two by applying one of several different presumptions and standards of review, such as strict scrutiny, intermediate scrutiny, and the rational basis test." (footnote omitted) (quoting Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 431 (1993))).

[32] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 946 (1987) (asserting that compelling-state-interest tests "exemplify" a "form" of balancing).

than asking whether the government's action is animated by a compelling or an important state interest, the court would ask whether the component of the government that took the action is responsible for furthering the state interest is at issue. Justice Stevens's opinion presents at least one justification for this tack: absent evidence that the institutional mandate of the government actor conduces to "some degree of expertise," there is cause for judicial skepticism of the bona fides of the government action.[33] Judicial "matching" of state interest to the component's policy competency is an epistemically less demanding inquiry, moreover, than the question whether a specific goal is in fact furthered by a government policy. So institution matching serves as a lower cost heuristic for determining whether a rights-infringing action should be ratified by the federal courts.

Hampton, to be sure, is not pellucidly clear as to how such a generally applicable doctrinal mechanism would work. As a threshold matter, it is not apparent from Justice Stevens's opinion how to evaluate the match between the agency's mission and the relevant government interest. The analysis in *Hampton* identified the CSC's scope of competence by examining and paraphrasing its organic statute.[34] That is, it seemed to proceed along relatively *formalist* tracks. But it is not clear whether an agency's organic statute should be the only relevant information on this score, or whether information about the agency's past actions and current staffing should also count.[35] Such evidence in a particular case could suggest a failure to apply salient expertise even if the agency is more generally recognized by statute as competent. In addition, a court could look at what an agency does, for example by asking whether it consulted with other, more expert colleagues in other departments.[36] These are ways for a court to adapt a more *functionalist* approach to institution matching.

If statutes are indeed the sole source of relevant information for judges, there remain questions of how clearly the text must speak to a policy question in order to pass muster (even aside from the question of how appellate judges will calibrate judgments of clarity in a way that conveys clear instructions to courts lower in the federal hierarchy). For example, a

[33] *Hampton*, 426 U.S. at 115.

[34] *Id.* at 114 & n.47 ("The only concern of the Civil Service Commission is the promotion of an efficient federal service.").

[35] In one later opinion, Justice Stevens suggested his abiding concern for the actual reasons for a government action. Califano v. Goldfarb, 430 U.S. 199, 217–19, 223 (1977) (Stevens, J., concurring). In a further case, he declined to speculate about Congress's justifications for a rule that discriminated among different groups of Delaware Indians for no apparent reason and instead voted to invalidate the statute based on the absence of "principled justification." Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 97 (1977) (Stevens, J., dissenting).

[36] *Cf.* MARK TUSHNET, RED, WHITE, AND BLUE 206 (1988) (criticizing *Hampton* on the ground that the invalidated rule was "undoubtedly produced after a study by members of the Commission's staff, who most certainly consulted both formally and informally with members of other staffs knowledgeable about foreign policy").

court might determine that Congress must speak especially clearly as to the expertise issue, or that ambiguous textual instructions would suffice as a basis for concluding that legislators believed an agency would possess sufficient expertise.[37]

Nor does the formalist–functionalist choice exhaust the puzzles raised by institution matching. In a larger context, it is also unclear whether the institution matching canon is a *substitute* for direct enforcement of the relevant constitutional interest—equal protection in *Hampton*—or a *complement* to such enforcement. After an agency's action is invalidated on institution matching grounds, and a different component of the government has stepped into the breach to consider the issue, is further constitutional challenge precluded?[38]

Hampton does not answer these questions. Principles and doctrinal mechanisms of constitutional law typically emerge in an incremental "common law" form.[39] Had *Hampton* been taken up and elaborated as constitutional common law, such uncertainties might have been confronted and resolved incrementally over time. It should be no surprise they were unresolved in a single judicial opinion. *Hampton* rather simply introduced in inchoate form the doctrinal device of institution matching. That canon might have use whenever a court tries to determine whether the reasons offered by the government for narrowing an equality or liberty interest are sufficiently compelling. By looking to the government actor's mandate, the court employs a less epistemically demanding heuristic for assessing the validity of a proffered state interest. *Hampton*'s invocation of institution matching left open many implementation questions. It also raised the question whether the effort needed to clarify Justice Stevens's innovation was worthwhile. Was this really a new doctrinal tool, or merely a retread of familiar devices in the Court's toolkit? How new, in fact, was institution matching?

B. *Institution Matching Distinguished from the Substantive Canons*

To assess *Hampton*'s novelty, it is helpful to situate the logic of institution matching within a family of doctrinal tools used by federal judges to infuse adjudication and statutory interpretation with extrastatutory, constitutional values without direct, unmediated application

[37] One might also query whether the canon should apply in different ways to liberty and equality interests. But *Hampton* provides little reason to believe that these should be separate lines of analysis. To the contrary, as Justice Rehnquist observed in dissent, the opinion conflates liberty and equality interests. 426 U.S. at 119 (Rehnquist, J., dissenting).

[38] Note also the question of what happens when there is no agency that has both the statutory competence to take the relevant decision and also the expertise deemed salient to the constitutional question. For a discussion of this problem, see *infra* text accompanying notes 231–234.

[39] *See* Strauss, *supra* note 1, at 925 (associating the common law method with "incremental change").

of a constitutional principle. These so-called "substantive canons"[40]—which include the avoidance canon, clear statement rules, and pro-deliberation canons—achieve constitutional goals indirectly through a variety of mechanisms.[41] They also all eschew the blunt instrument of invalidation. Yet institution matching is distinct. Unlike these other canons, it exploits the relationship between the justifications for infringing constitutional rights and the institutional competences of a governmental entity tasked with that potential infringement. It is therefore plausible to think that institution matching supplements the familiar array of doctrinal tools used to enforce constitutional norms indirectly.

The distinction between institution matching and more familiar canons can be seen by fleshing about the basic mechanisms underlying the latter. Two commonly employed mechanisms for indirect enforcement of constitutional norms are the avoidance canon and its close cousin the clear statement rule.[42] Interpreting federal statutes, a federal court can invoke a constitutional norm as a weak presumption or "rule of thumb" as a starting point of discussion or as a tiebreaker.[43] Or it can impose a more robust clear statement rule that can be rebutted only by unequivocal statutory language.[44] These presumptions, respectively weak and strong, may be deployed to further individual rights or structural principles. The Court applies them, for example, to disfavor derogation of the President's traditional powers,[45] to favor judicial review,[46] or to shield First Amendment values.[47]

The avoidance canon and clear statement rules promote constitutional values via four possible mechanisms. One possibility is that the Court is

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[40] William N. Eskridge Jr. & Philip P. Frickey, *The Supreme Court 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 68–69 (1994); Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2111 (1990) (noting how canons often rely on "something external to legislative desires").

[41] *Cf.* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 89–96 (2008) (emphasizing the diverse ways in which canons operate).

[42] For an overview of the Roberts Court's usage of the avoidance canon, see Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 189–95.

[43] Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2891 (2010) (Stevens, J., concurring).

[44] *Id.*; *see also* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 883–85 (4th ed. 2007) (drawing the same distinction).

[45] *See, e.g.*, Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988); Haig v. Agee, 453 U.S. 280, 291–92 (1981).

[46] *See, e.g.*, Demore v. Kim, 538 U.S. 510, 517 (2003) (requiring a clear statement from Congress before concluding that jurisdiction to review an agency action had been eliminated); Abbot Labs. v. Gardner, 387 U.S. 136, 139–40 (1967) (declining to read a statute as limiting judicial review in like fashion).

[47] *See, e.g.*, NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500–01 (1979) (requiring a clear statement of statutory authority for an agency action that impinged on First Amendment interests); United States v. Witkovich, 353 U.S. 194, 201–02 (1957) (articulating the avoidance principle).

using the clarity of statutory text as a proxy for the probability that Congress intended to "press[] the envelope of constitutional validity."[48] On this account, Congress acts with full awareness of constitutional limitations. Courts presume that legislators wish to approach constitutional limits only when they do so with linguistic precision.[49] An alternative explanation for avoidance canons rejects the idea that the presumption is a way of tracking congressional intent.[50] Rather, a judicial demand for linguistic clarity is in effect a tax on the enactment of constitutionally problematic statutes. It is more costly, in time and effort, for legislators to craft clear language than it is for them to agree on generalities. The statutory presumptions thereby serve as a "resistance norm," creating frictional enactment costs that make passage of constitutionally troubling laws less likely.[51] A similar logic underpins the hard look doctrine in administrative law. In both domains, the "court . . . reason[s] that the expert government decisionmaker's willingness to produce a high-quality explanation signals that the government believes the benefits of the proposed policy are high."[52]

A third explanation for avoidance canons and clear statement rules turns on the judicial "underenforcement" of constitutional norms due to institutional constraints on judicial factfinding and enforcement.[53] Proleptic invocation of constitutional concerns in the course of statutory interpretation is a way for courts to compensate for their inability to observe directly and respond to the full spectrum of constitutional violations.[54] This

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[48] Rapanos v. United States, 547 U.S. 715, 738 (2006) (plurality opinion); *accord* Rust v. Sullivan, 500 U.S. 173, 191 (1991); Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 465–66 (1989); *see also* Clark v. Martinez, 543 U.S. 371, 382 (2005) ("The canon is thus a means of giving effect to congressional intent, not of subverting it.").

[49] This assumes that the constitutional limitation was clear at the time a statute was enacted—which likely was not the case with the part of the Clean Water Act at issue in *Rapanos*. *Cf. Rapanos*, 547 U.S. at 788 (Stevens, J., dissenting).

[50] It is not clear why Congress would want more linguistic clarity as it approached the constitutional boundary, unless legislators were anticipating a judicial demand for such clarity. The *Rapanos* explanation for clear statement rules thus appears to be circular. *See* Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 71, 74 ("[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.").

[51] Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585–87 (2000); *accord* Manning, *supra* note 5, at 403 (using the term "clarity tax"); Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 41–42 (2008) (cataloging "enactment costs" imposed by clear statement rules).

[52] Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 755 (2006).

[53] For the idea of "underenforced norms," see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

[54] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) (noting that clear statement rules protect constitutional values that otherwise would not be directly judicially enforced); *see also*

justification for constitutionally inspired presumptions has provoked critics to worry about their unwarranted "penumbra" effect,[55] or to complain that judges should not "load the dice" by manipulating the enactment costs of different statutory options.[56]

A final explanation turns on institutional competence concerns: by setting the default for statutory interpretation to favor a constitutional value, courts in effect remand cases to the legislature when an ambiguous statute implicates constitutionally sensitive matters. Judges thereby ensure that it is the more democratic entity that is unequivocally allocated the necessary hard decision.[57] Focusing on this democracy-promoting logic, some scholars categorize avoidance and its ilk as latter-day forms of the "nondelegation" doctrine.[58]

None of these explanations for avoidance and its kin map precisely onto the logic of institution matching. As an initial matter, the avoidance canon and its kin focus on the *legislative* process, not the decisionmaking procedures or protocols of the Executive. They seek either to identify occasions that legislators have seriously considered constitutional concerns, or to stimulate such deliberation either through "remands" of statutes or by the manipulation of enactment costs. For example, by refusing to allow an agency to initiate a policy that may have constitutional ramifications until it has clear legislative license, the Court ensures that Congress as the appropriately credentialed democratic decisionmaker has determined that such action is appropriate given the risk to constitutional values.[59] These canons, however, furnish no means of testing directly the government's justifications for narrowing a constitutional right. They focus on process per se. The institution matching canon, by contrast, uses process as a direct proxy for the merits of a governmental decision.

It is worth noting that enactment-cost explanations of avoidance canons might also be understood as attempts to use the quality of deliberative process as a proxy for the validity of a constitutional decision.

Gregory v. Ashcroft, 501 U.S. 452, 467–70 (1991) (using a clear statement rule to shield states' ability to determine the forms of their own government structures, a federalism value not directly enforced by the Court).

[55] Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983) (internal quotation marks omitted).

[56] Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 27 (Amy Gutmann ed., 1997).

[57] *See* Bamberger, *supra* note 41, at 88.

[58] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); *see also* Solid Waste Agency v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172 (2000) (federalism); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 190–91 (2000) (Breyer, J., dissenting); Kent v. Dulles, 357 U.S. 116, 130 (1958) (First Amendment concerns).

[59] *See, e.g.*, NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500–01 (1979) (refusing to allow agency to take an action that might have limited First Amendment free exercise rights).

That is, the court assumes that a constitutionally sensitive decision is truly warranted only when the legislature has paid a high enactment price.[60] But it is not clear why one would believe that a greater legislative willingness to expend time and effort on statutory clarity alone will proxy for valid empirical justifications for narrowing a constitutional entitlement. It may also be that increased expenditure of legislative effort correlates with the special hostility felt toward a protected class where, for example, equal protection or free exercise concerns are at stake. The enactment-cost explanation for the avoidance canon, in this case, would have the odd consequence in the individual-rights context of endorsing animus-driven measures against the most despised of protected classes, while sheltering those protected classes that elicit only mild contempt from legislators. Whatever one makes of this peculiar outcome, semantic clarity is simply not reliably correlated with the credibility of the government's underlying non-animus-related justifications. The enactment-cost account of avoidance is better understood not to rely on the presumption that process tracks quality, but instead to rest on a claim that judicial review will create ex ante incentives for greater statutory clarity. Institution matching makes no such claim and so works through a different mechanism from enactment-cost-based canons.

