ESSAYS

SELECTION EFFECTS IN CONSTITUTIONAL LAW

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The literature on constitutional design focuses on the incentives that shape the behavior of government officials and other constitutional actors. Incentive-based accounts justify elections as a means of constraining officials to promote the public welfare, or at least the welfare of the median voter, justify the separation of powers as a means of making "ambition . . . counteract ambition,"[1] justify negative liberties, such as free speech and free association, as necessary correctives to the incentives of incumbent officials to suppress political opposition, and so forth.

In this experimental Essay I will sketch a different way of looking at constitutional design: through the lens of *selection effects*. Constitutional rules, on this account, should focus not only on the creation of optimal incentives for those who happen to occupy official posts at any given time, but also on the question of which (potential) officials are selected to occupy those posts over time. Where an incentive analysis is short-term and static, asking only how legal rules affect the behavior of a given set of officeholders, a selection analysis is long-term and dynamic, asking how legal rules themselves produce feedback effects that, over time, bring new types of government officials into power.[2]

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[1] The Federalist No. 51, at 290 (James Madison) (Clinton Rossiter ed., 2d prtg. 1999).

[2] The problem of "selection effects" I discuss here should not be confused with the problem of selection effects in statistical inference. In law, a famous example involves

This turn to selection-based analysis yields fresh insight into the dynamics of constitutionalism. Because constitutional rules affect the pool of potential and actual officeholders, as well as the behavior of current officeholders, focusing on selection effects shows that some constitutional rules prove *self-stabilizing*: the rules tend to select a corps of officeholders who will act to uphold and stabilize the rules themselves. Other constitutional rules, by contrast, prove *self-negating*: the rules tend to select a corps of officeholders who work to undermine or destabilize the rules themselves. This framework supplies insights into diverse areas of constitutional law and theory, ranging from governmental structure, campaign finance, and voting rights to criminal sentencing, free speech, and affirmative action.

Although selection analysis is not wholly absent from constitutional theory, it is invariably confined to particular debates on particular topics, such as the debate over term limits. My theoretical ambition here is to generalize selection analysis across constitutional contexts. Selection analysis can also illuminate many other areas of law, but I confine the present discussion to constitutional examples.[3]

Part I will offer some examples of selection analysis and develop a taxonomy of selection mechanisms. Parts II and III will turn to the dynamic consequences of selection effects. Part II will examine rules whose selection effects are self-stabilizing, while Part III will examine rules whose selection effects are self-negating. Part IV will sketch the general conditions under which selection analysis proves

changes in the pool of litigated cases that result from settlement decisions. See George L. Priest, The Selection of Disputes for Litigation, 6 J. Legal Stud. 65 (1977).

[3] Many of the basic mechanisms of selection analysis are to be found in one form or another in the theory of employment law, corporate law, and other private-law settings. A standard mode of analysis in private-law settings, for example, is to invoke screening, sanctioning, and other mechanisms that sort or select potential candidates out of some larger pool. In corporate law, an example involves the legal rules that affect the selection and self-selection of corporate officers. See Lucian Arye Bebchuk, Jesse M. Fried, & David I. Walker, Managerial Power and Rent Extraction in the Design of Executive Compensation, 69 U. Chi. L. Rev. 751, 761–83 (2002). There are similar issues relating to the design of regulatory agencies and the selection of bureaucrats. See David E. Lewis, Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946–1997 (2003). For a preliminary application of selection analysis to the bureaucracy, see Adrian Vermeule, Remarks at a Joint Session of the Sections on Legislation and Administrative Law of the Association of American Law Schools (Jan. 3, 2004) (transcript available at http://www.aals.org/am2004/vermeule.pdf).

more useful than the analysis of incentives. A brief conclusion will follow.

I. SELECTION EFFECTS: EXAMPLES AND MECHANISMS

Section A illustrates selection analysis with a range of examples from constitutional law. Section B develops a general taxonomy of selection mechanisms and offers some generalizations about these selection mechanisms at work in the examples.

A. Selection Effects Illustrated

To motivate the later discussion, I begin with some concrete illustrations of selection analysis. The most obvious settings involving elections and term limits come first; less intuitive examples follow.

The common theme in these examples is that exclusively incentive-based arguments either supply an incomplete account of the relevant rules or misfire altogether. It is important to be clear about the limits of this argument. I do not claim that incentives and selection are mutually exclusive, either as strategies of constitutional design or as explanatory hypotheses. Good constitutional design will inevitably adopt a mix of incentive-based strategies and selection-based strategies for accomplishing the designers' aims, while good social science will employ both incentive analysis and selection analysis as part of a larger explanatory repertoire. My project here, however, is merely to highlight selection-based mechanisms, which are far less familiar to constitutional scholars, and which are, in many settings, more illuminating than incentive-based approaches.

Elections. Rules that directly structure the election of federal officeholders are obvious candidates for selection analysis. A simple criterion for evaluating such rules is whether they produce good officeholders, where "good" is defined according to some background normative theory of official performance. Thus Madison described elections, in part, as filtering devices:[4] elections would

[4] On elections as filters, see Robert Cooter, Who Gets on Top in Democracy? Elections as Filters, 10 Sup. Ct. Econ. Rev. 127, 134–39 (2003).

strain out bad characters and ensure that public-spirited citizens would rise into government.[5]

The point may be simple, but until recently it has been widely ignored in the analysis of electoral systems. The standard account describes elections not as filtering devices but instead as incentive devices. Repeated elections reduce agency slack, or the ability of self-interested officials to divert resources from the public welfare to personal gain, by forcing officeholders to adopt policies that accord with the preferences of electoral majorities, on pain of losing office at the next election.[6] This is an application to elections of David Hume's knavery principle, which holds that "in contriving any system of government, and fixing the several checks and controuls of the constitution, every man ought to be supposed a *knave*, and to have no other end, in all his actions, than private interest."[7] On this view, all potential officeholders are assumed to be nar-

[5] In *The Federalist* No. 57, at 318 (James Madison) (Clinton Rossiter ed., 2d prtg. 1999), Madison wrote:

> The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.

The first part of this passage focuses upon selection, the second upon incentives. In Madison's view, elections could select for public-spirited candidates only in larger rather than smaller republics, because the former would have a greater supply of such candidates, and only if election districts were themselves sufficiently large that it would be too costly for corrupt candidates to corrupt the electorate. See The Federalist No. 10, at 50–51 (James Madison) (Clinton Rossiter ed., 2d prtg. 1999).

[6] The literature pursuing this theme is vast. For an important recent example, see John Ferejohn, Accountability and Authority: Toward a Theory of Political Accountability, *in* Democracy, Accountability and Representation 131, 137–38 (Adam Przeworski et al. eds., 1999).

[7] David Hume, Of the Independency of Parliament, *in* Essays: Moral, Political, and Literary 42, 42 (Eugene F. Miller ed., Liberty*Classics*, 1987) (1777). In Adrian Vermeule, Hume's Second-Best Constitutionalism, 70 U. Chi. L. Rev. 421, 421, 426 (2003), I critique the knavery principle, but also dispute the premise that Hume fully subscribed to it. This is not the standard view, however. For works associating Hume with the knavery principle, see Franklin A. Kalinowski, David Hume on the Philosophic Underpinnings of Interest Group Politics, 25 Polity 355, 360–72 (1993); Lewis A. Kornhauser, Virtue and Self-Interest in the Design of Constitutional Institutions, Theoretical Inquiries in Law, Jan. 2002, at 15, available at http://www.bepress.com/til/default/vol3/iss1/art2/. For other versions of the knavery principle, see Immanuel Kant, Perpetual Peace 18 (U.S. Library Ass'n, Inc. 1932) (1796); 19 John Stuart Mill, Considerations on Representative Government, *in* Collected Works 371, 505 (J. M. Robson ed., Univ. of Toronto Press 1977).

rowly self-interested, and the constitutional problem is to turn self-interest to public advantage by suitable design of the electoral system. The filtering model, by contrast, posits that officials are motivationally heterogeneous. Candidates may have either good (public-spirited) or bad (narrowly self-interested) characters, and the constitutional problem is to design elections so as to enable voters to sort the one from the other.

In the strands of political science most heavily influenced by rational choice theory, the Humean approach is distilled in the median voter model.[8] The simplest versions of the model show, under highly stylized assumptions, that where two self-interested political parties must bid for the electoral support of voters whose preferences are arrayed on a single dimension—say, from the leftmost voter, who prefers big government, to the rightmost voter, who prefers a minimalist libertarian state—the parties will both adopt platforms that maximally satisfy the preferences of the median voter.[9] Politicians here are ciphers, mere stand-ins for party platforms; their personal character is irrelevant.

Many features of ordinary electoral politics, however, cannot be explained by the median voter model in any straightforward way, and are better explained by the filtering account. Voters often devote a great deal of attention to a candidate's character, valuing principle and consistency in public position-taking and private behavior. Conversely, voters condemn waffling or pandering to the interests of electoral majorities. This is inexplicable on the median voter model, in which encouraging candidates to pander to voters is the very point of the electoral exercise.[10] So an account that treats elections as filters for selecting good characters is at least a necessary supplement to incentive-based accounts that treat elections strictly as mechanisms for forcing accountability on uniformly self-interested politicians.

Term Limits. One of the few areas of constitutional law in which selection analysis takes center stage is the debate over legislative

[8] Anthony Downs, An Economic Theory of Democracy 11–14 (1957).

[9] Kenneth A. Shepsle & Mark S. Bonchek, Analyzing Politics: Rationality, Behavior and Institutions 115 (1997).

[10] See James D. Fearon, Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance, *in* Democracy, Accountability and Representation, supra note 6, at 55, 55–56.

term limits, particularly at the federal level. Incentive-based accounts are hardly absent, even here. Consider the argument that term limits will improve deliberation by freeing legislators in their last term from the pressure to gain reelection.[11] The center of gravity in the debate, however, involves arguments over the consequences of term limits for the selection and quality of federal legislators. Proponents of term limits hope that limits will produce a new breed of citizen-legislators less beholden to special interests than the professional legislators who dominate the federal Congress.[12] Opponents of term limits argue, inter alia, that amateur legislators will know less about government policy and will thus lose power to legislative staff and to the permanent executive branch bureaucracy.[13]

Selection analysis reinforces the objections to term limits, although with a different emphasis. Here the crucial idea is that under a range of plausible conditions, term limits will substantially reduce the quality of legislators, where quality is defined as nonideological technical competence and integrity.[14] The basic intuition underpinning the model is simple. Assume that elections serve as filters that screen out low-quality candidates and screen in good ones. Even if the screening power of any particular election is low, the power of *repeated* elections to screen for quality cumulates dramatically; a pool of legislators that undergoes repeated elections will contain few low-quality representatives. Term limits, in contrast, markedly increase the proportion of low-quality representatives in the legislative pool by limiting the number of screening elections that anyone in the legislature has passed through. More work remains to be done. For one thing, the screening effect applies far more strongly to the House of Representatives than to the Senate, because elections are repeated more frequently at shorter intervals in the former body. But this sort of work at least shows

[11] Elizabeth Garrett, Term Limitations and the Myth of the Citizen-Legislator, 81 Cornell L. Rev. 623, 632 n.22 (1996). For an account of term limits focusing on collective-action problems among voters, see Einer Elhauge, Are Term Limits Undemocratic?, 64 U. Chi. L. Rev. 83 (1997).

