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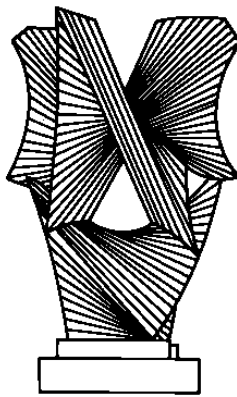
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SELECTION EFFECTS IN CONSTITUTIONAL LAW

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SELECTION EFFECTS IN CONSTITUTIONAL LAW

Adrian Vermeule *

The standard consequentialist analysis of constitutional law 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 a necessary corrective to incumbent officials’ incentives to suppress political opposition; and so forth.

In this experimental essay I offer a preliminary sketch of a different way of looking at constitutional law generally and constitutional structure in particular: 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 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, 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

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

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¹ THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

² The term “selection effects” as used here should thus be distinguished from another use of the phrase that is sometimes encountered in legal theory. In that sense, selection effects are changes in the pool of litigated cases that result from settlement decisions, see George Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 6(1) JOURNAL OF LEGAL STUDIES 65 (1977), or other decisions that litigants control. For an overview of litigation-related mechanisms, with connections to the debate about the efficiency of the common law, see Paul Rubin, *Why Was the Common Law Efficient?* (unpublished manuscript, on file with the author).

Selection Effects

from governmental structure, campaign finance and voting rights to criminal sentencing, free speech, and affirmative action.

Although selection-based analysis is not wholly absent from constitutional theory, it is invariably confined to particular debates on particular subtopics, such as the debate over term limits. My theoretical ambition here is to illuminate debates of this sort by generalizing selection analysis across constitutional contexts. Although selection analysis can also illuminate many areas of nonconstitutional law, I confine the present discussion to constitutional examples, in part because selection analysis is underdeveloped in that domain.³

Part I offers some motivating examples of selection analysis and develops a taxonomy of selection mechanisms. Parts II and III turn to the dynamic consequences of selection effects. Part II examines rules whose selection effects are self-stabilizing, while Part III examines rules whose selection effects destabilize the rules themselves. Part IV sketches the general conditions under which selection analysis proves most useful and illuminating, relative to incentive-based analysis. A brief conclusion follows.

I. SELECTION EFFECTS: EXAMPLES AND MECHANISMS

Section A illustrates selection analysis with a range of examples from constitutional law. Section B generalizes from the examples to develop a taxonomy of selection mechanisms.

A. Selection effects illustrated

To motivate the later discussion, I will begin with some concrete illustrations of selection analysis. The most obvious settings – elections and term limits – come first; less intuitive examples follow. In Section B, I proceed to offer some generalizations about the selection mechanisms at work in these examples.

The common theme in the examples is that exclusively incentive-based arguments either supply an incomplete account of the relevant rules, or else misfire altogether. It is important to be clear about the limits of this argument. I do not claim that incentive-based constitutional design is never appropriate; nor are incentive-based approaches and selection-based approaches mutually exclusive alternatives. Good constitutional design will inevitably adopt a mix of incentive-based strategies and selection-based strategies for accomplishing the designers' aims. My project here, however, is just to highlight

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, and David I. Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 761-62 (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, *Controlling Agencies through Appointments*, (remarks delivered at the Association of American Law Schools, January 3, 2004), available online at <http://www.aals.org/am2004/vermeule.pdf>.

Selection Effects

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. The principal criterion for evaluating such rules is, simply, whether they produce good officeholders, where “good” is defined according to some background normative theory of official performance. Thus Madison, Jefferson and others described elections principally as filtering devices⁴: elections, properly devised, would ensure that public-spirited citizens – a “natural aristocracy” of “virtue and talents” -- would rise into government, and would strain out bad characters.

The point is a simple one, but until recently it has been widely ignored in the political-science analysis of electoral systems. The standard analysis describes elections, not as filtering devices, but instead as incentive devices: repeated elections reduce agency slack – 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 being turned out at the next election.⁵ This is just 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.”⁶ On this view, all potential officeholders are assumed to be narrowly self-interested, and the constitutional-design 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.⁷ 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

⁴ Robert D. Cooter, *Who Gets On Top in Democracy? Elections as Filters 2* (2003) (unpublished working paper, Center for the Study of Law and Society Jurisprudence and Social Policy Program, University of California, Berkeley) (on file).