The same is true for other statutory presumptions and devices, such as deliberation-forcing norms. The latter target problems and epistemic difficulties that are distinct from the matching problem *Hampton* addressed. For example, there are a number of public law doctrines that demand reasoned explanations from agencies[61] or Congress[62] as the price of judicial endorsement of certain actions. Unlike institution matching, such reasoned-explanation demands mitigate the epistemic burden on courts by promoting ex ante the production of relevant factual material concerning a law.[63] Reasoned-explanation demands are also a prophylactic against interest-group capture: by compelling the production of a public-regarding reason for a law, and possibly evidence to support that reason, they make pure

[60] For an example of how this might work in practice, see Stephenson, *supra* note 51, at 12.

[61] *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (noting the need for a "satisfactory explanation" for agency decisions); *cf.* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (requiring a "searching and careful" review of agency decisionmaking).

[62] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 562–63 (1995) (suggesting that congressional findings, though not required, may be useful in Commerce Clause cases when such findings "would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye"); *accord* Tennessee v. Lane, 541 U.S. 509, 528–29 (2004). The Court has said, however, that neither the quality nor quantity of the legislative record is necessarily dispositive in the constitutional inquiry. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646 (1999).

[63] Stephenson, *supra* note 51, at 48 & n.121.

rent-seeking potentially less rewarding.[64] Deliberation-forcing rules thus allow courts to assess directly the government's reasons in a way that institution matching does not. They also respond to interest-group-capture problems in a way that institution matching cannot.

I do not wish to exaggerate the point being pressed here. My claim here is simply that the *Hampton* institution matching canon serves constitutional ends through subtly different means from other, more familiar canons. It is therefore a distinctive, although not in all regards superior, contribution to the federal judiciary's constitutional toolkit.

II. THE BRIEF LIFE AND LONG DECLINE OF INSTITUTION MATCHING: THE STANDARD ACCOUNT

This Part demonstrates that to the extent lawyers and scholars are aware of it, the rule of *Hampton* is viewed as a dead end in the law. To pick but one example, an important casebook, in excerpting Justice Stevens's opinion, states dourly that *Hampton* "has never directly controlled the result in any subsequent Supreme Court decision."[65] Indeed, the decision's aftermath and post-history provided scant cause for optimism. On either score, *Hampton* seemed to expire before it could generate new precedent beyond the confines of the specific facts of that case.

Before developing these points, it is worth raising and rejecting one hypothesis. Some have suggested that the circumstances of *Hampton*'s hand-down provide ground for skepticism of its enduring impact. The case had been held over from the previous Term. According to one secondhand account, the case, once argued, was assigned by Justice Brennan to Justice Stevens. Justice Stevens drafted in line with his own theory of the case, which no other Justice shared.[66] Although the four remaining members of the majority did not "technically" agree with his reasoning, they signed on to Justice Stevens's first opinion.[67] At a minimum, this does not suggest broad and deep support for institution matching.

The available archival evidence, however, does not support this account. Correspondence between the Justices suggests that both Justices Powell and Stewart understood and approved of the Stevens opinion's institution matching logic. Hence, on March 17, 1976, Justice Powell responded to Justice Stevens's *Hampton* draft with a memo commending

[64] Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 675 (1992).

[65] ESKRIDGE ET AL., *supra* note 44, at 425–26.

[66] BILL BARNHART & GENE SCHLICKMAN, JOHN PAUL STEVENS: AN INDEPENDENT LIFE 203 (2010) ("Stevens's opinion addressed a slightly different question than the one posed either by the U.S. Civil Service Commission in bringing the case or the other [J]ustices.").

[67] BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 402 (1979).

him for his "fine" opinion.[68] Two weeks later, Justice Potter Stewart sent Stevens a letter parsing the initial draft, and arguing that it could more cleanly focus on the question whether the challenged decision was "made by an office having the responsibility for fostering the interest at stake."[69] Stewart cautioned against the unwarranted implication of the draft that there might be "a constitutionally protected liberty interest in eligibility for employment in a major sector of the economy."[70] Two days later, Justice Stevens responded to Justice Stewart with two clarifications. First, he explained that even if the Commission "had expressly relied on national interest relating to immigration," its decision would still have been invalid under the opinion's logic.[71] Second, Stevens explained that his argument did not merely turn on the formal characteristics of the CSC's delegated authority. Rather, given the CSC rule's "significant impact on a liberty interest," he felt the Court had to be "sure it was adopted for an appropriate reason by an appropriate decision maker."[72] This correspondence strongly suggests two things. First, Justice Stevens was quite conscious of his doctrinal novation, even if it was not fully developed on the surface of the *Hampton* opinion. Second, other Justices were also aware of the institution matching logic and yet did not file separate concurrences to reject it in whole or in part.

A. Hampton's Immediate Consequences

Consider first the immediate aftermath of the CSC rule invalidated by the Court. Three months after the *Hampton* decision, President Gerald Ford promulgated an executive order categorically prohibiting federal employment of aliens pending congressional reconsideration of the question.[73] Lower courts affirmed President Ford's decision, and the Supreme Court denied certiorari review with Justices Brennan, Marshall, and White voting unsuccessfully to hear the case.[74] White House reenactment of the alienage bar did not rest on substantial foreign policy or national security grounds. To the contrary, documents uncovered by Professor Alexander Aleinikoff suggest that the reasons for the renewed

[68] *See* Letter from Justice Lewis Powell to Justice John Paul Stevens 1 (Mar. 17, 1976) (in Library of Congress, Blackmun Papers, Box 212, Folder 3, No. 73-1596, *Hampton v. Mow Sun Wong* [hereinafter Blackmun Papers Box 212] and on file with author).

[69] Letter from Justice Potter Stewart to Justice John Paul Stevens 2 (Apr. 14, 1976) (in Blackmun Papers Box 212 and on file with author).

[70] *Id.*

[71] Letter from Justice John Paul Stevens to Justice Potter Stewart 1 (Apr. 16, 1976) (in Blackmun Papers Box 212 and on file with author).

[72] *Id.*

[73] 41 Fed. Reg. 37,303–04 (Sept. 3, 1976).

[74] Mow Sun Wong v. Hampton, 435 F. Supp. 37 (N.D. Cal. 1977), *aff'd sub nom.* Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980), *cert. denied sub nom.* Lum v. Campbell, 450 U.S. 959 (1981).

rule were hardly so worthy.[75] Upon being asked for comments as to the proposed Ford order, the Postal Service had indicated it had no difficulty in employing resident aliens, the Department of Housing and Urban Development argued for a more tailored rule, and the Department of State expressed doubts about the wisdom of an absolute prohibition.[76] A memorandum from the general counsel of the Office of Management and Budget (OMB) explained that the CSC's foreign policy justifications for the alienage restriction were "more apparent than real"—but there was "a widespread visceral feeling that Government jobs should be reserved for citizens."[77] That the OMB labeled the sentiment underlying the bar "visceral" suggests not only that the opposition to aliens' employment was deeply held but also that it was based on an instinctual distaste for a certain class—precisely the kind of motivation that the Constitution's equality protection is intended to oust from government decisionmaking.

To the extent that the aim of the institution matching canon was to ensure that an "overlooked [constitutional] value" was accounted for fully in political branch deliberations, the post-history of *Hampton* gives no ground for optimism.[78] Instead, the history suggests that institution matching does not preclude the challenged government decision from proceeding apace via a different institutional vehicle.

B. Hampton's Reception as Precedent

Nor does the path of *Hampton* in the Supreme Court's subsequent case law suggest that institution matching has had much impact on constitutional doctrine. To be sure, *Hampton* was well received by academic commentators. For example, building on work by (later Justice) Hans Linde, Professor Lawrence Sager cited *Hampton* as an example of a novel "due process of lawmaking" approach to constitutional decisionmaking.[79] By effectively remanding the CSC's decision for reconsideration, Sager pointed out, the Court had evaded the twin dangers of endorsing a

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[75] *See* ESKRIDGE ET AL., *supra* note 44, at 424–25 (describing Aleinikoff's research and findings).

[76] *Id.* at 424.

[77] *Id.* at 424–25 (quoting Memorandum from William N. Nichols, Gen. Counsel, Office of Mgmt. & Budget, to Robert D. Linden, White House Chief Exec. Clerk (Aug. 30, 1976) (on file in Gerald R. Ford Library, Ann Arbor, MI)).

[78] Tushnet, *supra* note 9, at 2795. The post-history of *Hampton* undermines Tushnet's 1988 critique that the initial CSC decision was likely based on expertise. *See supra* text accompanying notes 73–77.

[79] Lawrence Gene Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1417–18 (1978). The year that *Hampton* was decided, Linde had published an article arguing for "rational lawmaking[, which] means that a judge is to assess the challenged law in relation to actual, not merely conjectural, purposes, and that he is similarly to gauge the reasonableness of doubtful means by realistic materials in the record and not by hypothetical rationalization." Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222 (1976); *see also* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 302–03, 306 (1975) (commending forms of judicial review that will spur "dialogue").

potentially troubling rule without full information and of prohibiting the government from a policy choice with weighty justifications.[80] *Hampton*, explained Sager, honored the plaintiffs' right to a "reasonable determination made by an appropriate tribunal of the federal government."[81] Subsequently, Professor Cass Sunstein favorably conscripted *Hampton* into his large camp of minimalist decisions.[82]

Notwithstanding growing academic interest in so-called dialogic forms of judicial review in the decades that followed,[83] the Court seemingly did not take up *Hampton*'s invitation. Individual Justices such as Lewis Powell and Byron White cited the case in ways that seemingly approved of its basic logic, but not in majority opinions.[84] Justice Stevens himself would look back to *Hampton* occasionally as authority for the more abstract proposition that government must "govern impartially"[85] and for the claim that restrictions on constitutional interests can be authorized only on the basis of real, not hypothesized, justifications for the government's actions.[86] His concern with the correct institutional locus of a decision also informed his opinion in *Bowsher v. Synar*,[87] wherein the Court invalidated the "reporting provisions" of the Balanced Budget and Emergency Deficit Control Act of 1985. The Act granted the Comptroller General authority to mandate

[80] Sager, *supra* note 79, at 1417.

[81] *Id.* at 1414.

[82] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 35 (1999).

[83] For a brief overview of the literature, see Rosalind Dixon, *The Supreme Court of Canada,* Charter *Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235, 238 (2009).

[84] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 308–09 (1978) (opinion of Powell, J.); N.Y. City Transit Auth. v. Beazer, 440 U.S. 569, 609 n.15 (1969) (White, J., dissenting).

[85] Lyng v. Castillo, 477 U.S. 635, 636 n.2 (1986) (citing Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976)); *accord* Fullilove v. Klutznick, 448 U.S. 448, 548 (1980) (Stevens, J., dissenting); *see also* BARNHART & SCHLICKMAN, *supra* note 66 (noting that the virtue of governing impartially is one of the "building blocks" of Stevens's jurisprudence).

[86] Employment Div., Dep't of Human Res. v. Smith, 485 U.S. 660, 675–76 (1988). In *City of Eastlake v. Forest City Enterprises, Inc.*, Justice Stevens also made the argument that "fundamental choices" must be made by "a responsible organ of government." 426 U.S. 668, 688 (1976) (Stevens, J., dissenting) (quoting McGautha v. California, 402 U.S. 183, 256 (1971) (Brennan, J., dissenting)). Justice Stevens then made a similar argument in his dissent in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 315–16 (1986) (Stevens, J. dissenting) (finding "a rational and unquestionably legitimate basis for" the challenged decision). At first blush, this passage in *Wygant* seems in tension with Justice Stevens's dissent in *Fullilove*, in which he voted to invalidate a federal statutory provision that favored "minority business enterprises." 448 U.S. at 553–54. The different positions on affirmative action that Justice Stevens took in the two cases can be reconciled by noting that in *Wygant* he found tailored justifications for the challenged state action, and in *Fullilove* he did not. *See also* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 778–79 (1994) (Stevens, J., concurring in part and dissenting in part) (contending that a legislatively imposed speech ban would be reviewed under a stricter standard than a judicially crafted injunction because the latter is necessarily more tailored, and emphasizing the "three days of testimony" gathered by the trial judge in the case at bar before issuing the injunction).

[87] 478 U.S. 714, 718, 736 (1986).

spending reductions once a budget had been enacted.[88] Voting to invalidate those provisions, Justice Stevens invoked "due process of lawmaking" concerns at their acme when "a legislature's agent is given powers to act without even the formalities of the legislative process."[89]

At first blush then, the standard account of *Hampton* appears compelling: despite some early enthusiasm from scholars, the decision seems not to have generated subsequent constitutional precedent. To the contrary, the post-history of the *Hampton* litigation itself seems to cast doubt on its value as a tool of constitutional adjudication.[90] However much potential institution matching may initially have had, it seems for all intents and purposes to have fallen into long and irremediable desuetude.

III. THE SURPRISING PERSISTENCE OF INSTITUTION MATCHING

But institution matching has not vanished from constitutional doctrine. Instead, it appears in unexpected forms. This Part presents three examples of the institution matching canon recently at work in diverse areas of public law—administrative law, criminal law, and national security law. Perhaps because these examples are heterogeneous, their relationship with each other has not been noticed. Nevertheless, in each line of cases, the essential element of institution matching—first glimpsed in *Hampton*—of testing the strength of the government's reasons by examining whether a decision was "adopted for an appropriate reason by an appropriate decision maker"[91] can be discerned in the Court's arguments.