[12] See Linda Cohen & Matthew Spitzer, Term Limits, 80 Geo. L.J. 477, 479–81 (1992).

[13] Garrett, supra note 11, at 675–82.

[14] See Jeffery J. Mondak, Elections as Filters: Term Limits and the Composition of the U.S. House, 48 Pol. Res. Q. 701, 723–24 (1995).

the ability of rigorous selection analysis to illuminate public law debates.

Official Immunity. Under the quasi-constitutional law of official immunity, particular officeholders enjoy immunity against damages suits brought by citizens whose legal rights have been violated. Generally speaking, the President, legislators, judges, and prosecutors enjoy absolute immunity for conduct within the outer perimeter of their official duties. Subordinate executive officials enjoy only qualified immunity, which applies whenever the official acts in objective good faith—that is, unless the official violated the plaintiff's clearly established rights.[15] Official immunity is often justified by a simple incentive story: "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"[16] The implicit logic here is that the threat of liability imposes expected pecuniary costs in the form of damages and litigation expenses arising from official actions. There is also a nonpecuniary cost: litigation diverts officials from their duties, and if those officials enjoy the duties attached to the office more than participating in litigation, the diversion reduces their nonpecuniary compensation as well. On this picture, immunity supplies an incentive for vigorous activity that existing officials would otherwise fail to supply.

An argument from selection effects complements, and complicates, the incentive-based account. Absent official immunity, the threat of citizen lawsuits might change not only the behavior of existing officials, but also the mix of persons who seek or accept office over time. The United States Supreme Court has assumed that the change would be for the worse, so that the absence of qualified immunity would "deter[] . . . able citizens from acceptance of public office."[17] Here, the Court's logic supposes that the most able candidates for office will anticipate the threat of liability and will, at the margin, substitute to activities with lower expected costs, such as private-sector work. The remaining candidates in the pool will be those whose next-best opportunity in the private sector provides less total compensation than federal office, even given the

[15] Harlow v. Fitzgerald, 457 U.S. 800, 807, 815 (1982).

[16] Id. at 814 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)) (alteration in original).

[17] Id.

additional expected costs of litigation. Those candidates will tend to be less able, all else being equal; that is why their private-sector opportunities are still less attractive than a federal post shadowed by the threat of litigation.

There are many contestable assumptions here about the information and rational expectations of potential candidates for federal office and about the efficiency of the background labor markets that set the value of candidates' next-best opportunities. Even granting all those assumptions, however, it is not clear that the absence of official immunity would, on net, reduce the quality of the pool of candidates for federal offices. An alternative possibility is that the *absence* of immunity would provide a useful screening or sorting mechanism that separates good or public-spirited officials from bad or ill-motivated officials.

The screening story would run like this. Suppose that the pool of candidates for federal offices generally contains two types. A-type candidates are public-spirited, in the sense that they are respectful of citizens' legal rights and have no desire to violate them. B-type candidates are ill-motivated, in the sense that they lack any respect for citizens' legal rights. Each candidate possesses private information, or information known only to the candidate and not to others, about which type she is. In this situation, B-types will claim to be A-types. Doing so is costless, while admitting to the voters or officials who are electing or appointing them that they are B-types would be disqualifying.

Some mechanism is needed to screen or sort good A-types from bad B-types, and liability for official actions can do the trick. The prospect of liability for violating citizens' rights is differentially costly to the two types of candidates: A-types, who know that they will rarely violate rights, will also know that their expected liability costs are very low; B-types will correctly expect that their liability costs will be high. All else being equal, A-types will tend to apply for positions that lack official immunity more than B-types will. To be sure, courts will sometimes err, deciding that even an A-type official has violated rights, or deciding that a B-type official has not. But unless courts are wholly random, the absence of immunity will tend to push A-types towards the office and B-types away from it. Given this, the law should not recognize official immunity; its ab-

sence is a useful screening mechanism for identifying rights-respecting applicants.

Whether this screening argument is persuasive on the merits is irrelevant. The crucial point is that the lens of selection effects brings into focus a theoretically crucial argument against official immunity, an argument that is invisible within the standard analysis of immunity's incentive effects.

The Compensation Clauses. The Compensation Clause of Article III provides that the judges shall, "at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[18] Article II contains a similar, although not strictly parallel, clause: The President "shall, at stated Times, receive for his services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected."[19] The difference here is that the judges' salaries may be increased during their term in office, a term consisting of life tenure, while the President's may not.

The standard account of these clauses points to their effects on the incentives of current officeholders. In Hamilton's words, "a power over a man's subsistence amounts to a power over his will."[20] The Compensation Clauses thus promote executive and judicial independence from legislative bullying. On this account, the Constitutional Convention traded off an increased risk of congressional influence over the judges, through salary increases, to make it possible for Congress to raise judicial salaries during the judges' life terms. To protect the judicial process by barring congressional bribes would have the side effect of barring pay raises during the whole term of a judge's service. The President, unlike the judges, serves only a four-year term. So this side effect is much less important in the presidential setting, and the Article II rules bar presidential salary increases.

To this standard account, however, we may juxtapose a selection effects analysis. In the Article III setting, one idea is that the Clause not only secures judicial independence, but helps to "induce 'learned' men and women 'to quit the lucrative pursuits' of the pri-

[18] U.S. Const. art. III, § 1.

[19] U.S. Const. art. II, § 1, cl. 7.

[20] The Federalist No. 79, at 440 (Alexander Hamilton) (Clinton Rossiter ed., 2d prtg. 1999) (emphasis removed).

vate sector."[21] We may interpret this as a concern about the selection effects of the Compensation Clause. The constitutional rules affect the composition of the pool of lawyers from which candidates for federal judicial service are drawn, because possible candidates know the rules and select in or out of the pool according to the relative costs and benefits of judicial service and private-sector opportunities. The Supreme Court has said that the guarantee against salary reduction "ensures a prospective judge that . . . the compensation of the new post will not diminish."[22] The salary stability provided by the Clause is thus a benefit that, at the margin, encourages high-value lawyers whose compensation is far more variable to forego private-sector opportunities.

A contrary view, however, is that keeping explicit judicial compensation lower than in comparable private-sector opportunities will tend to select for those who enjoy the job for its own sake, rather than instrumentally. The judge who derives satisfaction from performing the job enjoys a stream of nonpecuniary income; lowering pecuniary income tends to select candidates who derive intrinsic satisfaction from the work.[23] And those candidates, so the argument might run, will be better on some normative account of good judging than candidates for whom pecuniary compensation is the most important element of the overall mix. We need not attempt to arbitrate between these competing views here. The important point, to which I return below, is that the Clause's second-order effects on the pool of potential federal judges operate through effects on both pecuniary and nonpecuniary compensation.

The Ascertainment Clause. The Ascertainment Clause is the basic provision for congressional salaries; it provides that "[t]he Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States."[24] Two incentive stories are relevant here. First, as to the source of the payment, many delegates to the Constitu-

[21] United States v. Hatter, 532 U.S. 557, 568 (2001) (quoting 1 James Kent, Commentaries on American Law 294 (Boston, Little, Brown, and Co. 14th ed. 1896)).

[22] United States v. Will, 449 U.S. 200, 221 (1980).

[23] American Bar Association and Federal Bar Association, Federal Judicial Pay Erosion: A Report on the Need for Reform 12 (2001), at http://www.abanet.org/poladv/2001judicialpayreport.html (discussing the "psychic income" of upper level public servants).

[24] U.S. Const. art. I, § 6, cl. 1.

tional Convention hoped that requiring federal legislators to be paid according to federal law and out of federal funds rather than state funds (the practice under the Articles of Confederation) would make them less beholden to state governments.[25] Second, as to the fact of payment, the Convention feared that unpaid legislators would turn to corruption to supplement their incomes. As Story put it, "they might be compelled by their necessities, or tempted by their wants, to yield up their independence, and perhaps their integrity, to the allurements of the corrupt, or the opulent."[26]

The latter account posits a given, preselected group of unpaid legislators and asks how the presence or absence of compensation will affect their behavior. Against this we may juxtapose an account that looks to the selection effects of legislative compensation. On this view, high salaries will attract especially venal candidates to office, plausibly *increasing* rather than decreasing the incidence of corruption. No salaries, or nominal salaries, would instead differentially select for candidates who derive intrinsic satisfaction, and thus a stream of nonpecuniary income, from the position. Such officials will, on this view, outperform officials who hold the job for its accompanying salary. A long tradition, traceable at least to country-party critiques of the English court, condemns the latter sort of officeholders as corrupt placemen.[27]

This argument from selection effects, however, is ambiguous in its turn. Supporters of the federal legislative salary argued that providing no salary would not select for candidates motivated by intrinsic enjoyment of the office, but would instead simply select for wealthy candidates, creating a de facto legislative plutocracy. A few opponents of the federal legislative salary accepted this causal account, but claimed that the tendency to select for wealthy legislators would be good rather than bad, at least as to the Senate. As Charles Cotesworth Pinckney argued at the Convention, "[a]s this

[25] 1 The Records of the Federal Convention of 1787, at 215–16 (Max Farrand ed., 1911) ("[Madison] observed that it would be improper to leave the members of the Natl. legislature to be provided for by the State Legisls: because it would create an improper dependence . . . ." (abbreviations in original)).

[26] 2 Joseph Story, Commentaries on the Constitution of the United States § 431, at 304 (Carolina Academic Press 1987) (1833).

[27] Bernard Bailyn, The Ideological Origins of the American Revolution 46–51 (1967).

(the Senatorial) branch was meant to represent the wealth of the Country, it ought to be composed of persons of wealth; and if no allowance was to be made the wealthy alone would undertake the service."[28]

The structure of this debate is parallel to the debate over judicial compensation. In both the judicial and legislative settings, two opposing selection arguments might be advanced. Proponents of high official salaries fear that low compensation will produce a cohort of insufficiently talented and excessively wealthy amateur enthusiasts. Opponents of high official salaries fear that high compensation will produce a cohort of talented but venal opportunists. This debate is partly empirical, asking what exactly the selection effects of various salary levels will be, and partly normative, questioning whether the selection effects produce good or bad officials. For present purposes, however, the debate need not be resolved. The point that matters here is that a selection account reframes the analysis based solely on incentives.

B. Selection Mechanisms: A Taxonomy

In these and other cases, how do legal rules affect the selection of public officeholders and other actors over time? Here I offer a number of conceptual distinctions, in order to develop a taxonomy of selection mechanisms.