⁵ See infra notes ---.

⁶ DAVID HUME, *Of the Independency of Parliament*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY*, (Eugene F. Miller, ed, Liberty Fund, 1985) (1741) (“*Independency*”). In Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421 (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 Philosophical Underpinnings of Interest Group Politics*, POLITY, XXV, no. 3, (1993); David M. Kirkham, *European Sources of American Constitutional Thought Before 1787*, 3 USAFA J. LEG. STUD. 1 (1992); Lewis A. Kornhauser, *Virtue and Self-Interest in the Design of Constitutional Institutions*, 3 THEORETICAL INQUIRIES L. 21 (2002). For other versions of the knavery principle, see Emmanuel Kant, *Perpetual Peace: A Philosophical Essay* (Bobbs-Merill, 1957) (1795); JOHN STUART MILL, *Considerations on Representative Government*, in 19 COLLECTED WORKS OF JOHN STUART MILL 371, 505 (J. M. Robson ed., 1977) (1861).

⁷ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 11-14 (1957).

platforms that maximally satisfy the preferences of the median voter.⁸ 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, and are better explained by the filtering account. Voters in federal elections often devote a great deal of attention to candidates' "character," encompassing such things as "principle" and "consistency" in public position-taking, as well as 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 exercise.⁹ So an account that treats elections as filters for selecting good characters is at least a necessary supplement to incentive-based accounts that treats 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, and literature on, legislative 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 re-election.¹⁰ The center of gravity in the debate, however, involves arguments over the consequences of term limits for the selection and quality of federal legislators. Term limits proponents 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 (although not the states).¹¹ Opponents of term limits argue, inter alia, that amateur legislators will prove of lesser quality, at least in the sense that amateur legislators will know less about government policy and will thus lose power to legislative staff and to the permanent executive-branch bureaucracy.¹²

Although the debate here is in part evaluative – are the net effects of amateurism in the legislative branch desirable or undesirable? – it is also in part factual, and thus subject to the incremental social-science process of modeling and testing hypotheses. Rigorous work in political science has shown 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.¹³ The basic intuition underpinning the model is simple. 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.

⁸ KENNETH A. SHEPSLE AND MARK S. BONCHECK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR AND INSTITUTIONS* 115 (1997).

⁹ See James Fearon, *Electoral Accountability and the Control of Politicians: Selecting Good Types vs. Sanctioning Poor Performance*, in *DEMOCRACY, ACCOUNTABILITY AND REPRESENTATION* 56 (Bernard Marin, Adam Przeworski, and Susan Stokes eds., 1999).

¹⁰ See Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 *Cornell L. Rev.* 632 n. 22 (1996). For an account of term limits from the standpoint of collective-action problems among voters, see Einer Elhauge, *Are Term Limits Undemocratic?*, 64 *U. CHI. L. REV.* 83 (1997).

¹¹ Linda Cohen and Matthew Spitzer, *Term Limits*, 80 *GEO. L. J.* 477 (1992).

¹² See generally Garrett, *supra* note ---.

¹³ See Jeffrey J. Mondak, *Elections as Filters: Term Limits and the Composition of the U.S. House*, 48 *POLITICAL RESEARCH QUARTERLY* 701, 723-24 (1995).

Selection Effects

Term limits, on the other hand, 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 than to the Senate, because elections are repeated more frequently at shorter intervals in the former body. But this sort of work shows 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, legislators, judges and prosecutors enjoy absolute immunity for conduct within the “outer perimeter” of their official duties, as does the President, while 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.¹⁴ 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 discharge of their duties.”¹⁵ On this picture, immunity supplies an incentive for vigorous official activity that would otherwise be undersupplied.

Here, unlike the term limits case, the literature has generally overlooked that an argument from selection effects might complement or complicate the incentive-based account. Over time, the threat of citizen lawsuits might, absent official immunity, change the mix of persons who seek or accept office. The 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.”¹⁶ The implicit logic here is that legal susceptibility to lawsuits imposes an expected pecuniary cost – the expected cost of future liability, and litigation expenses, arising from official actions. There may also be 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, then the diversion reduces the official’s nonpecuniary compensation as well.