More specifically, there are four common elements in each of the cases limned below that can be usefully adumbrated at the threshold. First, each case involves an individual interest in some form of liberty or equality. Upon a sufficient showing by the government, however, it is undisputed that the individual entitlement can be abrogated. As a result, each of the cases in some measure presents a matching problem: Are the government's justifications for, say, restricting the liberty interest sufficient? Second, the result in each case turns upon the identity of the governmental decisionmaker. The Court's rulings in these cases, that is, turn on a "who" and not a "how" inquiry.[92] Third, the institution matching canon is applied in each case to the selection of governmental actor within a specific branch, rather than to the decision about which branch should act. Institution

[88] Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 251, 99 Stat. 1038, 1063–72 (codified as amended at 2 U.S.C. §§ 901, 907, 922 (2006)).

[89] *Bowsher*, 478 U.S. at 757 n.23 (Stevens, J., concurring) (internal quotation marks omitted).

[90] *Cf.* Rutan v. Republican Party of Ill., 497 U.S. 62, 100 n.3 (1990) (Scalia, J., dissenting) (recounting the post-history of *Hampton* as support for the proposition that the government has broad discretion as to employment decisions).

[91] Letter from Justice John Paul Stevens to Justice Potter Stewart, *supra* note 71, at 1.

[92] *Cf.* Coenen, *Pros and Cons*, *supra* note 9, at 8–14, 18–19 (distinguishing these two kinds of decision procedures).

matching thus is conceptually separate from the separation of powers. Finally, while the particular litigant's challenge to a government decision may prevail in a given case, the state still has authority to revise its procedures and to reallocate decisional authority in a fashion that conforms with the Court's instructions. As in *Hampton*, the Court leaves the door open to a fresh decision made by the correctly situated element of government. While the government loses this round, it has the opportunity to rework a decision in a form that may obtain a subsequent court's approval.

A. *Institution Matching in Criminal Law*

Perhaps the most practically consequential recent doctrinal innovation in criminal procedure is an application of *Hampton*'s institution matching canon. The new rule was developed in a line of precedent beginning in 2000 with *Apprendi v. New Jersey*.[93] In cases beginning with *Apprendi* and culminating in *United States v. Booker*,[94] the Court held that a criminal defendant has a right to a jury determination of any fact (other than a prior conviction) that is necessary to support a sentence exceeding the maximum authorized by the facts established by a guilty plea or jury verdict.[95] In *Booker*, a five-Justice majority, with Justice Stevens writing, held that this principle applied to the federal sentencing guidelines; a different five-Justice majority, with Justice Breyer at the helm, held that the provision of the federal sentencing statute making the guidelines mandatory could be severed, leaving the guidelines "effectively advisory."[96]

The principle articulated in *Apprendi* and applied in *Booker* relies on the distinctive role of the jury in calibrating exposure to criminal punishment.[97] Whether this elevation of the jury has an adequate historical pedigree remains the subject of sharp disagreement.[98] The *Apprendi* principle's intended effect, nevertheless, is to promote public (i.e., jury) "control" of the punishment function in criminal cases.[99] In this sense, the

[93] 530 U.S. 466 (2000).

[94] 543 U.S. 220 (2005).

[95] *Id.* at 244 (Stevens, J., delivering the opinion of the Court in part); *see also* Ring v. Arizona, 536 U.S. 584, 589 (2002) (extending *Apprendi* to the capital sentencing context); United States v. Harris, 536 U.S. 545, 558 (2002) (finding *Apprendi* inapplicable to mandatory minimums).

[96] *Booker*, 543 U.S. at 245 (Breyer, J., delivering the opinion of the Court in part).

[97] *See id.* at 236 (Stevens, J., delivering the opinion of the Court in part) (criticizing the pre-*Booker* federal regime because its "increas[ed] emphasis on facts that enhanced sentencing ranges . . . increase[d] the judge's power and diminish[ed] that of the jury").

[98] *Compare* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 234 (2005) (emphasizing the distinctive function of the jury as a restraint on government power), *with* Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1093 (2005) ("[T]he Court's underlying theory of jury as privileged fact finder in punishment determinations is also a constitutional novelty . . . .").

[99] Blakely v. Washington, 542 U.S. 296, 306 (2004).

Apprendi decision concerns the institutional locus of decisionmaking authority within the criminal trial. At bottom, it relies on a notion of "matching" those factual determinations the Court views as pivotal in the context of criminal adjudication to the body best suited to making such determinations.

Apprendi is commonly understood to turn on the jury's role because it is a Sixth Amendment case.[100] It is less often noted that Justice Stevens's opinion in *Apprendi*, like his *Hampton* opinion, invokes due process grounds too.[101] Due process and the Sixth Amendment converge because of the institutional match between the jury and the determination to expand a defendant's exposure to criminal sanction. But *Apprendi* does not rest on the claim that the jury is especially epistemically competent to make narrowly understood factual determinations. To the contrary, the Federal Rules of Evidence's hearsay and prejudice rules imply that juries are more prone to conceptual distortions and cognitive biases than judges.[102] The allocation of decisional authority in *Apprendi* instead reflects the jury's superior competence to make a certain genre of normatively inflected judgments. This is the belief, expressed elsewhere by Justice Stevens, that juries are "best able to express the conscience of the community."[103] To a greater extent than judges, juries "reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably" than judges.[104] Put another way, juries are well positioned to determine when a morally charged "societal stigma" is appropriately imposed.[105] They are "expert" on what the community thinks. By contrast, judges are institutionally, and perhaps temperamentally, incapacitated from serving as vehicles for a larger community's contextualized normative judgments. The *Apprendi* principle thus ensures a match between a class of normatively charged factual determinations and the body best able to make such determinations.[106]

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[100] *See, e.g.*, Stephanos Bibas, Max M. Schanzenbach & Emerson H. Tiller, *Policing Politics in Sentencing*, 103 NW. U. L. REV. 1371, 1372 (2009); Jonathan F. Mitchell, Apprendi*'s Domain*, 2006 SUP. CT. REV. 297, 297–99.

[101] *See Apprendi*, 530 U.S. at 476 (citing the Fourteenth Amendment's Due Process Clause).

[102] *See, e.g.*, Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 904–21 (1998) (reporting empirical research suggesting judges are less prone to certain cognitive biases than juries). *But see* Richard Lempert, *Juries, Hindsight, and Punitive Damage Awards: Failures of a Social Science Case for Change*, 48 DEPAUL L. REV. 867 *passim* (1999) (questioning the quality and the interpretation of the empirical evidence used in Hastie & Viscusi's study).

[103] Spaziano v. Florida, 468 U.S. 447, 470 (1984) (Stevens, J., dissenting) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)) (internal quotation mark omitted).

[104] *Id.* at 486–87.

[105] *See Apprendi*, 530 U.S. at 484–85.

[106] While neither *Apprendi* nor its progeny are wholly clear as to whether or not the Court is speaking of actual as opposed to idealized jurors, the application of the principle to cases in which no

Apprendi in the trenches has not been adjudged a success.[107] The Court has not applied the institution matching in a coherent fashion to determinate sentencing regimes such as the federal guidelines. Rather, *Booker*'s substantive holding that the guidelines vested too much authority in federal judges was hitched uncomfortably to a remedial holding that kept largely intact the judicial sentencing role and that simultaneously loosened constraints previously imposed upon the bench.[108] At best this result is counterintuitive; worse, it may create new, unjustified disparities in sentencing outcomes.[109] The perceived failure of *Apprendi* in the federal sphere, though, is a consequence of the unusual distribution of votes in *Booker*, not an inevitable consequence of the principle itself. Had the Court applied the *Apprendi* principle to the outer bounds of its basic logic, the results surely would have been different.[110] Whatever criticisms *Apprendi* and *Booker* merit based on their destabilizing effects or incoherent results do not impeach the observation that the *Apprendi* principle at heart is an effort to take seriously the possibility of institution matching in the criminal adjudication process.

B. Institution Matching in Administrative Law

Administrative law supplies a second example of institution matching. A central question in modern administrative law concerns the degree of deference courts accord to federal agencies' interpretations of federal

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jury in fact sat suggests the Court's logic is best understood as resting on a relatively abstract and idealized view of juries.

[107] *See, e.g.*, Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 342, 371–72 (2006) ("If writing on a blank slate, few would likely advocate the precise sentencing system resulting from the Supreme Court's decision in *Booker*.").

[108] *See* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 53 (2006) ("The [*Booker*] decision effectively endorsed the lax sentencing procedures that the federal system had used for two decades even while finding those procedures constitutionally problematic."). The peculiar result in *Booker* is a result of Justice Ginsburg's decision to vote with Justice Stevens on the substantive holding and with Justice Breyer on the remedy.

[109] *Id.*; *see also* Jonathan Masur, Booker *Reconsidered*, 77 U. CHI. L. REV. 1091, 1109 (2010) (explaining that *Booker*'s remedial effect is to shift sentencing policymaking from the centralized Sentencing Commission to the dispersed pool of federal district court judges, and concluding this change will be "costly in the net"); Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 732–40 (2008) (finding post-*Booker* sentencing disparities based on the political affiliation of the judge and the particular circuit). The remedial holding of *Booker* might also be characterized as a form of institution matching: individual judges have greater competence to issue a sentence that conforms to the equities of a given case than the Sentencing Commission does. Of course, this reading is in tension with the original centralizing impulse of the Guidelines, which were meant to strip authority from sentencing judges.

[110] *Cf.* United States v. Booker, 375 F.3d 508, 519–20 (7th Cir. 2004) (Easterbrook, J., dissenting) (noting that the principle also cast into doubt the federal parole system and precedential judicial sentencing rules).

statutes.[111] That seemingly binary problem of interbranch relations, however, has generated a briar patch of doctrinal tests.[112] One of the ways in which the deference question is decided turns on how authority is distributed within the Executive Branch. And to reach judgments about such intrabranch arrangements, the Court has applied the logic of institution matching.

The body of law and statutes addressing the division of authority between courts and agencies is complex. Its keystone is Justice Stevens's opinion in *Chevron U.S.A. Inc. v. NRDC*.[113] The *Chevron* Court announced a two-step process that courts must follow in reviewing federal agencies' interpretations of federal statutes: Has Congress "directly spoken" to the question, and, if not, is the agency's answer "based on a permissible construction of the statute"?[114] Both steps direct attention to the agency's regulatory work product. Arguably, the two steps blur into "a single inquiry into the reasonableness of the agency's statutory framework."[115] But the Court has added to the familiar *Chevron* two-step an additional, antecedent question: Does the agency even have the interpretive authority, and has it wielded such authority, in the case at hand?[116] Scholars have labeled this analysis "*Chevron* step zero."[117] Speaking to that threshold question, the Court has promulgated guidelines, but not directive rules, about how lower courts should draw *Chevron*'s outer boundary. It has suggested, for example, that an agency's interpretation lacking "the force of law" does not receive deference from a federal judge.[118] The products of formal rulemaking and adjudication sometimes, but not always, receive deference.[119] The Court's instructions on the step zero question have thus

[111] *See, e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 969–70 (1992) (describing sweeping consequences of varying the degree of judicial deference).

[112] *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron*'s Domain, 89 GEO. L.J. 833, 835–36 (2001) (describing some of these tests).

[113] 467 U.S. 837 (1984).

[114] *Id.* at 842–43.

[115] Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 598 (2009). Some commentators have read *Chevron* step two as training on the manner in which the agency has reached a decision, but this risks redundancy with separate administrative law doctrines that formally train on the agency's processes. *Id.* at 602–03.

[116] The Court framed this question in a 2000–2002 trilogy of cases. *See* Barnhart v. Walton, 535 U.S. 212 (2002); United States v. Mead Corp., 533 U.S. 218 (2001); Christensen v. Harris Cnty., 529 U.S. 576 (2000).

[117] Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 207–19 (2006); *see also* Merrill & Hickman, *supra* note 112, at 835 (framing the question as "what exactly is *Chevron*'s domain?").

[118] *Christensen*, 529 U.S. at 587; *accord Mead*, 533 U.S. at 226–27.

[119] *Compare Mead*, 533 U.S. at 229 (yes), *with Barnhart*, 535 U.S. at 222 (not always), *and* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1004–05 (2005) (Breyer, J., concurring) ("[T]he existence of a formal rulemaking proceeding is neither a necessary nor a sufficient condition for . . . *Chevron* deference . . . ."). Justice Stevens has long been a proponent of flexibility in the threshold determination whether *Chevron* applies. *See, e.g.*, Babbit v. Sweet Home Chapter of

been far from comprehensive or categorical. There remains much uncertainty about the step zero test.[120]

As a result, *Chevron* step zero serves as a placeholder for a range of judicial concerns—and has thereby opened the door to institution matching. Consider in this regard *Gonzales v. Oregon*, in which the Court invalidated an interpretative rule promulgated by Attorney General John Ashcroft that exposed physicians assisting the suicide of terminally ill patients to federal criminal penalties.[121] The Ashcroft Rule was a response to the Oregon Death with Dignity Act, adopted by referendum in 1994.[122] The Oregon Act established procedures through which terminally ill patients could request medication to end their lives. The medications prescribed under the Death with Dignity Act, however, were also regulated pursuant to the federal Controlled Substances Act (CSA).[123] Under a 1971 regulation promulgated by the Attorney General pursuant to the CSA, some substances controlled under the Act could be prescribed "by an individual practitioner acting in the usual course of his professional practice."[124] In November 2001, however, Attorney General John Ashcroft issued an "interpretive rule" that glossed the 1971 regulation to the effect that "assisting suicide [was] not a 'legitimate medical purpose'" under the CSA.[125] The Ashcroft Rule thereby claimed to render illegal under federal criminal law conduct that was otherwise permissible under Oregon's Death with Dignity Act. Ashcroft appended to the rule a legal opinion from the Justice Department's Office of Legal Counsel to support his determination that assisting suicide was not a "legitimate medical purpose."[126]

In an opinion by Justice Kennedy, the Supreme Court invalidated the Interpretive Rule and affirmed a permanent injunction granted by the District Court of the District of Oregon against the Rule's enforcement.[127]

Cmtys. for a Great Or., 515 U.S. 687, 703 (1995) (pointing to the agency's "latitude . . . in enforcing the statute, together with the degree of regulatory expertise necessary" for enforcement, as factors counseling for deference); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) (declining to give deference because of inconsistencies in agency positions).