Selection of Whom by Whom? Selection-based accounts necessarily suppose that a smaller group is selected, by some agent, from a larger group. Either the selecting agent or the selected group varies across cases. To illustrate variation in the selecting agent, we may consider the standard case in which holders of public office are selected from a pool of candidates. The selecting agent may be another public official or set of officials, as when the President appoints federal judges with Senate consent, or it may be the voters, as in the selection among candidates for the Presidency itself. To illustrate variation in the selected group, we may consider the difference between legal rules that (1) select public officeholders from a pool of candidates or (2) select voters from a pool of citizens. Although the examples in Section I.A all involved the selection of officeholders, we will subsequently extend the analysis to rules that

[28] 1 The Records of the Federal Convention of 1787, supra note 25, at 426.

allocate the voting franchise among citizens, such as state electoral laws and the Voting Rights Act. Although we shall not examine them, other variants exist. For example, legal rules enacted by voters and their official representatives select citizens from the broader pool of residents and select residents from the broader pool of would-be immigrants.

Direct vs. Indirect Selection Effects. Selection effects may operate directly or indirectly. Direct selection effects flow from rules that themselves establish or structure processes for selecting federal officers. Obvious examples in this category include the Qualifications Clauses of Articles I and II, which set age, residency, and citizenship requirements for federal legislative and executive office;[29] the rules in Article II and the Twelfth Amendment for electing Presidents;[30] the Appointments Clause of Article II, which specifies processes for the selection of federal executive and judicial officers;[31] and the term limits rules discussed above. But rules that do not specifically address the selection of officeholders can have important indirect selection effects. Consider the examples of official immunity, the Compensation Clauses, and the Ascertainment Clause, all of which generate indirect selection effects as a consequence of their direct effects on the compensation of officeholders.

Indirect Selection Effects: Three Mechanisms. The incentive accounts sampled in Section I.A share three assumptions that are typical in the literature on constitutional design. (1) The set of officeholders is fixed. Selection takes place offstage, and the only question is to design incentives for given officeholders. (2) All officeholders are rationally self-interested, and thus motivationally homogeneous. (3) The motivations of officeholders are not only homogenous, but wholly exogenous to the selection process; motivations are not affected by the process of selection to office.

I proceed by relaxing each of these assumptions in succession and cumulatively. This procedure generates three different selection mechanisms: changes in the *relative costs* of office holding; *screening* or sorting good types from bad types; and the *causal aftereffects* of selection rules. These mechanisms in turn generate

[29] U.S. Const. art. I, § 2, cl. 2; U.S. Const. art. I, § 3, cl. 3; U.S. Const. art. II, § 1, cl. 5.
[30] U.S. Const. art. II, § 1; U.S. Const. amend. XII.
[31] U.S. Const. art. II, § 2, cl. 2.

new hypotheses or normative accounts in various areas of constitutional design.

1. Relative Costs

Relaxing the first assumption, but retaining the other two, we say that all actors have uniformly self-interested and selection-independent preferences, but that the pool of officeholders changes over time depending on the costs and benefits of holding office. Constitutional rules that structure the incentives of current officers also alter the costs and benefits facing potential or prospective holders of federal offices when deciding whether to pursue or accept an office, or deciding, at an earlier stage, to invest in the necessary qualifications for particular federal offices. Incentive rules governing current officeholders impose costs and benefits upon those whose behavior is shaped by the incentives. Yet those costs also affect the expectations of potential officeholders about the attractiveness of holding a given position, relative to other employment or other courses of action the potential officeholder might pursue. To be clear, the relative-cost mechanism retains the assumption that the pool of potential candidates for office is motivationally homogeneous: every agent attempts to maximize total compensation by choosing the available employment that brings the greatest returns. The distinctive contribution of the relative-cost mechanism is just to drive the analysis back to the earlier point at which rational potential candidates assess the costs and benefits of office holding.

Compensation can take many forms, of which cash salary is only one. A given position may yield a stream of implicit compensation in the form of inherent interest, the opportunity to promote the officeholder's vision of good government, prestige, power, leisure, or any number of other goods. In many cases, the implicit elements of compensation may dwarf the explicit ones; it is unlikely that the pool of candidates for President would be greatly affected, all else being equal, if the presidential salary were cut in half. This is so not because Presidents can borrow against expected future income—a practice that raises many complex legal questions[32] and brings po-

[32] For an overview of relevant law, see Andrew Stark, Conflict of Interest in American Public Life (2000).

litical costs—but because the nominal salary is dominated by the in-kind compensation, in the form of power and prestige, that the office confers.

Constitutional rules that shape the incentives of current officeholders may thus have critical selection effects by affecting either pecuniary or nonpecuniary compensation. Collating this with the earlier distinction between direct and indirect effects yields a four-square taxonomy: constitutional rules may have (1) direct effects on pecuniary compensation, (2) indirect effects on pecuniary compensation, (3) direct effects on nonpecuniary compensation, or (4) indirect effects on nonpecuniary compensation. Case (1) is exemplified by the Article I rule prohibiting federal officers from accepting "emoluments" from foreign states;[33] case (2) is exemplified by the Ascertainment and Compensation Clauses, to which I return below; case (3) is exemplified by the prohibition on federal officers accepting titles of nobility from foreign governments, and the broader prohibition on the issuance on titles of nobility by the federal government (either to officers or citizens); and case (4) is exemplified by the argument, mentioned above, that official immunity indirectly prevents the reduction in nonpecuniary compensations that arises when officeholders are constantly exposed to the threat of lawsuits.

The important point, however, is that in every case it is the net effect of the relevant constitutional rule that matters. Every office carries a mix of pecuniary income or salary and nonpecuniary compensation; by changing the level or character of one or the other of these elements of total compensation, constitutional rules can change the total mix of compensation and thus change the pool of candidates who will find the office more attractive than other opportunities.

2. Screening Mechanisms

Relaxing the first two assumptions, but retaining the third, we stipulate both that the pool of potential officeholders changes over time, and that the pool is motivationally heterogeneous rather than homogeneous. We assume, in other words, that the pool of candidates is composed of two different types, one of which will perform

[33] U.S. Const. art. I, § 9, cl. 8.

better in the office than the other, according to whatever normative theory of government we assume.[34] Candidates know their own types, but this information is private, and cannot be directly observed by the officials who appoint them or by voters who elect them. In these circumstances, bad types will mimic good types, saying all the right things so long as it is costless to do so. The problem then becomes one of sorting good types from apparently identical bad types.

In many circumstances, institutions cope with this problem by adopting screening mechanisms.[35] The core idea is to adopt some prerequisites or conditions for obtaining whatever benefit the institution supplies; the prerequisite must provide differential advantages to good types or impose differential costs upon bad types. Even though the institutional designer cannot directly observe candidates' types, good and bad types will then sort themselves appropriately. At the margin, good types will tend to accept the benefit with the conditions, while bad types will tend to decline the benefit by going elsewhere. The differential benefit thus screens the good from the bad. For a simple example, consider a health insurance company that offers significantly lower benefits in the early period of a contract; this makes the contract less attractive to individuals who suffer preexisting conditions, or who anticipate imminent illness. Those types will tend to select themselves out of the insurance pool, to the benefit of healthy policyholders who

[34] The content of that background theory is irrelevant for current purposes, so I bracket the underlying questions of political theory. Imagine, for simplicity, that candidates for a given office are either public-spirited "good types" or self-interested "bad types," and that the more good types enter government service, the better government performance. The last clause is intended to bracket the complex problems of second-best that arise if, relative to a given normative theory of government, it turns out that a mix of good and bad types would produce worse results than a government composed solely of good types *or* a government composed solely of bad types (with appropriately designed incentive-based institutions attempting to minimize the damage in the latter scenario). See Jon Elster, The Market and the Forum: Three Varieties of Political Theory, *in* Foundations of Social Choice Theory 103, 116 (Jon Elster & Aanund Hylland eds., 1986) (noting arguments that universal selfishness or universal altruism may *both* outperform less-than-universal altruism).

[35] For introductions to the formal theory of screening, see Avinash Dixit & Susan Skeath, Games of Strategy 412 (1999); James D. Morrow, Game Theory for Political Scientists 219–59 (1994). For an important application of screening mechanisms to political institutions, see Geoffrey Brennan & Alan Hamlin, Democratic Devices and Desires 72–76 (2000).

would otherwise pay higher premiums to cover the expenses of the ill.[36] Constitutional designers might adopt similar screening mechanisms that attempt to sort agents with desirable motivations from agents with undesirable ones.

3. Causal Aftereffects

Relaxing all three assumptions, we stipulate that the pool of officeholders changes over time, that officials' motivations are heterogeneous, and that those motivations are at least in part an endogenous product of the selection process. To the extent motivations determine behavior, this means that the selection procedure can itself affect the future behavior of officeholders—not merely ex ante, by altering the relative costs of office holding and thus the ex ante willingness of the marginal candidate to accept office, but also by changing the ex post utility the officeholder derives from being selected or by changing the officeholder's conception of the role she is to fill. The behavior of the current officeholder is shaped, not by the anticipation of rewards and penalties for future action, but by the selection process through which the officeholder previously attained her post.

A prominent example in this category involves "precommitment politics,"[37] or the possibility that candidates for elected office, or nominees for appointed office, will make promises to the electorates, presidents, senators or other actors who have the power to elect, nominate, or confirm them. Presidential candidates promise "no new taxes"; nominees for judgeships commit to respecting *Roe v. Wade* as settled law. The motive for the promise is to gain the post, but the making of the promise can itself affect the behavior of the officeholders who are eventually elected or selected. Once in power, the officeholder may adhere to the promise because it was previously made, even if the officeholder now thinks, or always thought, that the promised policy is a bad one.

[36] Thanks to Ed Iacobucci for this example. For a more complex example, see Geoffrey Brennan, Selection and the Currency of Reward, *in* The Theory of Institutional Design 256 (Robert E. Goodin ed., 1996).

[37] Saul Levmore, Precommitment Politics, 82 Va. L. Rev. 567, 570 (1996). For an overview of conceptual and empirical issues, see Susan C. Stokes, Mandates and Democracy: Neoliberalism by Surprise in Latin America 6 (2001).

This ex post effect of the selection process can arise in two ways. First, the officeholder might foresee a reputational cost to promise-breaking, especially if the officeholder must eventually undergo re-election or renomination, and will thus have to obtain the approval of the same body to which the (broken) promise was initially made. In this case, the causal aftereffect is reducible to an incentive effect—a product of the officeholder's forward-looking concern for reelection. But the reputational cost may be positive even if the officeholder cannot run again—second-term Presidents are said to care deeply about their reputations.[38] Second, and more interestingly, the officeholder might internalize the promise made to gain office; the need to honor her public promises might become a part of her self-conception or her conception of the role she now fills. In that case, the selection process has produced a genuine causal aftereffect, one that is not reducible to an incentive-based account.