In either case, the Court’s logic supposes that the most able candidates for office will anticipate these additional costs, 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 additional expected costs of litigation. Those candidates will tend to be less able, all else 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 private-sector labor markets that set the value of candidates’ next-best opportunities. Even granting all those assumptions, however, it is not clear that the

¹⁴ Harlow v. Fitzgerald, 457 U.S. 800 (1982).

¹⁵ Harlow, 457 U.S. at 814.

¹⁶ Id. at 814.

Selection Effects

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 provides a useful screening or sorting mechanism that separates good or public-spirited official 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 and will violate them at every opportunity. Each candidate possesses private information – that is, information known only to the candidate, 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 officials who are hiring or appointing them) that they are B types would be disqualifying.

Some mechanism is needed to screen or sort good As from bad Bs, 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: As, who know that they will never violate rights, will also know that their expected liability costs are very low; Bs will correctly expect that their liability costs will be high. All else equal, then, As will tend to apply for positions that lack official immunity more than Bs 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 completely random, the net effect should still disproportionately push As towards the office and Bs away from it. Given this, the law should not recognize official immunity; its absence is a useful mechanism for identifying rights-respecting applicants.

It is irrelevant whether this screening argument is persuasive, on the merits. 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.”¹⁷ 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 increased nor diminished during the Period for which he shall have been elected.”¹⁸ 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.”¹⁹ 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,

¹⁷ U.S. Const. art. III §1.

¹⁸ U.S. Const. art. II §1.

¹⁹ THE FEDERALIST NO. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

Selection Effects

through salary increases, in order 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, but the President, unlike the judges, serves only a four-year term.

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 private sector."²⁰ 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",²¹ presumably the salary stability provided by the Clause is thus a benefit that, at the margin, encourages high-value lawyers to forego private-sector opportunities. The judges and their group allies among the bar associations have accordingly stressed this sort of argument in pressing for increases in judicial compensation, both in public discourse and in litigation.²²

A contrary view, however, is that keeping explicit judicial compensation low, or lower than in comparable private-sector opportunities, will alter the relative importance of cash compensation and in-kind compensation in ways that will 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, and lowering pecuniary income selects for those candidates for whom the intrinsic satisfaction is most rewarding. And those candidates, 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. For now, the important point is just that the Clause's second-order effects on the pool of potential federal judges, and the willingness to serve of candidates within this pool, operates through effects on both explicit and implicit, or 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."²³ Two incentive stories are relevant here. First, as to the *source* of

²⁰ U.S. v. Hatter, 532 U.S. 557, 568 (Scalia, J., concurring) (quoting James Kent, Commentaries on American Law 294).

²¹ U.S. v. Will, 449 U.S. 200, 221 (1980).

²² See, e.g., Chief Justice William H. Rehnquist, 2000 Year-End Report on the Federal Judiciary (2001) (on file with the author); American Bar Association and Federal Bar Association, Federal Judicial Pay Erosion: A Report on the Need for Reform 15-17 (2001) (on file with the author).

²³ U.S. Const. art. I §6.

Selection Effects

the payment, the delegates to the constitutional convention hoped, for the most part, 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.²⁴ 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.”²⁵

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 officeholder as corrupt “placemen.”²⁶

This argument from selection effects, however, can be reversed in its turn. Thus supporters of the federal legislative salary argued that providing no salary would not select candidates motivated by intrinsic enjoyment of the office, but would instead simply select for wealthy candidates, creating a *de facto* legislative plutocracy. (Similar arguments from the debate over campaign finance and free speech are discussed below).

Note that 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 zero compensation, or low compensation, will produce a cohort of insufficiently talented, and excessively wealthy, amateur enthusiasts. Opponents of high official salaries fear that excessively high compensation might produce a cohort of talented but venal opportunists. This debate is partly empirical – what exactly will the selection effects of various salary levels be? – and partly normative – will the selection effects produce good or bad officials (given some background normative theory)? 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 examples, how do legal rules affect the selection of public officeholders over time? Here I will offer a number of conceptual distinctions, in order to develop a working taxonomy of constitutional selection mechanisms.