[120] Many commentators have been critical of this uncertainty. *See* Sunstein, *supra* note 117, at 194 (arguing that that there are "much simpler and better ways" to achieve the Court's goal); Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003) ("[T]he Court has inadvertently sent the lower courts stumbling into a no-man's land."); *accord* Lisa Schulz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1475 (2005).

[121] 546 U.S. 243 (2006).

[122] OR. REV. STAT. §§ 127.800–.995 (2009).

[123] 21 U.S.C. §§ 811–812 (2006).

[124] 21 C.F.R. § 1306.04a (2010).

[125] *See* Dispensing of Controlled Substances To Assist Suicide, 66 Fed. Reg. 56,607, 56,608 (Nov. 9, 2001).

[126] *Id.* (internal quotation marks omitted) (noting the inclusion of an OLC opinion entitled "Whether Physician-Assisted Suicide Serves a 'Legitimate Medical Purpose' Under the Drug Enforcement Administration's Regulations Implementing the Controlled Substances Act" (June 27, 2001)).

[127] Gonzales v. Oregon, 546 U.S. 243, 254, 275 (2006).

Rejecting both the Attorney General's larger claim of interpretive authority and his specific reading of the CSA, the Court characterized the Ashcroft Rule as an effort to transform an "obscure grant of [statutory] authority" into a "radical shift of authority."[128] To reach this conclusion, the Court drew on two lines of reasoning: a federalism argument and an institution matching logic.[129] On the federalism side, Justice Kennedy emphasized provisions of the CSA that preserved state law from preemptive effect, and provisions that appeared to assume the existence of robust and independent state regulation of medical practice.[130] Given this statutory context, the Court discerned "no intent to regulate the practice of medicine generally" in the statute.[131]

Before applying the federalism canon, though, Justice Kennedy had already concluded that Ashcroft's interpretation of the CSA received no deference at *Chevron* step zero. This is where institution matching entered the case. The Court reasoned that the Attorney General's statutory authority over the "registration and control" of controlled substances did not allow promulgation of the Interpretive Rule.[132] But, as Justice Scalia argued in dissent, this conclusion could not be inferred from the text of the CSA, which spoke in broad terms of the Attorney General's power to register or delist physicians based on the "public interest," a criterion that Congress had defined explicitly to include "public health and safety."[133] Surely this broad mandate, reasoned Justice Scalia, encompassed the power to decide that physician-assisted suicide was not a legitimate form of medical practice.[134] The government, in Justice Scalia's eyes, had not only made the necessary showing to satisfy *Chevron* step zero, it had found sufficient ambiguity in the statute to secure full-bore *Chevron* deference to its construction of the CSA.[135]

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[128] *Id.* at 274–75.

[129] I bracket here the Court's discussion of *Auer v. Robbins*, 519 U.S. 452, 462–63 (1997), which held that agency constructions of the agency's own ambiguous regulations receive substantial deference. *But see Gonzales*, 546 U.S. at 255–58 (explaining that the Ashcroft Rule "just repeats" or "paraphrase[s]" the statutory text, and therefore did not constitute a clarification of the rule meriting respect).

[130] *Gonzales*, 546 U.S. at 270–71 ("The structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers.").

[131] *Id.* at 270. For commentary emphasizing this strand of *Gonzales v. Oregon* analysis, see Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. CAL. L. REV. 45, 64–66 (2008). Professor Bressman, by contrast, focuses on the promotion of political accountability as the value being promoted in the decision. *See* Lisa Schultz Bressman, *Deference and Democracy*, 75 GEO. WASH. L. REV. 761, 764 (2007) ("In *Gonzales*, the administration had used the CSA to take a position on an issue that the people actively were debating, without involving or ascertaining the views of the public.").

[132] *Gonzales*, 546 U.S. at 259, 268 (quoting 21 U.S.C. § 821 (2006)).

[133] *Id.* at 282–84 (internal quotation marks omitted); *cf.* 21 U.S.C. § 823(f) (2006).

[134] *Gonzales*, 546 U.S. at 288–99 (Scalia, J., dissenting).

[135] *Id.*

Given the force of Justice Scalia's analysis and the relative clarity of the statute, Justice Kennedy could hardly rest his *Chevron* step zero analysis on textual foundations. Instead, he employed an argument that turned on the mismatch between the liberty interests impinged upon by the Ashcroft Rule and the absence of Attorney General responsibility for the governmental justifications for that intrusion.[136]

Two liberty-related concerns suffused the case. First, nearly a decade earlier, the Court had rejected the argument that the Due Process Clause protected an interest in "ending one's life with a physician's assistance."[137] And yet in *Gonzales v. Oregon*, the Court began its opinion by underscoring the "importance of the issue of physician-assisted suicide" in terms of the deeply personal nature of end-of-life decisions.[138] The Court thereby suggested that the fact courts did not directly enforce a liberty interest in end-of-life decisions did not entail the further conclusion that there was no liberty interest implicated by the Ashcroft decision salient to the task of statutory interpretation. Even though the Court previously had been unwilling to defend a liberty interest directly, in *Gonzales v. Oregon* the Court suggested it would account for that interest in the *Chevron* step zero analysis.[139] And given that liberty interest, the Attorney General's sweeping claim of authority was "suspect."[140] Second, the Court observed that accepting an Attorney General power to define legitimate medical practice would mean endowing that official with an "extraordinary authority . . . to criminalize even the actions of registered physicians" based upon such official's subjective judgments about medical science and ethics.[141] Clearly, this too implicated due process interests in the predictability and stability of criminal liability-producing conduct.

The text of the statute, to be sure, could be read to encompass the power to squelch both these liberty interests. But the Court demurred to this broad reading by reasoning that the Attorney General was simply not competent to exercise the kind of medical judgment necessary to make such determinations.[142] At the federal level, it was the Secretary of Health and Human Services, not the Attorney General, who had the necessary expertise

[136] *See Gonzales*, 546 U.S. at 267–68.

[137] Washington v. Glucksberg, 521 U.S. 702, 735 n.24 (1997).

[138] *Gonzales*, 546 U.S. at 249, 267 (citing *Glucksberg*, 521 U.S. at 735).

[139] One way to explain this is by seeing the due process value addressed in *Glucksberg* as "underenforced" for institutional competence reasons. *See* Sager, *supra* note 53, at 1213. Although the Court will not transform the liberty interest into full-bore doctrine, it will more gently promote it through statutory interpretation. The same argument could be made in *Hampton*, where the Court understood itself to be defending a "liberty interest [in] . . . eligibility for [federal] employment." Letter from Justice John Paul Stevens to Justice Potter Stewart, *supra* note 71, at 2.

[140] *Gonzales*, 546 U.S. at 267–69.

[141] *Id.* at 262.

[142] *Id.* at 264–65.

to make to those judgments in a careful and informed fashion.[143] The Attorney General's reliance on Office of Legal Counsel (OLC) support for his position was thus unavailing. The absence of competence on medical matters defeated the Attorney General's claim that liberty was being narrowed for legitimate reasons. Correlatively, had the Secretary instituted the same policy, the Court may well not have invalidated it.

This is *Gonzales v. Oregon* as an exercise in institution matching. Given the difficulty of determining when the Government was justified in expansively criminalizing medical practice or shutting down debate on assisted suicide, the Court opted to look at the institutional locus of the relevant decision. It focused less on the quality of the reasons supplied by the Government and more on the kind of actor engaged in the decision. It used the CSA's text to distinguish sharply between delegations to law enforcement officials and delegations to technocratic medical professionals. Without this institution matching argument, the Court could easily have followed Justice Scalia's lead in reading the CSA to vest broad discretion in the Attorney General and ending its analysis there.

Gonzales v. Oregon is a case in which rights-related concerns impinge on the calculus of delegated statutory authority. But it is not the only case in which the Court has looked askance at agency action out of a concern that putatively technocratic decisions were driven by improper concerns. A year after confronting the Ashcroft Rule, the Court addressed whether the Environmental Protection Agency (EPA) had jurisdiction to regulate vehicular greenhouse gas emissions under the Clean Air Act.[144] In *Massachusetts v. EPA*, the Court rejected the EPA's appeal for *Chevron* deference and its underlying conclusion on the merits that it lacked statutory authority to act against global warming.[145] This conclusion, reasoned the Court with Justice Stevens writing, contradicted the "clear statutory command."[146] As in *Gonzales v. Oregon*, the Court explained that the agency's "laundry list" of reasons for not regulating had "nothing to do with whether greenhouse gas emissions contribute to climate change" and "[s]till less" amounted to "a reasoned justification for declining to form a scientific judgment."[147] The uncoupling of agency expertise from a regulatory decision with high stakes for public health and welfare (if not constitutional rights) raised red flags for the Court. As in *Gonzales v.*

[143] *Id.* at 274 ("[T]he Attorney General is an unlikely recipient of such broad authority, given the Secretary's primacy in shaping medical policy under the CSA, and the statute's otherwise careful allocation of decisionmaking powers."); *see also* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 247 ("Ultimately, what drove the Court's analysis [in *Gonzales*] was the relationship between statutes that share jurisdiction among the various federal and state authorities . . . .").

[144] Massachusetts v. EPA, 549 U.S. 497, 511 (2007).

[145] *Id.* at 532–35.

[146] *Id.* at 533.

[147] *Id.* at 533–34.

Oregon, the Justices consequently declined to apply the traditional canons of deference to "executive positions that they found untrustworthy, in the sense that executive expertise had been subordinated to politics."[148] By sending the agency back to the drawing board in both cases, the Court aimed to induce decisions grounded not on politics but on reasoned expertise.[149] What distinguishes the cases is the different reasons why the Court viewed the agency decision with a gimlet eye.[150] In the assisted-suicide case, the wrong element of the government made the decision. In the climate-change case, the right entity acted, but for the wrong kind of reasons. In both cases, the Court's decision thus turned on the perceived quality of the Executive's decisionmaking (rather than, say, the quality of congressional deliberation on a matter). But the Court used different proxies to conclude that the Executive's reasoning was flawed in the two cases.

C. *Institution Matching in National Security Law*

A third example of institution matching can be drawn from case law generated by challenges to federal responses to the September 11, 2001 terrorism attacks.[151] In post-9/11 jurisprudence, the Court has reacted to aggressive policy innovation in a variety of ways, with postures ranging from sharp skepticism to broad deference. These judicial responses cannot easily be explained by a national security-specific dynamic. Some scholars, for example, have argued that the cases turn on a separation of powers logic, with the Court endorsing policies only when both Congress and the Executive support such policies.[152] But the precedent poorly corresponds to this theory, with some executive initiatives being authorized and some bilaterally endorsed policies being struck down.[153] Rather, national security law is importantly continuous with other areas of law. Relevant here, one commonality between the post-9/11 national security jurisprudence and

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[148] Jody Freeman & Adrian Vermeule, Massachusetts v EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52.

[149] *Id.* at 99–101.

[150] Note that politics does not always take second place to expertise. The Court will alternatively read a statute to exclude a delegation to an agency in cases where the Court believes the determination is better suited to resolution by elected officials. *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("In extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended . . . an implicit delegation [to an agency]."); *cf.* Bressman, *supra* note 131, at 765–67 (emphasizing the virtue of limiting agency action in circumstances of immanent congressional opposition).

[151] *See* Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 225–26 (sketching problems generated by novel security policy responses).

[152] *See* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 5 (2004) ("[C]ourts have developed a process-based, institutionally-oriented (as opposed to rights-oriented) framework for examining the legality of governmental action in extreme security contexts.").

[153] Huq, *supra* note 151, at 254–56 (discussing such precedent, including *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Boumediene v. Bush*, 553 US 723 (2008)).

other domains of law is the institution matching canon, which may provide the best account of why the Court has invalidated some innovative security policies and upheld others.

Consider two opinions in which the Court has turned aside important, innovative post-9/11 government policies. In *Hamdan v. Rumsfeld*, the Court invalidated a system of military commissions established by presidential directive in November 2001.[154] Justice Stevens's majority opinion focused on the statutory, rather than constitutional, terrain of whether the President's November 2001 order complied with the congressional delegation of authority to convene military commissions contained in the Uniform Code of Military Justice (UCMJ).[155] The Court's analysis turned on Article 36(b) of the UCMJ, which demanded that military commission and court-martial procedures "be uniform insofar as practicable."[156] Even though President Bush had made a determination under a separate UCMJ provision that it was impracticable to apply the criminal procedure rules used in Article III courts, the Court found that the military commissions' divergences from court-martial procedures—for example, commission rules allowing for the admission of certain kinds of hearsay and the periodic exclusion of the defendant—failed Article 36(b)'s uniformity command.[157] The Court therefore invalidated the commissions as outside the President's authority.