Putting aside incentives, we may in some cases parsimoniously attempt to reduce causal aftereffects to some other selection mechanism, either a relative-cost mechanism or a screening mechanism. To a pro-life lawyer, the political necessity to promise to respect *Roe* reduces the expected utility of holding a judgeship, if the lawyer would otherwise hope to use the office to satisfy his ideological agenda, and this induces self-selection away from a judicial career. Likewise, the need to publicly commit to a constitutionally dubious decision might function as a screening mechanism that sorts judicial nominees who respect precedent from those who do not. In other cases, however, the causal aftereffect seems irreducible. In Part III, I suggest that selection of officials on the basis of racial preference—affirmative action—might have important ex post effects on the behavior of officeholders who benefit from preferences, effects that are not reducible to some complex relative-cost account or screening account.

II. SELF-STABILIZING CONSTITUTIONAL RULES

Selection effects drive the dynamics of constitutionalism. Over time, selection effects will produce systemic feedback: rules that affect selection might tend either to stabilize or to destabilize the rules themselves. In the stabilizing case, constitutional rules tend to

[38] Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2335 (2001).

select for officeholders who will respect, enforce, and help to entrench the rules. In the destabilizing case, constitutional rules select for officeholders who work to negate, contract, expand, or otherwise alter the rules.

Part III examines rules whose selection effects destabilize or negate the rules themselves. Here I examine some rules that produce self-stabilizing selection effects. Section A explains the problem of stabilizing constitutional structures, at the macrolevel of the whole constitution and at the microlevel of particular constitutional rules, and in the long run as well as the short run. Section B illustrates with a range of constitutional examples.

A. The Stabilization Problem

An important positive question in comparative politics and constitutional theory is how constitutions become, or fail to become, stable political structures. The bare adoption of a constitution guarantees nothing, and the average life-span of constitutions is quite short—about a generation.[39] There are conceptual problems here: A "constitution" that is extensively amended or reinterpreted can, over time, come to resemble the Ship of Theseus, all of whose planks were replaced one by one. It is not clear that such a constitution is stable in anything other than a nominal sense. Nonetheless, bracketing such problems, an important project is to understand the legal, institutional, and political conditions under which constitutions stabilize or destabilize.

The stability of constitutional rules may be examined at higher or lower levels of generality, and in a shorter or longer time frame. As to the first distinction, constitutional stability may be examined either at the macrolevel of the whole constitution, or at the microlevel of particular provisions. Even where the macrostructure of a constitution is recognizably stable over time, particular provisions may contract, expand, or be reinterpreted under a variety of political and social pressures. The United States Constitution is an example of this phenomenon. Although today's Constitution is a recognizable descendent of the Constitution of the Founding, in the sense that basic features like bicameralism, federalism, and an in-

[39] Giovanni Sartori, Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes 195–97 (1997).

dependently-elected executive are still in place, some provisions have more or less disappeared (for example, the Contracts Clause) while others have assumed ever-larger importance (for example, free speech). Not all of these changes, of course, can be explained by selection effects. Below I indicate some cases in which selection-based explanations seem particularly apt.

As to the second distinction, it is a familiar possibility that constitutional structures or provisions will be stable in the short run but not in the long run. An example discussed in Part III involves the Commerce Clause and the general scope of enumerated federal legislative powers, which expanded far more rapidly in the Constitution's second century than in its first.[40] Less intuitively, structures and provisions can be unstable in the short run but stable in the long run, as I illustrate below with the example of the federal sentencing guidelines.

The general point here is that selection effects have been slighted in the positive analysis of constitutional stability. The leading approach in this literature is to develop game-theoretic models of "self-enforcing constitutions,"[41] in which structures such as representative democracy and judicial review arise from compromises between risk-averse parties or groups who each prefer to lower the stakes of political conflict.[42] This is a strictly incentive-based approach; on this view, "the problem of constitutional stability is in large part one of incentives: do political officials have the appropriate incentives to honor the constitution?"[43] A different starting point is to assume that political officials are an internally heterogeneous and dynamically changing group, subject to the selection effects of constitutional rules, rather than a fixed set of identical actors with identical, self-interested motivations. The selection-based picture seems peculiarly apt where constitutional stability is the

[40] See David P. Currie, The Constitution in the Supreme Court: The Second Century 1888–1986, at 561 (1990).

[41] Barry R. Weingast, Self-Enforcing Constitutions: With an Application to Democratic Stability In America's First Century (Mar. 2003) (unpublished manuscript, available at http://lawweb.usc.edu/cslp/conferences/modeling_const_02/weingast.pdf).

[42] See, e.g., Adam Przeworski, Minimalist conception of democracy: a defense, *in* Democracy's Value 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); Matthew C. Stephenson, "When the Devil Turns . . .": The Political Foundations of Independent Judicial Review, 32 J. Legal Stud. 59 (2003).

[43] See Weingast, supra note 41, at 1–2.

subject, because constitutional designers usually hope that their handiwork will provide a stable political framework not merely for the first generation of officials selected under the new rules, but for succeeding generations as well.

B. Illustrations

I begin with a small-scale case, the constitutional law and public policy surrounding the federal sentencing guidelines, that cleanly illustrates the basic dynamics and the distinction between short-run and long-run effects. The succeeding examples involving voting rights, qualifications for federal office, official compensation, free speech, and campaign finance are progressively more ambitious.

Sentencing Guidelines. In *Mistretta v. United States*,[44] the Supreme Court upheld the federal sentencing guidelines, which dramatically constricted the sentencing discretion of federal district judges. In the short run, the combination of *Mistretta* and the sentencing guidelines seemed an unstable legal regime. Federal district judges fiercely opposed the new rules, and before *Mistretta*, many of them declared the guidelines unconstitutional on separation of powers grounds, only to be reversed on appeal.[45] Even after *Mistretta*, district judges in some circuits steadily worked to expand the range of circumstances in which the guidelines could be overridden.[46] Selection analysis explains the hostility of judges to the guidelines. Although that hostility will or would abate in the long run, if the hostility is sufficiently great there will not be any long run. As I explain below, the guidelines may not survive the transitional period before the long-term selection effects of the guidelines begin to operate.

Before the guidelines, district judges held a largely discretionary authority to sentence convicted defendants. Is the discretionary authority to sentence a benefit or a cost to the judge who possesses it? In the abstract either accounting is possible; some individuals will derive utility from holding discretionary sentencing authority,

[44] 488 U.S. 361 (1989).

[45] See Mark A. Cohen, Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?, 7 J.L. Econ. & Org. 183, 185 (1991).

[46] See Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers, 101 Yale L.J. 1681, 1725–27 (1992).

some will not. In fact, however, a majority of the district judges in office at the time of the *Mistretta* decision believed the guidelines to be unconstitutional,[47] and that fact is easily understood in light of the selection effects of the pre-guidelines regime. After all, the district judges in office before the guidelines had all been selected under the discretionary regime, and for most of those officeholders the power to determine the fate of convicted defendants was an in-kind benefit, certainly a nontrivial element of total compensation.

After the guidelines, however, new candidates for federal district judgeships will tend, at the margins, to self-select away from a judicial career to the extent that the reduction in discretionary sentencing authority reduces their experienced utility from a judicial career. (And current judges may tend, at the margin, to leave the bench for the same reason).[48] All else being equal, self-selected new candidates for the federal district courts will tend to be lawyers who would prefer not to possess the fearsome discretion of the pre-guidelines regime. We might even conceive these new candidates as (relatively) bureaucratic personalities who prefer to be able to disclaim responsibility for sentencing by pointing to the restrictive guideline rules, and who thus derive greater implicit compensation from a judicial career under the guidelines.

This account illustrates the distinction between short-run and long-run effects. The enactment of the guidelines had retroactive effects: Judges who self-selected into a judicial career under the old rules were willy-nilly subjected to the new rules. In the short run, until a new cohort takes the bench, those judges will tend to resist the rules in various ways. As we have seen, federal district judges did so by declaring the guidelines unconstitutional on separation of powers grounds, and by engaging in subtle circumvention. More recently, the Supreme Court has declared the guidelines "advisory" on the ground that binding rules would violate the right to a jury trial.[49] If the guidelines survive (in any meaningful form) until a

[47] See Cohen, supra note 45, at 186–87.

[48] See, e.g., John S. Martin, Jr., Editorial, Let Judges Do Their Jobs, N.Y. Times, June 24, 2003, at A31 (expressing the view of a district judge retiring because of loss of sentencing discretion); see also Richard T. Boylan, Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?, 33 J. Legal Stud. 231, 251 (2004) (finding that sentencing guidelines cause judges to take senior status earlier than they would in the guidelines' absence).

[49] United States v. Booker, 125 S. Ct. 738, 757 (2005).

new cohort of judges comes to dominate the courts, however, the impetus to destabilize the guidelines should abate. Judges selected in the era of the guidelines would tend to account discretionary sentencing authority as a cost rather than a benefit, and would have little reason to attempt to destabilize the sentencing regime. So the guidelines would be stable in the long run, even if highly unstable in the transitional period after their enactment.

Here selection effects produce a combination of instability in the short run and stability in the long run. This implicates a standard problem in the theory of legal transitions: Some desirable states of affairs in the legal system may be inaccessible from the current state of affairs, even if the reforms would prove stable once fully implemented.[50] The problem arises both in society-wide transitions, for example from capitalism to socialism or from command economies to free markets,[51] and in smaller scale transitions within ongoing legal systems. In either case, preexisting officials or interest groups may destabilize and perhaps block the transition itself, even if selection effects would eventually stabilize the new policy or regime, were it ever successfully attained. Stipulating for discussion's sake that the guidelines regime is desirable, the guidelines may eventually come to exemplify this inaccessibility of desirable reform. Although the desirable regime would produce self-stabilizing selection effects could it ever be reached, interim opposition will prevent it from ever being reached. While the early opposition from the district judges failed to extirpate the new regime, the Supreme Court may soon finish the job.

Voting Rights. The guidelines example focuses on appointed offices, but constitutional rules may also stabilize themselves by affecting the composition of the pool of candidates for elected offices. Consider the various constitutional rules that have, at various points in American history, expanded the franchise to new individuals and groups. Examples here are the Fifteenth and Nine-

[50] On the connection between large-scale transitions and the selection of new officials, see Frederick Schauer, Legal Development and the Problem of Systemic Transition, 13 J. Contemp. Legal Issues 261, 271–72 (2003).

[51] For the transition to socialism, see Adam Przeworski, Material interests, class compromise, and the transition to socialism, *in* Analytical Marxism 162 (John Roemer ed., 1986). For the transition to free markets, see Adam Przeworski, Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America 136–87 (1991).

teenth Amendments, and even the Voting Rights Act of 1965,[52] if we accept the widespread view that the Act has some form of quasi-constitutional stature.[53]

A standard view holds that franchise-expanding rules of this sort are extremely stable; once granted, they are almost never revoked. This view must be qualified in light of recent work on the history of American voting rights, showing important contractions of the franchise in the late nineteenth and early twentieth centuries.[54] At a higher level of abstraction, however, it seems clear that liberal democracies have universally pushed towards universal suffrage. In the broad view, any expansion of voting rights tends to show a certain stickiness, creating a ratchet effect over time.