²⁴ Debate in Massachusetts Ratifying Convention (Jan. 19, 1788), in 2 THE FOUNDERS' CONSTITUTION 328-29 (Philip B. Kurland & Ralph Lerner eds., 1987).

²⁵ JOSEPH STORY, COMMENTARIES ON THE COSTITUTION OF THE UNITED STATES 2 §851(Carolina Academic Press, 1987).

²⁶ BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 46-51 (Enlarged Ed. 1992).

Selection Effects

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 examples. 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 between or 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 preceding examples all involve the selection of officeholders, we will subsequently examine legal rules that allocate the voting franchise among citizens, such as state electoral laws and the Voting Rights Act, and thus illustrate the second case. In principle other variants exist, although we shall not examine them; 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;²⁷ the rules in Article II and the Twelfth Amendment for electing Presidents;²⁸ the Appointments Clause of Article II, which specifies processes for the selection of federal executive and judicial officers;²⁹ and the term limits rules discussed above. But rules that do not, in terms, 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 incentives of officeholders and potential candidates for office.

Indirect selection effects: three mechanisms. Generalizing from the examples given in I.A, and anticipating some examples to come, we may identify three critical mechanisms that generate indirect selection effects: changes in the *relative costs* of officeholding; *screening*, or sorting, good types from bad types; and *causal aftereffects* of selection rules.

1. Relative costs

Constitutional rules that structure the incentives of current officers also, inevitably, 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 to those whose behavior is shaped by the incentives, but those costs also affect the expectations of potential officeholders

²⁷ U.S. Const. art. I, §2-§3; U.S. Const. art. II, §1.

²⁸ U.S. Const. art. I, §2; U.S. Const. amend. XII.

²⁹ U.S. Const. art. II, §2.

Selection Effects

about the attractiveness of holding a given position, relative to other employment the potential officeholder might obtain or other courses of action she might pursue.

We may profitably introduce a further distinction, between explicit (or pecuniary) costs, on the one hand, and implicit (or nonpecuniary) costs, on the other. A central economic insight is that compensation can take many forms, of which cash salary is only one. A given position may yield a stream of implicit (or nonpecuniary, or in-kind) income, 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, *ceteris paribus*, 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,³⁰ and that brings political 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 immediately shape the incentives of current officeholders may thus have critical selection effects by affecting either pecuniary or nonpecuniary income. 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 income, (2) indirect effects on pecuniary income, (3) direct effects on nonpecuniary income, or (4) indirect effects on nonpecuniary income. Case (1) is exemplified by the Article I rule prohibiting federal officers from accepting “emoluments” from foreign states; case (2) is exemplified by the Ascertainment and Compensation Clauses, to which I shall 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); case (4) is exemplified by the argument, mentioned above, that official immunity indirectly prevents the reduction in *nonpecuniary* income that arises when officeholders are constantly exposed to the threat of lawsuits.

The substantive 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 incomes; 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

The relative-cost mechanism we have just described assumes a pool of agents – potential candidates for office – who are homogeneous: every agent attempts to maximize total (pecuniary and nonpecuniary) income by choosing the available employment that brings the greatest returns. In that sense, the relative-cost mechanism shares an important feature of purely incentive-based approaches. The distinctive contribution of the relative-cost mechanism, however, is to drive the analysis back to the earlier point at which

³⁰ For an overview of relevant law, see Andrew Stark, *CONFLICT OF INTEREST IN AMERICAN PUBLIC LIFE* (2000).

Selection Effects

rational potential candidates assess the costs and benefits of officeholding. The account of legislative and judicial compensation offered in I.A. ran along these lines.

A different assumption altogether is that the pool of candidates is heterogeneous, composed of at least two different types, one of which will perform better in the office than the other, according to whatever normative theory of government we assume. (Imagine, for simplicity, that candidates for a given constitutional 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).³¹ 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 cost-justified to do so. The problem then becomes one of sorting good types from superficially-identical bad types.