Hamdan is typically cataloged as a separation of powers decision in which the Court policed the outer boundaries of a congressional authorization.[158] But this account is incomplete. It fails to explain why the Court did not defer to the President's determination that such uniformity was impractical under the circumstances.[159] As Justice Thomas forcefully argued in dissent, the text of Article 36(b) could be read as a broad grant of discretion to the President and not as a limitation on his authority.[160] In the context of military affairs, moreover, it might be thought that an especially

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[154] 548 U.S. 557, 568 (2006) (citing Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001)).

[155] Justice Stevens also concluded that the November 2001 order impermissibly envisaged the charging of offenses that were not cognizable under the law of war, but this portion of his opinion did not obtain the support of a majority of the Court. *Id.* at 595–613 (opinion of Stevens, J.).

[156] *Id.* at 620 (opinion of the Court) (quoting 10 U.S.C. § 836(b) (2006)).

[157] *Id.* at 614–25.

[158] *See, e.g.*, Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After* Hamdan, 16 TRANSNAT'L L. & CONTEMP. PROBS. 933, 953–55, 956–63 (2007).

[159] *See* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1224 (2007) (setting forth argument in favor of deference). The Court's reasoning here was confused. It first stated that it owed "complete deference" to the President's determination. *Hamdan*, 548 U.S. at 623. It then observed that President Bush had made no formal finding of impracticality under Article 36(b) of the UCMJ but rejected the possibility that this would be outcome determinative. *Id.* It then went on to look at the evidence of impracticability—an inquiry that is inconsistent with deference to the President's determination. *Id.* at 624.

[160] *Hamdan*, 548 U.S. at 711–15 (Thomas, J., dissenting).

powerful kind of "*Chevron* plus" deference would extend to presidential readings of ambiguous federal statutes.[161] Compounding the case for deference, *Hamdan* involved a geographic jurisdiction—Guantánamo—to which the Court had not clearly extended individual constitutional entitlements.[162] As in *Gonzales v. Oregon*, the Court was dealing with circumstances in which it was not at all clear in the light of then-prevailing precedent that there were any individual entitlements that could be judicially enforced.[163] Separation of powers explanations for the result in *Hamdan* simply fail to explain the Court's refusal to defer to the President's reading of the law.

At first blush, *Hamdan* seems an unpromising exemplar of institution matching. The November 2001 military commission order was, after all, a product of the White House, signed by the Commander in Chief. What more appropriate institutional actor could there be? Indeed, viewed in this light, *Hamdan* is a remarkable case. It is a case in which the Court set aside a military policy determination reached at the highest level of government, by an actor with a constitutionally committed function in respect to military matters, in the absence of a pellucidly clear statutory direction to the contrary. What demands explanation in *Hamdan* is the Court's surprising decision not to accord with the President's impracticability determination some kind of outcome-determinative deference.

Institution matching here provides an explanation of the Court's action—but only if it is tweaked so as to be employed differently from its applications in the criminal law and administrative law domains. To see this, notice first that the November 2001 military commission order was a product of the White House, and not the Pentagon. Indeed, to the extent that the Defense Department supplied justifications for the military commissions' procedural shortcuts, these explanations might be criticized in retrospect as post hoc, superficial, and unconvincing. That is, the Court may have looked at the President's order on its face and expressly found it to be the product of an institution informed not by "the purpose and the history of military commissions."[164] When the Court examined the

[161] *See, e.g.*, Curtis v. Peters, 107 F. Supp. 2d 1, 6 (D.D.C. 2000) (holding, in the course of a *Chevron* analysis, that "the actions of the Air Force are entitled to even greater deference than are other agency actions").

[162] Posner and Sunstein explain the result in *Hamdan* by "a distinctive kind of nondelegation canon—one that requires Congress to speak clearly if it seeks to allow the executive to depart from the usual methods for conducting criminal trials." Posner & Sunstein, *supra* note 159, at 1224. But this is question-begging. Why was not Article 36(b) a sufficient authorization for such departure for circumstances in which Article III courts were not necessarily available? Congress did speak with some clarity to the question of when military commissions could be used. Something more is needed to explain the result in *Hamdan*—such as the logic of institution matching.

[163] *See* Eric A. Posner, Boumediene *and the Uncertain March of Judicial Cosmopolitanism*, 2007–2008 CATO SUP. CT. REV. 23, 23–25 (2008).

[164] *Hamdan*, 548 U.S. at 624.

presidential order it failed to locate the requisite indicia of expertise. Instead it saw the product of political deliberation not versed in military law.[165] The Court thus ignored the *formalist* indicia of expertise (such as the text of Article II of the Constitution), and engaged in a *functionalist* analysis of how the institution that promulgated the military commission policy developed its position.[166]

There is indirect evidence that it was the felt absence of military expertise in the November 2001 order that made the Court look askance at President Bush's military commissions, notwithstanding the President's constitutionally committed role as Commander in Chief. The substantive portion of Justice Stevens's *Hamdan* opinion is replete with references to the traditional content of military law as exemplified by William Winthrop's landmark treatise.[167] Winthrop, who the Court had previously recognized as the "Blackstone of Military Law,"[168] provided the *Hamdan* Court with a compass to ascertain the contours and demands of military exigency as defined by tradition-ratified military expertise.[169] Absent evidence that the nonmilitary decisionmaker had relied on military law and expertise in determining when to abrogate from a defendant's procedural entitlements in criminal adjudication, the *Hamdan* Court declined to defer even to the President. *Hamdan* thus employs the institution matching canon, but in a way that rests on a more searching and substantive judgment about the question of expertise leveraged by the relevant component of government.[170] In this fashion, it approaches the methodology of *Massachusetts v. EPA*, but still partakes of the component-specific judgment about executive process that informed *Gonzales v. Oregon*.[171] In short, *Hamdan* is an example of institution matching infused with a heavy

[165] Subsequent accounts of the November 2001 order's creation, although not available to the *Hamdan* Court, confirmed that relative absence of military law expertise in the crafting of the commission system. *See* Barton Gellman & Jo Becker, *A Different Understanding With the President*, WASH. POST, June 24, 2007, at A1.

[166] This, however, is consistent with the understanding of *Hampton* offered by Justice Stevens to other Justices in his memos about the case. *See supra* text accompanying note 72.

[167] *See Hamdan*, 548 U.S. at 590–92 (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831–32 (2d ed. 1920)).

[168] Reid v. Covert, 354 U.S. 1, 19 n.38 (1957) (plurality opinion) (internal quotation marks omitted); *see also* JOSHUA E. KASTENBERG, THE BLACKSTONE OF MILITARY LAW: COLONEL WILLIAM WINTHROP (2009).

[169] *See, e.g.*, *Hamdan*, 548 U.S. at 590, 592 n.21, 595, 597–600, 604–05, 607, 624–25; *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (also citing Winthrop).

[170] Note a troubling feature of this logic: It flips the traditional understanding of civilian control of the military by making some civilian decisions contingent on the backing of military experts.

[171] What if the Bush Administration had attempted to integrate military expertise more explicitly and conscientiously into the crafting of military commission policy, and then presented evidence to that effect to the Supreme Court? Notwithstanding the fact that by 2006 the White House was losing political credibility fast, I suspect (but of course cannot prove) this may have had an outcome-dispositive effect on the *Hamdan* litigation.

dose of situation-specific political realism about the particular components of government in question.

The second example of institution matching from the national security context is the Court's decision to grant a petition for certiorari from the Court of Appeals for the D.C. Circuit's 2007 decision to extinguish habeas jurisdiction for detainees held at the Guantánamo Bay Naval Base.[172] The ensuing opinion in *Boumediene v. Bush*, as is well-known, turns on the Suspension Clause of Article I of the Constitution.[173] Because it rests directly on the interpretation of a constitutional provision, *Boumediene* seems an unlikely place to identify the logic of institution matching at work. That canon, after all, operates only in the shadow of direct constitutional enforcement. Institution matching, however, enters the picture in the context of the Court's decision to accept the petition for certiorari from the detainees—a "decision to decide" almost as consequential as the result of the case itself.[174] Initially, the Court declined to hear *Boumediene*, but three months later reversed course and accepted the case for review on the last day of the 2006 Term upon a petition for rehearing.[175] Petitions for rehearing, however, are rarely successful before the Supreme Court.[176] Hence, the *Boumediene* decision rests on a threshold puzzle: Why, perhaps having decided that the stakes of the case were too fraught or constitutionally salient liberty interests not sufficiently imperiled, did the Court decide to hear the case?

Institution matching again provides an answer. As it arrived at the Court, the *Boumediene* case presented the question of how the courts should review individual detention determinations by military bodies called Combatant Status Review Tribunals (CSRTs),[177] described in Chief Justice Roberts's dissent as "the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants."[178] The Court's initial decision to deny certiorari reflects the deference traditionally accorded military decisionmaking, even in cases implicating individual

[172] Boumediene v. Bush, 551 U.S. 1160 (2007) (granting certiorari).

[173] 553 U.S. 723, 771 (2008).

[174] On the importance of the threshold decision as to which cases to hear, see H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 1–21 (1991).

[175] *Compare* 550 U.S. 1328, 1328–29 (2007) (denying petition for certiorari), *with* 551 U.S. at 1160 (2007) (granting petition for certiorari).

[176] *See* EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE 804 (9th ed. 2007) ("A petition for rehearing . . . will not be granted except by a majority of the Court." (quoting SUP. CT. R. 44) (internal quotation marks omitted)). Prior to *Boumediene*, the Court had last granted such a petition in 1956. *See* Reid v. Covert, 352 U.S. 901, 901 (1956) (granting petition for certiorari).

[177] 553 U.S. at 733–34 (describing Defense Department establishment of CSRTs).

[178] *Id.* at 801 (Roberts, C.J., dissenting).

rights.[179] What may have nudged the Court to change course was a perception that the CSRTs were not, in fact, exercises in military decisionmaking, and that the narrowing of procedural entitlements that the *Boumediene* petitioners protested was not underwritten by relevant security-related expertise.

The Court's "lack of faith in CSRTs"[180] may plausibly be traced to a declaration from a senior military lawyer, lodged alongside the petition for rehearing of the denial of certiorari, which suggested the CSRTs were organized to affirm detention decisions but not to yield accurate results.[181] The Court could have reasoned that it was not confronted by an institutional apparatus designed to generate and apply expertise carefully to calibrate deprivations of liberty precisely.[182] The taint of suspicion also leaks into the merits of the *Boumediene* decision, in which the Court underscored the "myriad deficiencies in the CSRTs" as a justification for holding that robust district court factfinding was a necessary supplement to any military process accorded to the Guantánamo detainees.[183]

Neither *Hamdan* nor *Boumediene* precisely tracks the logic of *Hampton*. In both post-9/11 cases, the Executive might have made a plausible case that the component of government charged with a decision (the White House and CSRTs respectively) had the relevant and necessary expertise to decide whether restraints on liberty were in fact justified by pressing policy concerns. Unlike *Hampton*, these cases do not turn on the formal characteristics and legal mandate of the relevant governmental component. Rather, in both cases, extra-record evidence may have suggested to the Court that any expertise putatively held by the governmental component had either been distorted or wholly withheld. No match existed as a result between the institution and the security-policy justifications offered for liberty deprivations. Viewed in this light, *Boumediene* and *Hamdan* exemplify a functionalist rather than a formalist methodology of institution matching. They further suggest that the Court

[179] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986) (denying free exercise claim challenging military dress regulations).

[180] Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantánamo: The* Boumediene *Decision*, 2008 SUP. CT. REV. 1, 43.

[181] *See* Reply to Opposition to Petition for Rehearing at i–viii, Al Odah v. United States, 551 U.S. 1161 (2007) (No. 06-1196) (declaration of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve); *see also* Meltzer, *supra* note 180, at 47–48 (describing declaration); William Glaberson, *In Shift, Justices Agree to Review Detainees' Case*, N.Y. TIMES, June 30, 2007, at A1 (drawing the same inference).

[182] *Accord* Meltzer, *supra* note 180, at 49 ("One interpretation of the *Boumediene* decision is that the Court simply lacked faith that military officials serving on CSRTs possessed the combination of capacity and will needed to make judgments that struck reasonable accommodations between the contending interests at play.").

[183] 553 U.S. at 783. To be precise, the Court here was paraphrasing the petitioners' argument; it went on to accept the basic force of that argument. *Id.* at 785–87.

can demonstrate sensitivity to the occasional availability of particularized information about how government in fact operates.[184] They suggest that information about the actual exercise of expertise can trump formalist considerations grounded in constitutional or statutory text about how such expertise ought, by law, to be cultivated and exercised. And they show how the method by which a canon is operationalized can subtly change over time even as the basic strategy of the Justices persists.