Two selection mechanisms help to explain this effect. First, at the de jure level of formal voting rights, is the effect of selection into the pool of actual voters. The franchise-expanding rule will necessarily tend to increase the fraction of actual voters from the relevant group, and those voters are unlikely ever to vote for a repeal of their own voting rights. Second, at the de facto level of effective voting power, the franchise-expanding rule will tend to increase the election or selection of officials from the newly-enfranchised group, and those officials will resist any repeal or dilution of the electoral clout of the group from which they are drawn. The second effect, however, may be diluted by agency slack between the group and the officials drawn from the group. A legislator elected by and from a minority group might resist a plan to redraw a majority-minority voting district, even if spreading minority voters out over a larger number of districts might maximize the minority's overall influence upon legislators drawn from the majority group.[55]

In these cases the selection effect does not operate by altering the net benefits of office holding, as in the guidelines example. We may stipulate that the total package of explicit and implicit com-

[52] Voting Rights Act of 1965, 42 U.S.C. § 1971 (2000).

[53] See William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1237 (2001).

[54] See, e.g., Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 225–55 (2000). Thanks to Adam Cox and Rick Pildes for emphasizing this qualification.

[55] On the tradeoffs involved in districting, see Heather K. Gerken, Second-Order Diversity, 118 Harv. L. Rev. 1099, 1133 (2005).

pensation for the relevant post remains unchanged. Instead the selection effect alters the prior likelihood that the relevant candidates can attain the posts they seek. The presence of a larger number of voters from the relevant group in the voting pool encourages members of that group to enter the candidate pool.

These selection effects do not guarantee political change. First, within particular groups, a large fraction of those holding the legal right to vote may choose not to exercise it. Second, the relevant constitutional rules may go unenforced in the period before the new cohort of officials has come into office. The history of black voting rights between 1870 (the enactment of the Fifteenth Amendment) and the 1965 Voting Rights Act is a notorious example of the latter possibility, as black voting rights were systematically denied or evaded by white officials in (mostly) southern states.[56] But that is just to say that, as a practical matter, the franchise-expanding rule does not exist until it is genuinely enforced. Once enforcement is real, the rule becomes self-stabilizing as officials from the newly-enfranchised group enter the system. Thus the events of the 1960s, including the Voting Rights Act of 1965, have helped to produce a cohort of black officials in both federal and state governments who vigorously resist any contraction or dilution of black voting rights.

Qualifications for Office. Articles I and II enact mandatory age, citizenship and residence requirements for federal legislative and executive office.[57] It is trivial that those requirements have direct selection effects. A harder question is whether the requirements have indirect selection effects that are either self-stabilizing or self-undermining. The answer likely turns on the way the rules are cast.

For simplicity, consider the age minimums for federal office: twenty-five for the House, thirty for the Senate, thirty-five for the presidency. Any officers selected under these rules will be older than the age minimum and will thus have no interest in destabilizing the rules; to approve a constitutional amendment lowering the

[56] See Keyssar, supra note 54, at 103–16 (describing the effective disenfranchisement of many black southerners between the 1870s and 1960s). For an overview of the Voting Rights Act's large effects on southern politics, see Quiet Revolution in the South (Chandler Davidson & Bernard Grofman eds., 1994); Richard H. Pildes, The Politics of Race: Quiet Revolution in the South, 108 Harv. L. Rev. 1359 (1995) (book review).

[57] See supra notes 29–31 and accompanying text.

age minimums would simply be to expand the pool of potential challengers for those offices. Suppose, however, that the Framers had also included mandatory age maximums for federal office, perhaps on the same theory that drives mandatory retirement ages for various professions. A plausible prediction is that mandatory maximums would prove chronically unstable. As officials acquire more seniority, they will be increasingly threatened by the rules. With an age maximum of seventy, we should be unsurprised to find powerful sixty-nine-year-old legislators working to repeal, alter, or undermine the rule.

A similar analysis suggests that term limits will be subject to constant pressure from senior officials who wish to repeal the limits. So far the empirical evidence is mixed. Although the Federal Constitution contains no legislative term limits, and states are constitutionally barred from adding federal term limits,[58] the House imposed a term limit on committee chairs by intracameral rule in 1995, while the Senate Republican conference adopted an internal equivalent in 1996.[59] The Twenty-Second Amendment, adopted in 1951, imposes a two-term limitation on the presidency.[60] Roosevelt's decision to flout an unwritten norm dating from Washington's presidency made the latter rule necessary. Although the written rule has proved more stable, proposals for its repeal or modification have arisen during or soon after all recent two-term administrations.[61] So too the stability of congressional committee term limits presents a mixed picture. Although the House limits have proved stable enough, senior Republican senators diluted their conference's rule through narrow interpretation just before it threatened to strip them of their preferred committee chairs.[62] It is

[58] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837–38 (1995).

[59] 1 Cong. Q. Press, Guide to Congress 559–61 (5th ed. 2000).

[60] U.S. Const. amend. XXII.

[61] See David E. Kyvig, Explicit and Authentic Acts: Amending the U.S. Constitution, 1776–1995, at 334–35 (1996) (discussing times when repeal was considered and stating that this movement was "renewed momentarily after Richard Nixon's election to a second term in 1972 and Ronald Reagan's in 1984"); David Stout, Assessing Clinton's Aspirations, Again, N.Y. Times, May 30, 2003, at A24 (discussing Clinton's argument that past presidents who have served two terms should be eligible to serve as president again).

[62] Helen Dewar, GOP Senators Opt To Modify Terms For Chairmen: Six-Year Committee Rule Kept, Wash. Post, June 26, 2002, at A23.

too soon to tell whether the internal House or Senate limits will prove stable in the long run.

The Ascertainment Clause (Redux). Let us revisit the constitutional rules governing official salaries. The simplest of those rules, the decision embodied in the Ascertainment Clause to pay federal legislators something rather than nothing, plausibly has self-stabilizing effects. The basic theory of the Clause is that a salary will attract well-qualified and (therefore) well-motivated legislators to office. If the Clause's theory is correct, then the Clause itself represents good policy and will be protected against change by the well-motivated legislators the Clause effectively selects. The converse does not hold, however. The Clause may be self-stabilizing even if guaranteed salaries attract venal candidates to office.[63] In that case the Clause is a bad policy, but nonetheless a self-stabilizing one. Venal legislators will be as assiduous as well-motivated legislators in protecting the Clause from amendment or circumvention, precisely because the Clause is what allows venal legislators to feed at the public trough. The example again emphasizes that either good or bad rules may be self-stabilizing.

Free Speech (and a Free Press). Consider a crude account of the institutional dynamics of constitutional free speech law, particularly the law bearing on the speech rights of the media. With regard to the media, there are restrictive tests for defamation of public officials and public figures, restrictive rules about licensing, censorship, and prior restraints, and the general precept that governmental regulation must be content-neutral. Such an account suggests that the Justices on the Supreme Court are particularly susceptible to informal suasion, flattery, or criticism from media organs with a vested interest in protecting and expanding speech rights. The large institutional media has reported favorably on speech-protective decisions.[64] Justices who attempt to restrict media pre-

[63] Opponents of salaries argued that compensation would attract venal candidates. 2 Story, supra note 26, § 432.

[64] See, e.g., Editorial, A Wise Ruling on Campus Fees, N.Y. Times, Mar. 24, 2000, at A20. For an argument as to why the Justices would protect speech rights, see Mark Tushnet, The Supreme Court and its First Amendment Constituency, 44 Hastings L.J. 881, 888–89 (1993) (arguing that "the respectable media" matters to the Court "because the Justices need media support—or at least need to reduce media opposition—to accomplish their other projects").

rogatives have been condemned as extremist or lawless.[65] Over time, then, the Justices strongly protect media interests.

This account has too many moving parts and contestable assumptions to be plausible on its own terms. "The media" is not a natural kind; it is an internally heterogeneous collection of competing economic structures and interests. The account assumes that the judicial maximand is reputation among the elites who consume the product of the institutional media—merely one possible answer to the notoriously complex question about what judges, or Justices, seek to maximize.[66] Most crucially, the implicit claim here is strictly one about the incentives of sitting Justices, who are assumed to move in the direction of media preferences. An awkward fact for this account is the consistent finding, in empirical political science, that there is a strong correlation between the Justices' ideological values *at the time of nomination* and their subsequent votes in civil liberties cases, including free speech cases.[67] If this is so, then Justices do not seem to move in the direction of media preferences after taking the bench. Nor does it seem plausible to think that the incentive effect operates on lower-court judges, from whose ranks most Justices are now drawn, as lower-court judges do not frequently receive a great deal of public attention.

This critique itself suggests an improved version of the general account, one that sounds in selection rather than incentives. In political science, attitudinal scholarship attempts to gauge Justices' ideology at the time of nomination by the party of the appointing President[68] and, critically, by editorials written at the time of nomination in the major national newspapers,[69] which tend to praise nominees with strong free-speech proclivities. Suppose that those

[65] See, e.g., William Safire, Essay, Free Speech v. Scalia, N.Y. Times, Apr. 29, 1985, at A17.

[66] The best treatments of this are Lawrence Baum, The Puzzle of Judicial Behavior (1997), and Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, 68 U. Cin. L. Rev. 615 (2000).

[67] Jeffrey A. Segal & Albert D. Cover, Ideological Values and the Votes of U.S. Supreme Court Justices, 83 Am. Pol. Sci. Rev. 557 (1989). The standard assumption in the attitudinalist literature is that judicial preferences are stable over the course of the judicial career. For a contrary view, see Lee Epstein et al., Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices, 60 J. Pol. 801, 801 (1998).

[68] See Epstein, supra note 67, at 803.

[69] See Segal & Cover, supra note 67, at 559–61.

proclivities are themselves wholly exogenous, not at all the product of media pressure. Even if they are, to the extent that the anticipated reaction of the press influences presidential selection of Supreme Court nominees—and there is reason to think that the press's influence is very real[70]—then the selection of nominees will be skewed in the direction of nominees who support media free-speech claims. The other weaknesses of the account remain, but the selection lens at least makes the picture of systematic press influence on the Supreme Court seem more plausible than it otherwise would.

Campaign Finance (and Free Speech). Why should federal law regulate campaign finance? Two answers are prominent. In *Buckley v. Valeo*, the Supreme Court held that the primary valid interest underlying campaign-finance laws is the prevention of actual or apparent corruption in the form of quid pro quo exchanges between legislators or candidates, on the one hand, and individuals or interest groups on the other.[71] Any other rationale for regulation, in the Court's view, would unconstitutionally restrict the free speech rights and political rights of association of citizens who expend funds on campaigns and other political activity.[72] Accordingly, the Court upheld federal restrictions on contributions,[73] invalidated restrictions on independent expenditures and self-financing by candidates,[74] and upheld disclosure regulations that require candidates, including incumbents, to make important aspects of their campaign fundraising publicly available.[75]

Buckley's rationale has been widely criticized by republican theorists who argue that equality in the marketplace of ideas, rather than corruption, is or should be the animating principle of campaign finance reform.[76] On this view, the focus on corruption is misplaced. The core evil of unregulated campaign finance is to

[70] For some examples, see William G. Ross, Participation by the Public in the Federal Judicial Selection Process, 43 Vand. L. Rev. 1, 2–24 (1990) (discussing the press's influence on specific judicial nominations).