In many circumstances, institutions cope with this problem by adopting screening mechanisms.³² The core idea is to adopt some prerequisite or condition 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 (or cost) 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 would otherwise pay higher premiums to cover the expenses of the ill.³³

A more complex example involves “currency effects.”³⁴ Suppose a law school dean must decide how to compensate her untenured faculty. The dean knows that law professors come in two types: “scholars,” who will produce scholarship of high quality and volume even after receiving tenure; and “expedients,” who wish to exploit the security of a tenured post to engage in paid consulting or political activism. The dean wishes to pay higher compensation to scholars, but she cannot directly observe untenured

³¹ I put aside the complex problems of second-best that arise if, on whatever normative theory of government performance we hold, 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). Cf. Jon Elster, *The Market and the Forum*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 116 (Jon Elster and Aanund Hylland eds., 1986) (noting arguments that universal selfishness or universal altruism may *both* outperform less-than-universal altruism).

³² 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 ch. 8 (1994). For an application of screening mechanisms to political institutions, see Geoffrey Brennan & Alan Hamlin, DEMOCRATIC DEVICES AND DESIRES 72-76 (2000).

³³ Thanks to Ed Iacobucci for this example.

³⁴ Geoffrey Brennan, *Selection and the Currency of Reward*, in THE THEORY OF INSTITUTIONAL DESIGN 256-74 (Robert E. Goodin ed., 1998).

Selection Effects

faculty members' types; before tenure, expedients will mimic scholars, producing academic work and waiting until tenure has been granted to drop the mask. The dean can, however, institute a partial screen by offering compensation in a currency that has more value to scholars than to expedients. Some fraction of compensation, for example, might be paid in the form of research funding, which can be used to buy books or to hire assistants for scholarly work, but cannot be used to buy fancy suits or to fly to clients' offices. The compensation has greater value to scholars, so expedients will, all else equal, receive a lower actual return from nominally equivalent compensation, and will tend, at the margin, to go to other schools or into a different line of work.

Here too, the screening account makes many assumptions. But it is irrelevant whether the account is ultimately persuasive. The relevant point is that constitutional designers may plausibly be viewed as adopting similar screening mechanisms that attempt to sort agents with desirable motivations from agents with undesirable ones. In I.A, I offered an account of official immunity along these lines.

3. Causal aftereffects

Finally, there is the important possibility that selection rules will themselves have causal aftereffects on the behavior of the officeholders who are selected by those rules. This sort of mechanism posits that the selection *procedure* can itself affect the future behavior of officeholders -- not merely *ex ante*, by altering the relative costs of officeholding and thus the *ex ante* willingness of the marginal candidate to accept office, but instead 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. This mechanism is thus an intermediate case between pure incentive rules and pure selection rules: the behavior of current officeholders is shaped, not by the anticipation of rewards and penalties for future action, but by the selection process by which the officeholder previously attained her post.

A prominent example in this category involves "precommitment politics"³⁵ – 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*³⁶ 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.

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 reelection 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

³⁵ Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567 (1996). For an overview of conceptual and empirical issues, see Susan C. Stokes, *MANDATES AND DEMOCRACY: NEOLIBERALISM BY SURPRISE IN LATIN AMERICA* (2001).

³⁶ 410 U.S. 113 (1973).

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.³⁷ Second, and more interestingly, the officeholder might internalize the promise made to gain office; it might become a part of her self-conception, or her conception of the role she now fills, that her public promises should be honored. In that case the selection process has produced a genuine causal aftereffect, one that is not reducible to an incentive-based account.

In some cases, we may parsimoniously attempt to reduce causal aftereffects either to a relative-cost mechanism or to 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 thus 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 *stare decisis* from those who do not. In other cases, however, the causal aftereffect seems irreducible. In Part III, I will suggest that selection of officials on the basis of racial preference -- affirmative action -- has important *ex post* effects on the behavior of officeholders who benefit from preferences, effects that are not reducible to some complex relative-costs account or screening mechanism.

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 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 will 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.³⁸ 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

³⁷ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001).

³⁸ GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES, AND OUTCOMES* 197 (2nd ed. 1997).