The logic and the results in *Hamdan* and *Boumediene* contrast strikingly with another sequence of post-9/11 cases in which the Court has exercised more circumspection and deference to political branch decisions respecting national security. In this other line of cases, the Court has suggested that security decisions obtain respect when rendered by a properly qualified body and in the absence of disqualifying exogenous data.[185] The first two cases arose in 2008. In *Winter v. NRDC*, the Court vacated a preliminary injunction against the Navy's use of mid-frequency active sonar in training exercises off the southern Californian coast.[186] Drawing an extensive picture of the Navy's efforts to predict risks to aquatic megafauna using sophisticated computer modeling technologies, Chief Justice Roberts's opinion relied on the "complex, subtle, and *professional* decisions" underpinning the Navy's policy to vacate the injunction.[187] In *Munaf v. Geren*, the Court unanimously denied habeas relief to a pair of U.S. citizens detained in Iraq by American forces on the ground that the Executive Branch was better equipped to make decisions about when to cooperate, and when not to cooperate, with an ally in the course of ongoing military operations.[188] The Court emphasized the State Department's examination of conditions in Iraqi prisons, thus matching the liberty deprivation at issue in that case to the putative exercise of institutional expertise by an appropriate component of the federal government.[189]

Finally, in the 2010 case of *Holder v. Humanitarian Law Project* (*HLP*), the Court turned aside First Amendment objections to one of several statutes that criminalize diverse forms of "material support" to terrorism.[190]

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[184] Such information may only rarely be available. *Cf.* Judith Resnick, *Detention, The War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 618 (2010) ("The Guantánamo cases are thus rare instances when participants—prosecutors and lower tier decisionmakers within the CSRT process—broke ranks to report failures in their own work.").

[185] *See* Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008); Munaf v. Geren, 553 U.S. 674 (2008).

[186] 555 U.S. at 12–13.

[187] *Id.* at 24, 33 (emphasis added) (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (internal quotation marks omitted)).

[188] 553 U.S. at 700–01. Full disclosure: I was counsel for the habeas petitioners in this litigation.

[189] *Id.* at 702.

[190] 130 S. Ct. 2705, 2724–30 (2010) (rejecting challenge to applications of 18 U.S.C. § 2339B, one of several material support provisions).

This case turned upon whether "any contribution" to a foreign organization designated as terrorist by the Secretary of State could have the effect of promoting terrorism, even if the contribution could not be employed directly to promote or support violence.[191] To conclude that even innocuous aid could promote terrorism by freeing up an organization's resources and legitimating its goals, the Court relied on a State Department affidavit purporting to embody the "experience and analysis of the U.S. government agencies charged with combating terrorism."[192] Inverting the usually heightened judicial sensitivity to factual questions in the First Amendment context,[193] the Court leaned instead on its "respect" for the predictive judgment of expert officials as justification for its refusal to engage in anything more than minimal scrutiny of either the government's fungibility or legitimacy argument.[194] The result in *HLP* was a peculiar combination of notionally strict First Amendment scrutiny[195] and self-consciously deferential judicial inattention to the fit between a speech restriction and the policy justifications offered to support that narrowing.[196] In lieu of tailored empirical analysis, the *HLP* Court effectively invoked the institution matching canon in favor of the government: because the correct component of the government made the relevant decision (here the State Department[197]), the Court's logic suggested that no further judicial inquiry was needed.[198]

[191] *Id.* at 2724–26.

[192] *Id.* at 2727 (quoting Declaration of Kenneth R. McKune, Assoc. Coordinator for Counterterrorism in the U.S. Dep't of State, Joint Appendix at 133, *HLP*, 130 S. Ct. 2705 (Nos. 08-1498, 09-89), 2009 WL 3877534, at *133.).

[193] *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984).

[194] *HLP*, 130 S. Ct. at 2727.

[195] *Id.* at 2723–24 (rejecting the government's argument that the statute should only "receive intermediate scrutiny" and concluding that a "more rigorous scrutiny" was appropriate).

[196] *Id.* at 2727 ("[W]hen it comes to collecting evidence and drawing factual inferences in [the national security] area, 'the lack of competence on the part of the courts is marked,' and respect for the Government's conclusions is appropriate." (citation omitted) (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981))).

[197] The State Department is tasked by statute with designating "foreign terrorist organizations," which cannot be supported without violating the criminal law. *See* 8 U.S.C. § 1189(a)(1), (d)(4). Under this statute, the State Department is tasked with determining that an entity is foreign, that it engages in "terrorist activity" or "terrorism," and thereby "threatens the security of United States nationals or the national security of the United States." *Id.* Under these circumstances, the Court seems to presume the State Department has special competence respecting the facts underlying a designation.

[198] The deference accorded governmental speech restrictions in *HLP* contrasts with the careful, fact-bound review employed by the Court (again with Chief Justice Roberts writing) in *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011). Contrasting *HLP* with *Snyder* suggests that the specificity of judicial review of facts in First Amendment cases involving the application of strict scrutiny occupies a spectrum. Courts dial deference up or down depending on the government's justification for a decision. Whether it makes sense to maximize deference in national security cases given the historical record of American civil liberties during wartime is a question beyond the scope of this Article. *Cf.* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON

National security is a domain in which factual determinations often appear to be particularly resistant to judicial scrutiny. Such determinations can rest on some combination of classified material and impossible-to-quantify predictive judgment. It should thus be no surprise that the Court's entanglements with diverse post-9/11 issues furnish evidence of the institution matching canon's use both in favor of the government and in favor of litigants challenging government action.

D. *Summary: Institution Matching After Hampton*

This Part has identified three diverse and otherwise unrelated domains in which legal doctrine rests upon an institution matching logic—criminal law, administrative law, and the post-9/11 jurisprudence of national security. In none of these domains is the underlying liberty interest absolute.[199] The government can surely sometimes extinguish freedom from criminal detention, the freedom to take one's own life, and the freedom from military detention. Standing alone, the liberty interests at stake in some of these cases would not merit judicial protection. But by paying attention to which component within a given branch is responsible for a decision, the Court places a subtle finger on the scale in favor of a liberty or equality interest. The Court ensures that the fit between that an interest's contraction and the justification for such narrowing is reasonably tight without the epistemic heavy lifting that direct inquiry into the government's reasoning may require.

This evidence of institution matching's persistence from diverse areas of the law suggests that *Hampton* is not a dead letter and that the standard account reprised in Part II is incorrect. Consciously or not, the Court across the years has pursued Justice Stevens's doctrinal insight in different guises. The logic of institution matching accordingly warrants more scholarly attention than the relative disregard it has to date received.

IV. EVALUATING THE INSTITUTION MATCHING CANON

Courts have developed a spectrum of doctrinal tests to implement the Constitution's abstract generalities across diverse policy contests and shifting technological and social conditions. Should the institution matching canon figure more prominently in that work, whether in its formalist or its functional guise? This Part addresses that question by analyzing institution matching in federal law.[200]

TERRORISM 530–50 (2004) (summarizing lessons from a study of wartime security panics since the early Republic).

[199] I assume the same analysis would apply to equality interests.

[200] I focus on its application to Executive Branch decisions and bracket questions related to the canon's application to state institutions.

At the outset, I should underscore again the limited ambition of the following prescriptive analysis. My limited goal here is to specify, I hope with some degree of precision, the costs and benefits of using institution matching as an instrument of constitutional analysis and a part of the federal judge's toolkit. How the reader weighs those costs and benefits will depend on her normative priors about the appropriate distribution of interpretative authority on constitutional matters between courts and the political branches. There obtains wide disagreement on the latter question. I make no claim here to settle that disagreement. Given the existence of profound normative disagreements on basic questions about what federal courts can and should do in respect to constitutional enforcement, I believe instead that the most useful approach for an analyst of a specific doctrinal tool is to describe accurately and comprehensively how that instrument is used and what its effects will be so that readers can reach their own judgments. That is what I have aimed to do, however poorly and incompletely, in this Part.

To clarify the canon's costs and benefits, I develop two analytic perspectives: a static and a dynamic one.[201] The static analysis treats institution matching as a discrete judicial intervention and then investigates its positive and negative consequences. The dynamic perspective widens the time horizon of analysis. It considers the potential for sequential interactions among the multiple participants in the federal political system (Congress, the Executive, and the courts), all of whom might exercise rational foresight to anticipate the responses of other political interactions.[202] The dynamic perspective thereby accounts for the possibility that "political environments . . . impose systematic constraints" on embedded actors.[203] It also forces attention to potential policy effects that are only visible with the passage of time, such as positive feedback loops and the gradual entrenchment of institutional design decisions against amendment.[204] I

[201] *Cf.* Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL'Y REV. 245, 250 (2010) (drawing a distinction between the two kinds of analysis).

[202] *See, e.g.*, KENNETH A. SHEPSLE, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 159–70 (2d ed. 2010) (introducing concepts of rational foresight and strategic anticipation); Rui J. P. de Figueiredo, Jr., Tonja Jacobi & Barry R. Weingast, *The New Separation-of-Powers Approach to American Politics*, *in* THE OXFORD HANDBOOK OF POLITICAL ECONOMY 199 (Barry R. Weingast & Donald A. Wittman eds., 2006) (exploring spatial models of interbranch interactions); *cf.* JON ELSTER, EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES 327–29 (2007) (explaining the utility of dynamic modes of analysis); DAVID M. KREPS, GAME THEORY AND ECONOMIC MODELING 41–44 (1990) (same).

[203] de Figueiredo, Jr. et al., *supra* note 202, at 200. For example, Congress anticipates the possibility of presidential vetoes and legislates strategically to mitigate the risk. SHEPSLE, *supra* note 202, at 167–69.

[204] *See* PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 44–48 (2004) (explaining the effects of sequencing and inertia on political institution design).

consider seriatim costs and benefits in both a static and a dynamic perspective.

Both static and dynamic modes of analysis must attend to the possibility of the different ways in which courts might implement the institution matching canon. In particular, courts might use a formalist analysis of the kind used in *Hampton*, which turns solely on the statutory mandate and similar formal characteristics of the agency. Alternatively, courts could deploy the more functionalist analysis of *Hamdan* and *Boumediene*, looking beyond categorical labels to determine whether an administrative decision represents the application of actual expertise. The choice between formalist and functionalist implementation of the canon may influence both its pros and cons under either a static or dynamic analysis.

A. Static Analysis of Institution Matching

Institution matching is designed to promote liberty and equality interests by lowering the epistemic burden of judicial review—substituting easy questions for hard ones—thereby expanding the range of constitutional concerns plausibly vindicated by the bench. While there is some evidence that the canon can successfully achieve those ends, there is also some evidence of attendant costs.

From *Hampton*[205] onward, judges have used institution matching as a low-cost heuristic for ascertaining whether the narrowing of liberty or equality interests is truly warranted.[206] To this end, the canon relies on the reasonably plausible assumption that agencies, or other components of government, attend to their primary policy mission, but often are inattentive to other nonmarquee concerns.[207] Given that situation, it is cheaper for courts to focus on, say, the statutory competences of the CSC or the Attorney General than to wade into the murky waters of whether federal employment decisions can figure in national security policy or to resolve definitively the medical ethics of assisted suicide.

Notice, however, that the gain from this epistemic substitution is offset as courts move from the parsimonious formalist version of the canon employed in *Gonzales v. Oregon* to the empirically more latitudinarian functionalist version used in *Hamdan*. The functionalist iteration of institution matching therefore might be better justified on the basis of

[205] Hampton v. Mow Sun Wong, 426 U.S. 88, 115–16 (1976).

[206] *See supra* Part III (supplying evidence for this claim).

[207] J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2220 (2005) ("Agencies frequently resolve . . . conflicts by prioritizing their primary mission and letting their secondary obligations fall by the wayside."); *see also* Eric Biber, *Too Many Things To Do: How To Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 9–13 (2009) (explaining that agencies burdened with multiple tasks tend to focus on measurable objectives and goals that are consistent with the internal culture's priorities).

somewhat different assumptions. It allows courts to take account of the pervasive uncertainty about both constitutional rules and the effects of policies on the ground by use of "a kind of implicit balancing of interests."[208] In this way, the functionalist version of institution matching enables judges to engage in a probabilistic weighing of the best available evidence for whether a liberty or equality interest has been needlessly narrowed. It also permits judges to calibrate their responses more finely. In cases such as *Hamdan* and *Boumediene*, for example, where exogenous information suggested that government justificatory claims should be discounted, the functional version of institution matching provided a vehicle for the expression of judicial skepticism without the strong medicine of irredeemable invalidation. The functionalist variant may be especially attractive in national security cases, where evidentiary barriers are especially high and the political costs of direct enforcement potentially prohibitive.[209] In these circumstances, it is especially plausible to think that judicial inquiry into whether an agency has exercised expertise *at all* is less costly than judicial inquiry into whether the agency has exercised expertise *correctly*. Moreover, it mitigates the risk of the Executive employing formal, legal mandates as cover for rights-infringing actions.

Both functionalist and formalist versions of institution matching force recourse to more tailored institutional vehicles. Decisions about medical matters must go through the Secretary of Health and Human Services, for example, while decisions with diplomatic repercussions must be handled by the Secretary of State. All else being equal, the judicial demand for such specificity via the institution matching canon imposes a costly friction upon rulemaking efforts.[210] The channeling effect of institution matching reduces the range of available institutional avenues for implementing a policy that will survive judicial challenge. It thus has a deregulatory edge because political actors have less leeway to distribute labor between government components in ways that account for the changing workload of government. This narrowing of institutional design options increases the risk of bottlenecks. To the extent that the agencies with expertise are independent of presidential control, the use of institution matching may also result in policy differences between the White House and agency heads delaying or even precluding rules' promulgation.