[71] 424 U.S. 1, 26–27 (1976).

[72] Id. at 12–59.

[73] Id. at 26–27.

[74] Id. at 55.

[75] Id. at 68–74.

[76] See, e.g., Cass R. Sunstein, Free Speech Now, 59 U. Chi. L. Rev. 255, 291–92 (1992).

skew political influence in favor of the wealthy, including corporations. Campaign finance rules should attempt to level the playing field by reducing the role of money in the political process. Although cases after *Buckley* took a more hospitable view of the equality rationale,[77] the Court's recent decision in *McConnell v. FEC*, which upheld the soft-money restrictions and other provisions of the Bipartisan Campaign Finance Reform Act, reaffirmed the basic premises of *Buckley*'s analytic focus on corruption.[78]

Selection analysis supplies a critique of the corruption rationale that is entirely distinct from the republican concern with political equality. The corruption rationale is incentive-based and focuses on policy distortions arising from the behavior of legislators who are influenced by campaign contributions.[79] The basic concern is that, in order to obtain contributions, legislators will truckle to narrowly based interest groups, supporting policies that diverge from their best judgment of the public interest. But the selection lens suggests a simple way to reframe the issue: A principal goal, if not the sole goal, of campaign finance rules should be to maximize the quality of successful candidates and produce good legislators, where good is defined by some background political theory. There are several ways of fleshing out this idea, because quality is not self-defining, but the corruption and equality rationales also need a great deal of further specification to produce concrete conclusions. Promoting quality, rather than equalizing influence in the marketplace of political ideas or dampening corruption, serves as a useful regulative ideal. A variety of political perspectives surely converges to an overlapping consensus on quality, or at least certain qualities, such as integrity and competence.

In some circumstances, the current forms of campaign finance regulation may reduce candidates' quality, however defined. One possibility is that limitations on cash contributions directly to campaigns, or so-called "hard money," have the perverse effect of pro-

[77] See, e.g., Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 659–60 (1990) (emphasizing equality, within an analysis nominally focused on corruption).

[78] See McConnell v. Fed. Election Comm'n, 540 U.S. 93, 143–61 (2003).

[79] For a summary of this argument and criticism of it see David A. Strauss, Corruption, Equality, and Campaign Finance Reform, 94 Colum. L. Rev. 1369, 1372 (1994) (denying that campaign contributions, as opposed to true bribes, really are corrupting in this sense).

tecting incumbents from high-quality challengers whom the electorate might prefer. Challengers who lack name recognition, but who would receive large electoral support, may have a disproportionate need to spend money on advertising and grassroots organization. Hard-money caps may thus confer a differential advantage on incumbents who already possess the visibility of office, and thus reduce the pool of quality candidates from whom the electorate may select.[80] A second possibility is that disclosure regulation is systematically perverse. Here the intuition is that disclosure "may have made it easier for incumbents to deter quality challengers by raising large amounts of easily observable funds."[81] By amassing campaign war chests, incumbents can send a discouraging signal to high-quality challengers—a signal that is publicly verifiable, and thus credible, by virtue of the disclosure regulations themselves.

These claims, if true,[82] suggest that campaign finance regulation may amount to a self-stabilizing regime: The incumbents who enact the campaign finance rules will produce rules that discourage quality challengers, thereby maximizing incumbents' chances of reelection, thereby preventing any beneficial change in the campaign finance rules, and so on ad nauseam.[83] This example also emphasizes that a legal regime whose selection effects are self-stabilizing may entrench a bad equilibrium, in which poor-quality incumbents exclude high-quality competitors; selection effects have no inherent normative valence, and may be either bad or good. Of course many uncertainties remain. It is an obvious challenge for this account to explain why Congress recently enacted a package of campaign finance reforms, although many have suggested that the purpose or effect of the reforms is to further strengthen, rather than

[80] See Bradley A. Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 Yale L.J. 1049, 1073–75 (1996).

[81] See David Epstein & Peter Zemsky, Money Talks: Deterring Quality Challengers in Congressional Elections, 89 Am. Pol. Sci. Rev. 295, 295 (1995).

[82] As against the sources cited above, there is other work finding that the size of incumbents' war chests does not affect the quality of challengers. See Jay Goodliffe, The Effect of War Chests on Challenger Entry in U.S. House Elections, 45 Am. J. Pol. Sci. 830, 830–31 (2001).

[83] See Gary C. Jacobson, The Effects of Campaign Spending in Congressional Elections, 72 Am. Pol. Sci. Rev. 469, 488–89 (1978); Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 Geo. L.J. 491, 522 (1997) (noting that legislators have incentives to pass campaign finance rules that facilitate entrenchment).

dilute, incumbents' advantages. The important point is simply that analyzing campaign finance through a selection lens, rather than an incentive lens, pushes the debate away from *Buckley*'s corruption analysis towards the central issue of legislators' quality.

III. SELF-NEGATING CONSTITUTIONAL RULES

In this Part, I turn to constitutional rules whose selection effects negate or destabilize the rules themselves. Two preliminary points are necessary. First, as before, no normative connotation should be attached to the positive claim that a given constitutional rule has self-negating selection effects. Although this will in some cases be bad, perhaps because the systemic benefits of stability are particularly high in the relevant setting, in other cases destabilizing selection effects will serve valuable functions. If a policy is desirable in the short run but undesirable in the long run, the destabilizing long-run selection effects of the policy may function as a built-in sunset provision or termination mechanism. We will see below that affirmative action is a possible example.

Second, it is a mistake to assume that rules whose selection effects are self-destabilizing necessarily become *narrower* over time, or disappear entirely. An important special case involves rules whose destabilizing selection effects cause a broadening of the rules over time; the Commerce Clause may exemplify this trend, as discussed below. So the criterion for inclusion in this Part is simply that the relevant constitutional rules produce selection effects that destabilize the rules themselves, changing their scope and even content over time.

The Article III Compensation Clause (Redux). Part II suggested that the Ascertainment Clause is a simple example of a self-stabilizing rule. The same cannot be said of the Article III Compensation Clause. That clause is a ratchet-type rule: it authorizes Congress to set judicial salaries, and allows future increases, but forbids Congress to reduce salaries once they are set. Here the dynamic, over time, has been that Congress has continuously failed to provide judicial salary increases sufficient to keep pace with infla-

tion.[84] Two forces drive this dynamic. First, Congress has often linked legislative salaries to judicial salaries, refusing to raise one unless both are raised. The heavy political pressure against legislative salary increases then keeps downward pressure on judicial salaries as well. Second, legislators understand the structure of the Compensation Clause as well as anyone else, and anticipate that any salary increase for the judges will be frozen into place by force of constitutional law. The predictable equilibrium reaction, one the Framers ought themselves to have anticipated but failed to, is that Congress is more reluctant to raise judicial salaries in the first instance.

The result of these political forces is that the Clause has a self-negating effect. As we have seen, a principal theory of the Article III Compensation Clause is that the ratchet-like protection against salary reduction would attract talented judges to office, "induc[ing] 'learned' men and women 'to quit the lucrative pursuits' of the private sector."[85] The guarantee "ensures a prospective judge that . . . the compensation of the new post will not diminish."[86] But the theory is flawed. It fails to take into account that Congress, like prospective judges, can anticipate the effects of the Clause's structure. Legislators who anticipate the ratchet effect of any future increase will award fewer increases. Accordingly, the structure of the Clause has perverse unanticipated consequences, and those consequences undermine or negate the personnel rationale that (in part) justified the Clause's ratchet-like structure in the first place. Because Congress refuses to award judicial salary increases sufficient to keep pace with inflation, real judicial salaries decline, judges leave the

[84] ABA, FBA urge immediate action on judicial pay, ABA Washington Letter (American Bar Association, Washington, D.C.), June 2003, at http://www.abanet.org/poladv/letter/03june/1.html (reporting by ABA President that "over the past 30 years, the purchasing power of judges' salaries declined while the real pay of average American workers increased by 17.5 percent. In comparison to their 1969 salaries, the current salaries of lower court judges declined 23.5 percent in value after being adjusted for inflation. The loss of purchasing power for Supreme Court justices . . . has declined by 37.7 percent").

[85] United States v. Hatter, 532 U.S. 557, 568 (2000) (Scalia, J., concurring) (quoting 1 James Kent, supra note 21, at 295).

[86] United States v. Will, 449 U.S. 200, 221 (1980).

bench,[87] and talented lawyers decline to serve as judges.[88] These effects occur at the margin, but they are hardly marginal; commentators increasingly describe the law of judicial compensation as a system in crisis.[89]

Affirmative Action. The Supreme Court has recently revisited the constitutional law of affirmative action,[90] with the Court's only black Justice, who is a beneficiary of affirmative action,[91] strongly of the view that colorblindness is both constitutionally mandated and morally just.[92] Strikingly, some prominent beneficiaries of affirmative action are strong supporters, while others are vehement opponents. This might just be a feature of the base population, unrelated to beneficiary status. Another possibility, the one I shall attempt to clarify here, is that the fact of being selected for an official post on the basis of affirmative action has causal aftereffects on the attitudes of beneficiaries themselves.

If the dominant effect of affirmative action is to push beneficiaries' attitudes in a favorable direction, the natural hypothesis is that affirmative action tends to stabilize itself over time as officials selected on that basis act to perpetuate the policy. If the dominant effect is to push attitudes in an unfavorable direction, however, the opposite hypothesis suggests itself: the selection effects of affirmative action might make it a self-negating or self-limiting legal policy as officials selected under an affirmative-action policy work to undermine the policy itself. (Of course both mechanisms might operate on different segments of the beneficiary pool; the empirical question would be to find the net effect.) Here I expand upon the

[87] See, e.g., Joe Mandak, More Judges Leaving Bench for Better Pay, Associated Press, Feb. 6, 2004, at http://www.judicialaccountability.org/judgesleavingbench.htm (suggesting through statistics and anecdotes that an increasing number of judges are leaving the bench to go into private practice).

[88] For an argument against the claim that low salaries discourage qualified attorneys from becoming judges, see Michael J. Frank, Judge Not, Lest Yee Be Judged Unworthy of a Pay Raise: An Examination of the Federal Judicial Salary "Crisis," 87 Marq. L. Rev. 55, 56 (2003).

[89] See, e.g., Linda Greenhouse, Pay Erodes, Judges Flee, And Relief Is Not at Hand, N.Y. Times, July 17, 2002, at A14; Mandak, supra note 87.