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 independently-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 will indicate some cases in which selection-based explanations seem particularly apt.

As to the second distinction, constitutional structures or provisions can 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.³⁹ Less intuitively, structures and provisions can be unstable in the short run but stable in the long run. Below I give a topical example, the constitutional law and policy surrounding the federal guidelines for criminal sentencing.

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,"⁴⁰ 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.⁴¹ 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?"⁴² 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 subject, just because constitutional designers usually hope or intend 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

³⁹ DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986* 561 (1990).

⁴⁰ Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century*, March 2003 (unpublished manuscript available at http://lawweb.usc.edu/cslp/conferences/modeling_const_02/weingast.pdf).

⁴¹ See, e.g., Adam Przeworski, *Minimalist Conception of Democracy: A Defense* in *DEMOCRACY'S VALUE* (Ian Shapiro and Casiano Hacker-Cordon, eds., 1999); Matthew C. Stephenson, "When the Devil Turns...": *The Political Foundations of Independent Judicial Review*, 32 *JOURNAL OF LEGAL STUDIES* 59 (2003).

⁴² See Weingast, *supra* note ---, at 1-2.

as well.

B. Illustrations

I will 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*,⁴³ the Supreme Court upheld, against various separation-of-powers challenges, 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, only to be reversed on appeal.⁴⁴ Even after *Mistretta*, district judges in some Circuits steadily worked to expand the range of circumstances in which the guidelines could be overridden.⁴⁵ Selection analysis explains the hostility of district judges to the guidelines. But it also predicts that, over the long run, that hostility will abate; it has already begun to do so. In this sense *Mistretta* will ultimately prove to be a self-stabilizing constitutional rule.

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, some will not. In fact, however, the district judges in office at the time *Mistretta* was decided almost universally abhorred the guidelines,⁴⁶ 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 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).⁴⁷ All else 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

⁴³ 488 U.S. 361 (1989).

⁴⁴ See Mark A. Cohen, *Explaining Judicial Behavior or What's "Unconstitutional" about the Sentencing Commission?*, 7 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 183, 185 (1991).

⁴⁵ 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).

⁴⁶ See Cohen, *supra* note ---, at 186.

⁴⁷ See John S. Martin, Jr., *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (editorial by district judge retiring because of loss of sentencing discretion); Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 JOURNAL OF LEGAL STUDIES 231 (2004) (finding that sentencing guidelines cause judges to take senior status earlier than they would in the guidelines' absence).

Selection Effects

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 is, in a sense, retroactive: judges who self-selected into a judicial career under the old rules are 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, and as we have seen federal district judges did so by declaring the guidelines unconstitutional and by engaging in subtle circumvention. Once the new cohort of judges takes office, however, the impetus to destabilize the guidelines will abate, and the rules will move to a stable equilibrium.

This combination of instability in the short run with stability in the long run raises an interesting theoretical possibility: some desirable states of affairs in the legal system might be inaccessible from the current state of affairs, even if the reforms would prove stable and desirable once fully implemented. This is a smaller-scale analogue of a known problem arising in society-wide transitions, for example from capitalism to socialism or from command economies to free markets: the disruption caused by the transition may animate social groups to destabilize and even block the transition, even if the new equilibrium sought to be implemented would benefit all concerned, were it ever successfully attained.⁴⁸ The sentencing-guidelines do not exemplify this possibility, as the district judges have apparently failed to undermine the new regime, but that outcome was wholly contingent; they might have succeeded.

Voting rights. *Mistretta's* decision to permit the sentencing guidelines, although a usefully simple example, is a self-stabilizing rule only by virtue of the fact that the expectations of potential district judges will adjust, over time, to the new package of compensation. In this broad sense, any new constitutional rule affecting the terms of official service or the powers and incidents of office might prove self-stabilizing, simply because it alters the net benefits of officeholding, relative to other careers. In this sort of example, the rule is not itself affecting the *composition* of the pool of potential candidates; rather, the rule merely influences self-selection of candidates from within some exogenously determined pool.