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[208] Stephenson, *supra* note 51, at 5.

[209] *Korematsu v. United States*, 323 U.S. 214 (1944), is a notorious example of how direct enforcement of a constitutional norm can fail when political actors leverage federal courts' epistemic and political constraints. *See, e.g.*, Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 294. That *Korematsu* has become an aversive precedent in the constitutional law canon is no recompense for those harmed by the policy it endorsed.

[210] *See* Stephenson, *supra* note 51, at 11 ("[J]udicial doctrines can raise the costs to legislators of enacting a given policy . . . ." (footnote omitted)).

Hence, both direct and indirect forms of institution matching operate as a sort of "resistance norm" that increases the price of political action close to the constitutional line without wholly precluding such action.[211] By placing the burden on the political branches to internalize higher enactment costs in constitutionally troubling circumstances, the canon pushes political actors to take constitutional values seriously. In this way, it resembles the enactment-cost explanation for the avoidance canon. But the institution matching canon also mitigates the potential perverse effect of enactment-cost mechanisms—that of ratifying precisely those measures where legislative animus is greatest. By demanding a fit between administrative actor and substantive decision, the institution matching canon does not merely reward raw political effort. It rewards effort of the right kind—i.e., effort supported by expertise. In a similar vein, the canon may also amplify democratic accountability by making it easier for the public to ascribe responsibility for particular decisions to particular governmental components.[212]

If institution matching reduces the cost of judicial review, it means courts can vindicate a broader range of constitutional values that otherwise would go underenforced. The evidence of the canon's success on this metric is somewhat mixed. *Hampton* yielded to reinstallation of an animus-based policy.[213] But *Gonzales v. Oregon* has left in place the state's Death with Dignity Act.[214] The *Apprendi* principle's effect remains controversial given the unusual remedial solution of *Booker*.[215] But *Hamdan* precipitated two major legislative enactments that revived military commissions, albeit with more generous procedural protections.[216] And *Boumediene* was followed by a significant decrease in the number of releases from Guantánamo.[217] Based on this history is not clear that the use of institution matching has always led to a net increase in the achievement of constitutional outcomes. Like

[211] Young, *supra* note 51, at 1552.

[212] *Cf.* Rosberg, *supra* note 12, at 280 (arguing that *Hampton* prevented "Congress and the President [from] hid[ing] behind the Civil Service Commission"). Although common in constitutional reasoning, claims about democratic accountability must be treated with care. They often rest on controversial, but unstated, assumptions about how voters consume information and why they vote. Given these concerns, the point in the text should be taken with appropriate caution.

[213] *See supra* text accompanying notes 75–77.

[214] Gonzales v. Oregon, 546 U.S. 243, 275 (2006).

[215] *Cf.* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1482 (2008) ("[*Booker*] reduc[es] the leverage of federal prosecutors by recharging the sentencing judge . . . .").

[216] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 1801–07, 123 Stat. 2190, 2574–614 (2009); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

[217] Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 402–04 (2010).

other substantive canons, therefore, institution matching appears "never [to be] a complete solution" to the problem of constitutional enforcement.[218]

Yet this somewhat haphazard record may not be a conclusive strike against the canon but rather evidence of the canon's democratic merit. There are many commentators who are suspicious of judicial review on democratic or majoritarian grounds. For them, the institution matching canon may be an attractive way for courts to promote constitutional values without wholly "degenerat[ing]" into democracy-displacing direct enforcement.[219] The canon thus draws attention to potential constitutional questions without taking matters wholly out of democratically accountable hands. It may furthermore have the salutary effect of pushing decisions into the hands of higher profile decisionmakers, whether directly elected officials or the head of departments or agencies.[220] The resulting transparency and publicity further conduce to more "accountable and considered decision making" and constitutionally inflected outcomes free of countermajoritarian taint.[221] That the canon in practice does not always result in the supposedly constitutionally favored outcome is then evidence that it is working with, and not against, the democratic process. Of course, what some style as a benefit, others will condemn as needless constraints on the judicial promotion of constitutional norms. Like other "weak" forms of judicial review,[222] institution matching can plausibly be condemned as inadequate precisely because it allows political actors to revive constitutionally problematic rules, as indeed occurred in *Hampton* and perhaps *Hamdan*.

Moreover, if courts use the canon without regard to the probability of political-branch reversal, there is the risk that institution matching can have the "affirmatively perverse" effect of inducing political actors to reject constitutional concerns about which they would otherwise have remained ambiguous or uncertain.[223] As in *Hampton* and *Hamdan*, a court's application of the canon can have the unintended consequence of inducing a policy's ratification by more powerful actors (e.g., Congress or the President), thereby entrenching a dubious choice that judges had otherwise sought to discourage. Even if the court can then invalidate the newly enacted policy, its doing so may well demand more political capital than a threshold invalidation would have done. Alternatively, it may be that the

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[218] Freeman & Vermeule, *supra* note 148, at 98–99.

[219] Tushnet, *supra* note 9, at 2792.

[220] In this regard, institution matching may be like the modification of *Chevron* proposed in David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 234–36 (urging *Chevron* deference only when "statutory delegatees" make a decision).

[221] *Id.* at 236.

[222] For an introduction to weak-form review, see MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 24–33 (2008).

[223] Freeman & Vermeule, *supra* note 148, at 100–01.

exercise of a weak form of judicial review will make an issue salient to interest groups who otherwise would not have mobilized around an issue.[224] For example, the *Hampton* decision may have lead to an increase in publicity about and awareness of the question whether noncitizens should be employed by the federal government. The result of more aggressive interest group mobilization precipitated by the employment of institution matching may be less, and not more, enforcement of a constitutional law. In the long term, there is accordingly a risk that application of the institution matching canon might (depending on the path of politics) lead to more and not fewer violations of the Constitution.

On the other hand, opponents of judicial review will be concerned about the opposite risk. The institution matching canon can be deployed strategically even when judges know that reenactment of the measure is unlikely given the current distribution of political forces.[225] On this account, it provides a mere façade to obscure the exercise of judicial fiat, a form of direct constitutional enforcement for which courts do not take full accountability. This may be especially troubling in cases such as *Hampton* and *Gonzales v. Oregon*, where there is no precedent that supplies a reason to think that an independently protected liberty or equality interest is at stake. In such cases, institution matching seems to enable a "judge-made penumbra" around constitutional rules that blocks political action that should properly be permitted.[226] Further, the canon vests judges with large discretion about when and how to reject democratically selected outcomes. It is by now well-established that judges' votes are at least in part correlated to their apparent substantive policy preferences.[227] Judges wishing to infuse decisions with their own policy preferences can play fast and loose in their characterization of institutions, thereby shifting effective power from the political branches to the federal courts, while at the same time introducing costly new uncertainty into the legal regime.

The formalist and functionalist versions of institution matching present this risk to different degrees. A formalist inquiry is both less costly and

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[224] On this point, I am indebted to Saul Levmore's insightful paper on the interaction between interest group dynamics and incrementalist policy change, even though Levmore focuses on slightly different mechanisms. *See* Saul Levmore, *Interest Groups and the Problem with Incrementalism*, 158 U. PA. L. REV. 815, 817 (2010) (noting that "[t]he conventional view of incrementalism pays little attention to interest groups" and beginning to remedy the gap).

[225] Freeman & Vermeule, *supra* note 148, at 99 (noting that the Court may be "implicitly betting" on certain agency responses); Tushnet, *supra* note 9, at 2794–95 (criticizing "provisional review" as in *Hampton* on these grounds); *accord* de Figueiredo, Jr. et al., *supra* note 202, at 200 (modeling backward induction by judges in response to legislative circumstances).

[226] Posner, *supra* note 55, at 816. *But see* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 469 (1989) ("Judge Posner's [penumbra] objection becomes less forceful . . . in light of the fact that constitutional norms are often underenforced.").

[227] *See* Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 844 (2008) (concluding that "judicial policy preferences are only part of the picture" and noting the influence of other factors on judicial behavior).

more predictable than a functionalist variant. The former may be vulnerable to Executive Branch manipulation of mandates and labels, but the latter creates a greater risk of courts reaching judgment based on freewheeling assessments of the open-ended question whether an agency has in fact used expertise. Using a functionalist rationale, courts could easily invoke different, and plausibly conflicting, values as a basis for preferring one agency over another. For example, it is possible that agencies' decisions are disproportionately influenced by private actors, such as regulated industries.[228] Arguably, a functionalist variant on institution matching should not only account for distortions in executive branch reasoning due to endogenous political influences, but also due to exogenous agency capture. But to take on that role, courts would have to embark on the onerous, and perhaps impossible, task of defining the appropriate level of private influence on a given agency. In light of these complications, it is possible to imagine that institution matching, rather than reducing the agency costs of executive action, would instead become a new source of judicial agency costs.[229] At the very least, it would be a new source of uncertainty and instability for agencies, which would have no reliable way to forecast whether their actions would be deemed consistent with the canon.[230]

One final problem with institution matching warrants attention here. The analytic force of that tool withers as the structure of the Executive Branch becomes increasingly centralized. Recent political and legal trends conduce to a vertical drift of decisional authority from agencies upward to the White House. Faced with divided government, recent administrations have shifted more effective authority into the President's direct control, which as a result has "expanded dramatically" since 1992.[231] While courts can still distinguish presidential decisions from those of expert agencies—as the Court seems to have done in *Hamdan*[232]—this is more politically costly and less analytically tractable than distinguishing between different agencies. Claims that the White House already possesses a reserve of substantive expertise muddy the analysis even further.[233] Compounding these political trends is the Supreme Court's apparent return to the "unitary" Executive as a ground of decision. In 2010, the Court invalidated provisions

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[228] *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1285 (2006) ("[E]xplanations [of agency capture] look to how agencies cooperate with interest groups in order to procure needed information, political support, and guidance; the more one-sided that information, support, and guidance, the more likely that agencies will act favorably toward the dominant interest group."); *accord* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 12 (1971).

[229] I am grateful to Jide Nzelibe for pressing this point in correspondence.

[230] Ex ante uncertainty would be heightened if courts employed both formalist and functionalist versions of the canon promiscuously.

[231] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001).

[232] Hamdan v. Rumsfeld, 548 U.S. 557, 590 (2006).

[233] Kagan, *supra* note 231, at 2352–53.

of the 2002 Sarbanes–Oxley Act on the theory that the President lacked "full control" of regulatory entities created by that statute.[234] Perseverance in this Article II logic may further push effective authority upward within the Executive, concentrating power in the White House and rendering institution matching less relevant. This dynamic may be especially pronounced if there is no other agency empowered to take the decision in question. Consider, for example, the facts in *Hampton*. Only the CSC appeared to have the necessary breadth of authority to set personnel policy for the federal government as a whole. Neither the Department of Defense nor the National Security Council has any such authority. As a result, the practical effect of the *Hampton* decision was to push the challenged decision upward in the vertical hierarchy of the Executive Branch.

To reiterate, the net positive or negative effect of the considerations canvassed here is likely a function of the analyst's views about appropriate levels of judicial review, the extent of current judicial underenforcement of constitutional norms, and the agency costs attendant to judicial discretion. Provisionally, and bracketing arguments for an absolute rejection of judicial review for constitutional concerns, it might be thought that both skeptics and supporters of judicial review would identify at least some circumstances in which institution matching is warranted and more desirable than the status quo judicial methodology. Each camp, however, may wish to see the canon deployed under different circumstances and to distinct ends.

B. Dynamic Analysis of Institution Matching

Judicial doctrine—the distillation and generalization of judges' behavior across diverse cases—"shapes policy outcomes" because Congress, the White House, and the agencies must all account for the possibility that their decisions will be delayed, modified, or derailed by the courts.[235] As a consequence, it is likely that political actors will anticipate courts' responses to policy choices and modify their own decisions in light of their predictions of what courts will do. But courts are also not final movers in the production of policy outcomes. The institution matching canon in particular almost invites political actors to take a second cut at a policy problem using different instruments. As the aftermaths of *Hampton* and *Hamdan* show, Congress and the Executive each hold in reserve some authority to unspool judicial decisions.[236] In consequence, judges must

[234] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3154 (2010). For a critique of the Court's reasoning in this case, see Aziz Z. Huq, *Removal as a Political Question*, 62 STAN. L. REV. (forthcoming 2013) (on file with author).

[235] de Figueiredo, Jr. et al., *supra* note 202, at 208.

[236] William N. Eskridge, Jr., *Overruling Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 344 (1991) (cataloguing overrides); Pablo T. Spiller & Emerson H. Tiller, *Invitations To Override: Congressional Reversals of Supreme Court Decisions*, 16 INT'L REV. L. &

either be strategic actors themselves or resign themselves to irrelevance even when constitutional concerns are at stake.[237] Policy outcomes, in short, must be understood as the products of strategic and iterative interactions of multiple political actors through time. From this perspective, static analyses must be complemented with a dynamic view of the canon's effect in political time. This dynamic perspective reveals new costs and benefits.