[90] Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

[91] See Clarence Thomas: 1991–, at http://www.supremecourthistory.org/myweb/justice/thomas.htm (last accessed May 5, 2005) (stating that Justice Thomas was admitted to Yale Law School under an affirmative action plan).

[92] *Grutter*, 539 U.S. at 349–50 (Thomas, J., concurring).

latter hypothesis, not because it is more likely to capture the typical attitude of beneficiaries towards affirmative action, but because it is less intuitive.

Suppose that, as an empirical matter, affirmative action has a stigmatizing effect on its beneficiaries, who experience a cost from others' perception that they lack the professional competence of the marginal nonbenefited candidates they replaced by virtue of race-based preferences.[93] For simplicity, I will refer to a single benefited group, although the analysis generalizes fully to the more realistic case in which multiple racial, ethnic, and social groups interact. Suppose also that the beneficiaries attempt to cancel or nullify the stigma by opposing affirmative action. Given these two assumptions, legislative or executive decisions to pursue affirmative action in selecting officials will ultimately have self-negating effects. Affirmative action will tend to promote a cohort of new beneficiaries to important official posts, but that cohort will, in the next generation, react against affirmative action and work to undermine it through constitutional and political change. In terms of the mechanisms described in Part I, this is an example of the causal after-effects of a selection process: the fact of having been selected under an affirmative action regime changes the attitudes of the program's beneficiaries, in this case by causing them to oppose affirmative action itself.

This account requires adequate microfoundations in the behavior of beneficiaries. For one thing, how might opposition to affirmative action help beneficiaries to dispel the associated stigma? After all, even if affirmative action is abolished in the next generation, members of the first cohort of beneficiaries will not be able to shed their own status. Several conditions, however, might make

[93] See *Grutter*, 539 U.S. at 373 (Thomas, J., concurring) ("Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination 'engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race.'" (alteration in original)) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring)). Clearly there are empirical controversies here, on which I express no opinion; my point is simply to illustrate one possible selection mechanism. For a more extended treatment of the social-science issues surrounding stigma and affirmative action, and a claim that Justice Thomas's empirical assertion is ungrounded, see R.A. Lenhardt, Understanding the Mark: Race, Stigma, and Equality in Context, 79 N.Y.U. L. Rev. 803, 814, 902–16 (2004).

this a sensible course of action for beneficiaries. First, the relevant consumers, audiences, or other groups who stigmatize beneficiaries may be imperfectly informed, or even rationally ignorant, about the temporal extension of affirmative action policies. If those policies are abolished at some later time, then the first cohort of beneficiaries may hope to be mistaken for later arrivals, from the same group, who did not benefit from preferences. Second, suppose that the stigmatic effect of affirmative action is overinclusive, because it operates at the level of groups rather than individuals. Suppose, in other words, that affirmative action stigmatizes group members who would have attained the relevant offices or successes even without preferences. Group members who fall in this special subset of beneficiaries may strive to signal their special position, and opposition to affirmative action might constitute a signal of that sort. Finally, beneficiaries might simply act irrationally; they might behave as though stigma is a form of "moral taint"[94] that vigorous opposition to racial preferences can dilute or wash away.

Ultimately, the key questions are empirical, not methodological. It is clear that some beneficiaries of affirmative action share Justice Thomas's view of its effects, while other beneficiaries see affirmative action as a socially justified or even morally compelled policy, Colin Powell being one example.[95] The difficult empirical question is to determine how many beneficiaries fall in each camp, and to sketch the conditions under which beneficiaries might adopt one view or the other. If most of the beneficiary cohort eventually adopts Justice Thomas's view, affirmative action policies will tend to undermine or destabilize themselves in the long term.

Paradoxically, the possible self-negating selection effects of affirmative action might be beneficial in the long run even if affirmative action policies are themselves beneficial in the short run. Affirmative action is typically justified as a temporally-limited policy—a transitional expedient designed to promote equality of opportunity, in the long run, by means of race-based inequality of

[94] A similar phenomenon can be observed in the idea that "people may be stigmatized for their unintended association with evil." Anthony Appiah, Racism and Moral Pollution, *in* Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics 219, 221 (Larry May & Stacey Hoffman eds., 1991).

[95] Derrick Z. Jackson, Cheney's Grand Moment of Moderation, Boston Globe, Aug. 27, 2004, at A23 (discussing Colin Powell's support for affirmative action).

opportunity in the short run.[96] Justice Blackmun suggested that "[i]n order to get beyond racism, we must first take account of race."[97] One of the Court's recent decisions also suggests that affirmative action should terminate, or "sunset," within another generation.[98] From this standpoint, the possibility that affirmative action has self-stabilizing selection effects would be cause for concern. If affirmative-action beneficiaries who attain government office perpetuate like benefits for favored groups, affirmative action policies may become permanently entrenched or persist too long. If, on the other hand, affirmative action has self-negating selection effects that cause it to terminate after a generation or two, then the policy has an internal regulator, a built-in sunset mechanism, that might prevent unjustified extensions. Here again, however, selection effects are normatively ambiguous. The other possibility is that self-negating selection effects might cause affirmative action policies to terminate too soon, before the opportunity-creating effects of affirmative action policies have been attained.

These questions cannot be resolved in the abstract, and the empirical work that would resolve them does not yet exist.[99] Much more would have to be known about the views of affirmative-action beneficiaries in general, about the crucial subset of beneficiaries that become government officials, and about the temporal framework of their careers, among other questions. This does not mean, however, that the selection-based analysis is futile. Perhaps these questions are underexplored in the social sciences, at least in any fashion that is useful for constitutional lawyers, in part because the constitutional analysis has not yet focused on them. As in other examples, the value of selection-based analysis is that it provides a range of new hypotheses and questions.

Commerce and Enumeration. In principle, a constitutional rule might produce self-negating selection effects that either contract the scope of the rule or expand it. On the account of affirmative action we have just surveyed, the effect is contraction: an initial constitutional rule permitting affirmative action might produce a cadre

[96] *Grutter*, 539 U.S. at 342–43.

[97] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

[98] *Grutter*, 539 U.S. at 342–43.

[99] For references to the current literature, see Lenhardt, supra note 93, at 878–85.

of elite beneficiaries who work to restrict the constitutionally permissible scope of affirmative action. Here I offer a speculative account of the commerce power, and more generally the enumerated powers of the federal legislature, in which the effect goes in the opposite direction. The basic idea here is that selection effects might reinforce, or accelerate, the expansion of the federal government's constitutional powers, and in this sense undermine or negate the original constitutional structure.

The background here is an implausible story about incentives. A rhetorical trope of federalist theory is the idea that "Congress" seeks to "aggrandize itself" at the expense of the states, swallowing ever-larger increments of power by pressing outwards the boundaries of its enumerated powers with the acquiescence of compliant courts. But, as the scare quotes indicate, the story anthropomorphizes a collective institution. "Congress" cannot benefit from the increasing scope of enumerated powers, because Congress is merely an institutional label for a set of individuals who act through elaborate internal rules of procedure. Any account that posits a systematic tendency of Congress to attempt to expand its enumerated powers, over time, must be supplied with microfoundations in the behavior of the individuals who occupy the institution at different times.[100]

Selection analysis can fill in the critical gaps in the story of federal legislative aggrandizement. The key mechanism here involves changes, over time, in the benefits and costs of holding federal legislative office. I will not pretend to offer an historical account, but merely a stylized sketch to generate a hypothesis. Suppose that just after the founding era, federal legislative service was seen as less prestigious than service in state government, in part because the powers of the federal government were far narrower than they are today. This state of affairs would produce self-stabilizing selection effects: holding other factors constant, federal legislative service would tend to attract legislators for whom substantive authority over policy questions was not a large element of implicit compensation.

[100] See Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 Harv. L. Rev. 915, 920 (2005).

Now suppose that some exogenous shock destabilizes the system, producing a broad consensus that the scope of congressional power must be increased to cope with new political, economic, or social problems. Perhaps the need for internal improvements, or the Civil War, or the growth of interstate railroads, produces a critical mass of states and individuals willing to turn to federal legislation for collective solutions.[101] Service in Congress would then have become relatively more attractive for legislators who derive implicit compensation in the form of enjoyment from participating in or determining large questions of national policy. Once in place, such legislators might be expected to press the boundaries of the enumerated powers in new, more expansive directions. The point here is not, as in the aggrandizement story, that the new legislators desire to maximize the power of Congress as an institution. They strictly desire to maximize their own power, from which they derive implicit compensation. Maximizing legislators' own power, however, requires maximizing the power of Congress, because an individual federal legislator holds power strictly in proportion to her fractional share in the power of Congress as an institution.

This extremely speculative story is only partially sketched. Testing it further would require specification, as well as a great deal of careful historical work; the key question would be whether the historical break-points indicated above have indeed been associated with changes, over time, in the composition of the federal legislative corps, including the legislators' socioeconomic and professional backgrounds. Here, too, the cash value of selection analysis is to suggest new empirical hypotheses, ones that an exclusive focus on incentive-based accounts would obscure.

Tolerating the Intolerant (Political Association for Illiberal Ends). A final example is the broadest so far. Here the possibility is that, under certain (possibly rare) political and social circumstances, the whole complex of constitutional rules that require *toleration of the intolerant* might have self-negating selection effects.

Roughly speaking, rules that require toleration of the intolerant are constitutional rules that require liberal democratic govern-

[101] Cf. William H. Riker, The Senate and American Federalism, 49 Am. Pol. Sci. Rev. 452, 469 (1955) ("[B]y 1911, the state legislatures had lost all touch with national policy . . . [and] had been increasingly confined to the particular problems of their states.").

ments to extend rights of political speech and association and participation, including voting, to illiberal individuals or groups whose professed ideals reject toleration. Such groups would deny to other groups the very speech rights, and political rights, that the illiberal groups enjoy. Toleration of the intolerant is conventionally justified by a skeptical account of the incentives and motivations of the government officials who hold power in a liberal democratic regime. Those officials will tend, the story runs, to appease majority coalitions in the electorate by suppressing the speech of unpopular groups whose speech may make a valuable contribution to the marketplace of political ideas, even or especially if that speech is false or objectionable.

From the selection standpoint, however, this incentive-based justification for tolerating the intolerant is fatally static. The incentive-based justification overlooks a dynamic concern: tolerating the intolerant will bring to power officials, eventually including appointed judges, who will act intolerantly. In its most extreme version, the concern is that liberal democracy, with unrestricted rights of speech and democratic participation for illiberal groups, may prove self-negating or self-undermining. Illiberal groups will use elections to seize control of the state and then entrench their intolerant policies, permanently revoking the speech rights, and democratic franchise, of the supporters of the former liberal regime.

The concern is a real one. Important cases of illiberal groups who have pursued this aim by seizing power through elections and using it for illiberal or undemocratic ends have been: various Marxist, communist, and socialist parties committed to the abolition of bourgeois democracy; fascist groups committed to the same aim, although for nationalist rather than egalitarian reasons; and, especially, religious extremists who aim to abolish liberal democracy in favor of some particular brand of theocracy.[102] Indeed, a useful generalization from comparative politics is that the trend in the twentieth century was for illiberal groups to eschew violent revolution, in favor of an indirect strategy of undermining liberal democracy through the exercise of liberal democratic rights.[103] An am-

[102] For a discussion of political extremism, see Political Extremism and Rationality xi–xxi (Albert Breton et al. eds., 2002).

[103] Juan J. Linz, The Breakdown of Democratic Regimes: Crisis, Breakdown, & Reequilibration 15 (1978).

biguous case is Hitler's seizure of power after the Nazi Party's successes in the elections of 1933;[104] clearer, and more recent, cases involve theocratic Islamist parties in Algeria and other nations.[105]

The most stringent conceptions of free speech accept this dynamic possibility with equanimity, or at least resignation. As Justice Holmes put it, "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[106] There is a paradox implicit in Holmes's remark, however. A commitment to liberal democracy in the long run will short-circuit if it permits illiberal and antidemocratic forces to seize power at some particular time.

On a different conception of free speech, therefore, the commitment to sustaining liberal democracy over time is taken to trump the commitment to respecting the liberal rights of illiberal groups at any particular time. Although Holmes's position suggests that "the First Amendment . . . places out of bounds any law that attempts to freeze public debate at a particular moment in time,"[107] the competing conception holds that public debate may legitimately be frozen, by coercive laws, on the question of the desirability of liberal democracy itself. Governments may structure the political process to exclude groups, movements, and parties who will not credibly commit to playing by the rules of the democratic game, not only in the current period, but in future periods as well.

The latter position, rather than Holmes's pose of utter self-abnegation, has prevailed in almost all liberal democracies. Established democracies typically proscribe or prohibit antidemocratic parties, although the mechanics and scope of these proscriptions vary. The German Basic Law provides that "[p]arties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger

[104] Id. at 105 n.6.

[105] Luisa Giuriato & Maria Cristina Molinari, Rationally Violent Tactics: Evidence from Modern Islamic Fundamentalism, *in* Political Extremism and Rationality, supra note 102, at 183.

[106] Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

[107] Geoffrey R. Stone, Reflections on the First Amendment: The Evolution of the American Jurisprudence of Free Expression, 131 Proc. Am. Phil. Soc'y 251, 253 (1987).

the existence of the Federal Republic of Germany, shall be unconstitutional."[108] In other nations, constitutional provisions or statutes may vaguely commit all parties to "respect" for democracy, such as France and Portugal, or may proscribe particular parties with historical resonance, such as the Italian Fascists.[109] In the German case a party may suffer proscription merely for advocating totalitarianism, while under current American law the government must prove advocacy that is likely to incite or produce "imminent lawless action."[110] Whatever its normative merits as an aspirational ideal, however, the current test does not reflect the historical scope of American law, which has permitted proscription of antidemocratic parties ranging from former Confederate rebels to twentieth-century communists.[111]

The hard questions surrounding such laws are not ones of political theory, but rather of political strategy and tactics. Proscription of antidemocratic parties is a legal strategy whose consequences are unclear, and perhaps self-defeating or perverse. Two classes of mechanisms might operate in such situations, with opposing effects. The intent of proscription laws is to raise the cost of operating outside the liberal democratic framework, the expectation being that antidemocratic parties will moderate their positions and acquiesce in the system. The contrary possibility, however, is that the proscription itself will increase the violent tendencies of antidemocratic parties. One mechanism involves group polarization: if proscription laws force radicals to associate solely with other radicals, extremist individuals may push each other to become yet more extreme.[112] But even if individuals' views remain constant, there is also a noteworthy argument from selection effects: proscription laws may deter only the least radical individuals from joining antidemocratic parties, thus ensuring that proscribed parties are composed solely of individuals with the most radical dispo-

[108] John E. Finn, Electoral Regimes and the Proscription of Anti-democratic Parties, *in* The Democratic Experience and Political Violence 51, 71 (David C. Rapoport & Leonard Weinberg eds., 2001).

[109] Id. at 71–73.

[110] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[111] See U.S. Const. amend. XIV, § 3; Smith Act of 1940, 18 U.S.C. § 2385 (2000).

[112] Cass R. Sunstein, Deliberative Trouble? Why Groups Go To Extremes, 110 Yale L.J. 71, 74–75 (2000).

sitions.[113] In that case, proscription may reduce the membership of extremist parties, but increase the average radicalism of the remaining members, plausibly making the party more committed to illiberal or antidemocratic ideas than it was initially.

If the latter set of effects dominate, proscription laws may exacerbate the problem they are intended to solve. A better strategy for law, in this scenario, would be to allow even openly antidemocratic parties to compete for political power in the hope of coopting them through the political process itself. If no antidemocratic party can win an outright majority, or in a first-past-the-post electoral system, an outright plurality, then the need to form alliances with democratic parties may force adoption of more moderate positions.[114] Comparative political history suggests that twentieth-century communist parties in Europe and Scandinavia were often co-opted, and moderated, by electoral alliances with social democrats and other nonrevolutionary parties of the left.[115]

It is hard to say anything very general about such questions because the effects of the opposing mechanisms depend largely on local political institutions. It is clear, however, that incentive-based arguments cannot even identify the right questions, let alone answer them. Both the concern that official toleration for the intolerant may bring intolerant officials into power, and the idea that proscription laws radicalize opposition groups by excluding the least radical individuals, are selection arguments that focus on the composition of the pool of political actors, rather than the incentives of political actors already on the stage. Here, as elsewhere, selection analysis is a crucial analytic tool for identifying the dynamic effects of constitutional regimes. Incentive arguments are too static to supply a complete analytic framework.

IV. SELECTION AND INCENTIVES REVISITED

My claim has been a modest one. Incentive-based analysis is not somehow bad, or intrinsically flawed, or useless. But it is incom-

[113] Cf. Russell Hardin, The Crippled Epistemology of Extremism, *in* Political Extremism and Rationality, supra note 102, at 3, 10 (arguing that, "[i]n normal politics it is the extremists who depart and the less intense who remain behind").

[114] See, e.g., Adam Przeworski, Capitalism and social democracy 35–38 (1985).

[115] Id. at 23–42.

plete. Legal rules not only structure the incentives of a given set of government officials, but also affect the selection, over time, of the individuals who will occupy official posts. In some settings, for some purposes, selection analysis usefully supplements incentive analysis, either by supplying new arguments for a given constitutional rule, or even by suggesting a different conclusion altogether. The most general point is that selection analysis is a critical tool for examining the dynamic effects of constitutional rules over time. As a first approximation, selection analysis becomes more useful as we become more interested in the long-run effects of constitutional rules, as the pool of potential candidates for government office becomes more heterogeneous, and as constitutional rules affect the explicit or implicit compensation, or net costs and benefits, of office holding. I take up these ideas in turn.

Long-term versus Short-term Analysis. Constitutional analysis may legitimately concern itself with shorter or longer time periods. At one extreme, the analyst might examine a very small temporal slice of the legal system. A great deal of conventional constitutional scholarship falls into this category: the analyst asks how the current Supreme Court is likely to decide a case on the current Term's docket, in light of the Court's institutional incentives, or how the current political branches are likely to react to the Court's decisions, given the incentives structuring political behavior. Here incentive-based analysis dominates, only because the time scale of the analysis deliberately assumes away the dynamic feedback effects of constitutional rules on the selection, over time, of the legislative, executive, and judicial officials themselves.

This methodological procedure of focusing on a short time-slice is unobjectionable. There is nothing wrong with holding constant long-term dynamic effects in order to examine narrow problems. But constitutional analysts are also interested in the long run, and selection analysis is more powerful than incentive analysis over large time scales. An example, discussed above, involves game-theoretic analysis of the conditions under which constitutions can become self-enforcing.[116] This analysis is important but also incomplete, because the focus on the incentives of political officials overlooks the feedback effects of constitutional structures on the iden-

[116] See Weingast, supra note 41 and accompanying text.

tity of the very officials at issue. Quite plausibly the key strategy for creating a self-enforcing constitution is not, or not solely, to design appropriate incentives for whatever officials happen to hold power, but to choose self-stabilizing selection rules that bring to power officials who will tend to respect the constitutional rules previously laid down. No incentive-based analysis can adequately address that dimension of the constitutional designers' task.

Heterogeneous Candidate Pools. As we have seen, incentive analysis assumes that officials are motivationally homogeneous. On this view, constitutional rules must necessarily focus on providing the right incentives for current officeholders, because the alternative of attempting to pick well-motivated officials is simply not available; officials and potential officials are uniformly assumed to be self-interested. The most distinctive versions of selection analysis, by contrast, proceed on the assumption that potential officeholders are motivationally heterogeneous.[117] The candidate pool contains both good types and bad types, both well-motivated candidates and ill-motivated ones. Where types can be directly discerned, constitutional rules should attempt to do so. Where they cannot be directly discerned, screening and sanctioning devices may indirectly accomplish the same end by creating differential incentives that encourage good types to sort themselves into official careers.

Effects on Official Compensation. Incentive analysis is most likely to go astray when constitutional rules affect the explicit or implicit compensation that officials derive from office holding. That compensation may be pecuniary, as in the Ascertainment Clause of Article I and the Compensation Clauses of Articles II and III, but nonpecuniary compensation is important across a far broader range of constitutional rules. Most importantly, officials with altruistic or public-spirited motives may derive utility from posts that allow them to implement beneficial collective solutions, and may derive disutility from incentive-based schemes that assume all officeholders to be venal or ill-motivated. Incentive-based analyses that overlook the ex ante problem facing potential officeholders—the decision whether to seek or accept office in the first instance—will ignore the possibility that the incentives themselves may detract from the implicit compensation of well-motivated offi-

[117] This is a basic theme of Brennan & Hamlin, supra note 35, at 72–73.

cials. In such cases incentive-based constitutional rules may discourage the well-motivated from seeking public office, and may thus exacerbate, rather than alleviate, the problem of self-interested official action.

CONCLUSION

We may tie the preceding points together. Theorists of constitutional law should be alert to the possibility that incentives may have (desirable or undesirable) feedback effects on the composition of the corps of officeholders. Where potential officeholders are heterogeneous, the effect of incentives on the corps of officeholders means that a given constitutional rule that is apparently justifiable on strictly incentive-based grounds may have bad dynamic consequences, and thus may produce only a short-run benefit while incurring long-run costs. The opposite scenario is also possible. The upshot is that selection analysis generates empirical hypotheses that are invisible to a strictly incentive-based framework.

To be sure, feedback effects of this sort are often uncertain. I have canvassed a number of speculative examples to show the breadth of the domain in which selection analysis is potentially useful, but I have not claimed that selection analysis invariably yields determinate conclusions. But incentive analysis is also complex and often indeterminate, as the reams of conflicting incentive-based analysis demonstrate. Selection analysis provides no easy answers, but it is an indispensable tool for illuminating the dynamics of constitutionalism.