Attention to the institution matching canon in a dynamic perspective suggests two potential sequences of play with very different outcomes—one likely desirable and the other probably troubling. Consider first the affirmative story. This turns on the possibility that the canon will induce virtuous feedback mechanisms within agencies. As political scientists have long recognized, bureaucracies are "adaptive" institutions that respond to changing policy environments, including incremental and temporally dispersed judicial action.[238] A positive account of the dynamic effects of institution matching would posit that agencies whose decisions are negated on institution matching grounds find such reversals costly and embarrassing. They therefore seek to avoid such reversals in the future by acquiring both expertise on a matter and a congressional imprimatur upon that expertise. Information and the expertise to use it are exogenous and costly to acquire to begin with.[239] Agencies do not engage in such investments absent incentives to do so. Institution matching provides such incentives,[240] and may prompt agencies to seek out expertise proactively.[241] Once garlanded with expertise, agencies have an incentive to protect their turf by updating their information investments and by resisting political interference.[242]

But this story may be too optimistic. Instead of positive adaption, the political branches may respond strategically to the courts' use of institution matching in ways that dampen, mitigate, or circumvent the doctrine's purposes. There are three mechanisms through which such negative

ECON. 503, 505 (1996) (describing most common conditions precedent for congressional overrides of Supreme Court decisions).

[237] LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 23 (1998) ("[M]ost justices, in most cases, pursue policy; that is, they want to move the substantive content of law as close as possible to their preferred position.").

[238] *See* B. Dan Wood & Richard W. Waterman, *The Dynamics of Political-Bureaucratic Adaptation*, 37 AM. J. POL. SCI. 497, 500, 524 (1993).

[239] Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1426–38 (2011); *accord* Gersen, *supra* note 143, at 212.

[240] Gersen, *supra* note 143, at 213.

[241] *Id.* at 213–14; *see also* ROBERT JERVIS, SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 153–54 (1997) (characterizing competition as a potential source of positive feedback).

[242] If Congress decides to insulate the agency from political control, this may also have costs because it makes agencies more durable and less amenable to presidential influence, thereby increasing the risk of policy sclerosis. *See* David E. Lewis, *The Adverse Consequences of the Politics of Agency Design for Presidential Management in the United States: The Relative Durability of Insulated Agencies*, 34 BRIT. J. POL. SCI. 377, 377 (2004).

feedback loops might work. First, the political branches over time can try to appoint judges less inclined to promote constitutional values. The effectiveness of this response, of course, depends on the rate of turnover on the bench. Increasing longevity over the past century perhaps makes it an unreliable path.[243] Second, political actors might choose obduracy as a response to institution matching so as to pressure courts into abandoning the tactic. That is, the political branches may respond to the institution matching canon as they did in *Hampton*—by having a different institution take the disputed decision without any meaningful supplemental gathering of evidence or any change in the normative bases for a decision.[244] Judicial competence limitations may, as in the case of the alienage bar on federal employment, leave the relevant constitutional rule underenforced. Anticipating this sequence of events, rational judges would refrain from using institution matching, which merely delays an inevitable settlement of the law without tangible gains in constitutional compliance.[245] On this account, the aftermath of *Hampton* can be explained as a political branch effort to dissuade the federal courts from meaningfully developing the institution matching canon. The canon, in other words, may have a built-in self-defeating logic[246] in the absence of judicial mechanisms to counter political branch manipulation.[247]

A third long-term response to the institution matching canon may be congressional or presidential reorganization of the Executive Branch in ways that shield decisions behind formally expertise-rich but functionally ad hoc or empty institutional structures. Both Congress and the White House exercise some influence over agency design.[248] Rather than

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[243] For a more general and empirical picture of recent and long-term trends in judicial review, *see* Aziz. Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579 (2012).

[244] *See supra* text accompanying notes 75–77.

[245] *See* de Figueiredo, Jr. et al., *supra* note 202, at 208. This assumes, however, that judges have perfect information about the preferences of other branches. *See* KREPS, *supra* note 202, at 82.

[246] This argument is similar to the argument developed by Adrian Vermeule against the judicial use of legislative history. Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 151–52 (2001) (describing legislative and litigation cycles related to the use of legislative history).

[247] Kathryn Watts has argued that courts can account for political considerations in the course of "arbitrary and capricious" review under the Administrative Procedure Act. *See* Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 8 (2009) ("[W]hat count as 'valid' reasons under arbitrary and capricious review should be expanded to include certain political influences from the President, other executive officials, and members of Congress, so long as the political influences are openly and transparently disclosed in the agency's rulemaking record."). It is not clear that this proposal translates into the institution matching context, where courts are (presumably) trying to distinguish valid, policy-based reasons for restricting a liberty or equality interest from political ones. I leave for another day the hard question of how to distinguish policy from political grounds.

[248] *See* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997, at 21–38 (2003) (describing interaction of Congress and the presidency in matters of institutional design); William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1096–1101 (2004) (same);

responding to the institution matching canon by deepening agencies' expertise and expanding their formal mandates, Congress and the White House could respond with circumvention and evasion. Institution matching, as a result, might accelerate the aforementioned trends toward presidential administration and "unitary" executive structure by creating an incentive for presidents to substitute their own unilateral action for that of agencies.[249] Or formal agency mandates could be crafted with an eye to their use in litigation rather than as accurate reflections of the actual operation of bureaucracies. A collateral cost of this strategy would sound in democratic accountability, which would diminish as publically available signals about agency competencies and responsibilities peeled away from their de facto operation. Further, and even absent congressional action, presidents could frustrate the canon's goals by expanding direct control over agencies through appointments, direct instructions, or informal directives.[250]

The Executive may also respond to the prospect of judicial switching from a formalist approach to a functional analysis by seeking to constrain the flow of exogenous information available to courts. For example, an administration that viewed the results in *Hamdan* and *Boumediene* as major defeats might forestall future setbacks by ratcheting up penalties on the unauthorized disclosure of information that, while posing no risk to national security, contradicts governmental claims to efficiency, expertise, or competence.[251] To be sure, such responses are predictable even in the absence of judicial use of institution matching. But the canon exacerbates the incentives to render opaque the processes of government from either formal or informal scrutiny. As with the manipulation of formal agency mandates, anticipatory responses to functionalist institution matching have the collateral effect of raising the cost of public superintendence of governmental behavior. In the aggregate, this range of potential responses, both formal and informal, may suggest that the dynamic effects of institution matching may render the canon ineffectual as a tool for promoting constitutional values.

Terry M. Moe, *The Positive Theory of Public Bureaucracy*, *in* PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 455, 466–69 (Dennis C. Mueller ed., 1997) (summarizing literature on congressional power to shape agencies).

[249] *See* Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG. 132, 133 (1999) ("[P]residents have always acted unilaterally to make law. . . . [T]heir power to do so has grown over time and become more consequential.").

[250] Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 918 (2008) (describing presidential tools).

[251] Consistent with this thesis, the government has aggressively used the 1917 Espionage Act to prosecute government employees alleged to have shared classified information in ways that are historically atypical. *See* Jane Mayer, *The Secret Sharer*, THE NEW YORKER, May 23, 2011, at 47 (describing prosecution of former National Security Agency employee under the Espionage Act); Charlie Savage, *Soldier Faces 22 New WikiLeaks Charges*, N.Y. TIMES, Mar. 3, 2011, at A6 (describing the prosecution of Pfc. Bradley Manning, the alleged source for WikiLeaks).

The observed sample of institution matching in action does not, to be sure, readily yield examples of these sorts of strategic response. Congress did not respond to *Hampton* by giving the CSC authority over national security matters. Nor did *Gonzales v. Oregon* provoke statutory enlargement of the Attorney General's power to include regulation of the medical profession. This absence of overt manipulation may simply be a function of how rare judicial use of institution matching has been until now. Alternatively, it may be evidence that courts also anticipate the possibility of strategic circumvention, and use the canon sparingly to mitigate that risk.

Even if the political branches respond strategically to judicial institution matching, is the canon necessarily futile? If the invocation of institution matching is parried by cosmetic changes in institutional design, then one option for courts would be the "mixed" strategy of randomizing between a range of responses to agency decisions that approach a constitutional threshold.[252] Judges would resort to institution matching stochastically, for example by pivoting between indirect promotion of constitutional norms and direct enforcement of norms. Alternatively, judges could randomize between different modalities of indirect enforcement, such as institution matching, the avoidance canon, and nondelegation rules. In either case, the absence of a stable and predictable judicial response may mitigate the risk of political branch circumvention by raising the costs of such evasion.

This is not as far-fetched as it sounds. It may indeed describe the current interaction of the courts and the political branches. Notwithstanding the judicial distaste for randomization,[253] the current judicial approach to constitutional problems may indeed be described as a mixed strategy of sorts. From one case to the next, courts move seemingly at random from indirect application of the Constitution via canons to direct, unmediated constitutional rules. Courts also move between different canons without much rhyme or reason. In the almost four decades since *Hampton*, for example, institution matching can be discerned in a seemingly arbitrary set of unconnected cases. But the Court is no more consistent in how it uses other doctrinal devices, such as the avoidance or nondelegation canons.[254] At least at the level of the Supreme Court, this seemingly stochastic pattern cannot wholly be explained by litigant behavior. The Court's discretionary

[252] *See* DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 37 (1994).

[253] Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 7, 28–29 (2009) ("[J]udges almost never overtly randomize their merits decisions, and those who do risk sanctions beyond reversal.").

[254] Consider, for example, the Court's application of a clear statement rule on federalism grounds in cases such as *Gregory v. Ashcroft*, 501 U.S. 452, 467–70 (1991), and *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 539 (1994). The Court never explained why it employed the canon in those cases while directly enforcing federalism in other contemporaneous cases such as *Printz v. United States*, 521 U.S. 898, 932 (1997).

control of the certiorari docket means that the Justices have as much control over the pool of adjudicated disputes as litigants. Casual observation thus suggests that the Court is engaged in some randomization between the Constitution and substantive canons on the one hand, and within the class of different substantive canons on the other hand. Perhaps this approach can be justified on the ground that the Court's approach makes it difficult for political actors to respond strategically to the application of constitutional rules.

In summary, the dynamic analysis of institution matching in an extended timeframe introduces new possibilities to the analysis. It is hard to know ex ante whether persistent use of the canon would induce positive or negative feedback effects. The path of judicial–political branch interactions may depend on the quality of interbranch relations at the time the canon is first deployed: do the political branches view the courts as partners in the production of policy outcomes, relying on the bench when direct political action would face insurmountable obstacles in the legislative process or would impose intolerable costs for the dominant political coalition of the moment?[255] Or is the relationship between the bench and the elected branches more adversarial, perhaps as a result of slippages over time between changing preferences of the bench and those of the dominant national political coalition? The point of departure for institution matching, that is, may be dispositive of its trajectory.[256] On this view, the absence of overt precedential fruit from the seed planted by Justice Stevens in 1976 may be less a function of poor doctrinal design and more the effect of the happenstance that the Court in the late 1970s remained at odds with then-dominant political coalitions.

V. CONCLUSION

The institution matching canon has been a persistent, but underappreciated, feature of American public law since at least the *Hampton* decision in 1976. It tests the justifications for government abrogation of a liberty or equality interest by asking whether the policy was "adopted for an appropriate reason by an appropriate decision maker."[257] While *Hampton* yielded no immediate progeny in the U.S. Reports, this Article has documented the persistence of institution matching's basic logic through to the present day: the judicial search for a fit between the policy justifications invoked to curtail a liberty or equality interest and the institutional competences of the relevant component within a branch tasked with that decision. That logic can be discerned in recent criminal law,

[255] *See* Huq, *supra* note 243, at 597–603 (compiling evidence of political branch delegation to the Judiciary of policy ends that could be accomplished at lower cost by the courts).

[256] *Cf.* PIERSON, *supra* note 204, at 44 (stressing how, in the development of political institutions, "early parts of a sequence matter much more than later parts").

[257] Letter from Justice John Paul Stevens to Justice Potter Stewart, *supra* note 71, at 1.

administrative law, and national security law contexts. Rather than a legal Lohengrin, institution matching may be the most important substantive canon that most scholars and commentators have never heard about. And rather than a dead letter, Justice Stevens's first opinions for the Supreme Court should be recognized for their surprising and enduring generative effects in public law.

This is not to say that the institution matching canon is an unalloyed boon to the project of judicial enforcement of constitutional rights, or that judges should rush now to embrace it. Whether the evaluative focus is narrow and case-specific, or broad and encompassing of sequential political action across time, it is clear that the institution matching canon has distinctive pros and cons. Assessment of the institution matching canon, as with many substantive canons, in part depends on the reader's independent and prior judgments about the appropriate degree of judicial enforcement of constitutional rules (should we all be Thayerians?), assessments of current judicial behavior (are the courts today replete with activists or pushovers?), and the substantive scope of constitutional liberty and equality entitlements (is there anything left to the right to die after *Washington v. Glucksberg*?[258]). Moreover, a judgment on the institution matching canon will also turn on empirical questions about the relative degree of agency slack within agencies and courts. I expect no settlement of the stormy normative and empirical controversies around these matters.

Without essaying the Sisyphean task of reaching such settlement, I have aimed here at offering a more tentative conclusion: Institution matching has been part of the judicial toolkit for some time now. Courts employ it to implement constitutional norms against a background of complex empirical uncertainty and strategic political action. There is little evidence (yet) that it fosters unacceptably high agency costs by allowing judges to make freewheeling policy judgments about executive action. For those who endorse a judicial role in constitutional enforcement, therefore, the canon has attractive qualities that render it a superior instrument to more familiar canons and presumptions of statutory construction at least some of the time. To that end, it is past time to restore Justice Stevens's opinion in *Hampton* to its proper place in the canon of pathmarking constitutional interpretation decisions.

[258] 521 U.S. 702 (1997).

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