Constitutional rules may also, however, prove self-stabilizing in the narrower and stronger sense that the rule itself affects the composition of the candidate pool. 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 Twentieth Amendments, and even the Voting Rights Act of 1964, if we accept the widespread view that the Act has some form of quasi-constitutional stature.⁴⁹

Franchise-expanding rules of this sort are extremely stable; once granted, they are almost never revoked. This stickiness creates a ratchet effect that has, over time, pushed

⁴⁸ 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* ch. 4 (1991).

⁴⁹ See William N. Eskridge and John A. Ferejohn, *Super-Statutes*, 50 *DUKE L. J.* 1215, 1237 (2001).

Selection Effects

liberal democracies towards universal enfranchisement of the adult population. 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 most unlikely ever to vote for a repeal of their own voting rights.⁵⁰ 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 may, however, be diluted by agency slack between the group and the officials drawn from the group; consider that a minority legislator 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 over legislators drawn from the majority.⁵¹

Note that, in both cases, the selection effect does not operate by altering the net benefits of officeholding, as was true in the guidelines example. We may stipulate, for purposes of this account, that the total package of explicit and implicit compensation for the relevant post remains unchanged. Instead the selection effect operates on the pool itself, by altering 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.

To be sure, the magnitude of these selection effects is uncertain. 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; of course the history of black voting rights between 1870 (the enactment of the Fifteenth Amendment) and the 1964 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.⁵² 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 Voting Rights Act has itself 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, respectively.⁵³ It is trivial that those requirements have direct selection effects. A much harder question is

⁵⁰ It is logically possible that group X might be allowed to vote on all questions except revocation of its own voting rights, but I am unaware of any real-world examples.

⁵¹ On the districting problems discussed in text, see Heather Gerken, *Second-Order Diversity* (unpublished manuscript on file with author).

⁵² See Robert D. Loevy, *Introduction: The Background and Setting of the Civil Rights Act of 1964* in *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* 3-40 (Robert D. Loevy, ed., 1997).

⁵³ See *supra* notes --- and accompanying text.

Selection Effects

whether those requirements are self-stabilizing or self-undermining. The answer plausibly turns on the details of the way the rules are cast.

For simplicity, consider the age minimums for federal office – 25 for the House, 30 for the Senate, 35 for the Presidency. Any officers selected under these rules will be older than the age minimum, and would thus have no interest in destabilizing the rules; should legislators, for example, approve a constitutional amendment lowering the age minimums, the principal effect would simply be to expand the pool of potential challengers for the legislators' 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. The effect of the rules would be to select for officials whose position would be increasingly threatened by the rules as the officials acquire more seniority. With an age maximum of 70, we should be unsurprised to find powerful 69-year-old legislators working towards repeal of the rule or attempting to undermine it in more subtle ways.

A similar analysis suggests that term limits will be subject to constant pressure from senior officials who wish to undermine the limits themselves. So far the empirical evidence is mixed. Although the federal Constitution contains no legislative term limits, and states are constitutionally barred from adding term limits as a matter of state law,⁵⁴ the House imposed a term limit on committee chairs by intracameral rule in 1995, while the Senate Republican conference adopted an internal equivalent in 1996,⁵⁵ more famously, the 22d Amendment, adopted in 1951, imposes a two-term limitation on the presidency.⁵⁶ The latter rule was made necessary by Roosevelt's decision to flout a parallel unwritten norm dating from Washington's presidency; although the written rule has proved more stable, recent two-term incumbents have floated proposals for its repeal or modification.⁵⁷ 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.⁵⁸ The soundest view, although one that is admittedly difficult to falsify, is that it is too soon to tell whether the internal House or Senate limits will prove stable in the long run.

The Ascertainment Clause (Redux). Consider again 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, that a salary will attract well-

⁵⁴ U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

⁵⁵ See CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 560-61 (5th ed. 2000).

⁵⁶ See U.S. CONST. AMDT XXII.

⁵⁷ See David Kyvig, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995 335 (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 already served two terms should be eligible to serve as president again).

⁵⁸ *GOP Senators Opt to Modify Terms for Chairmen; Six-Year Committee Rule Kept*, WASHINGTON POST, June 26, 2003, at A23.

Selection Effects

qualified and (therefore) well-motivated legislators to office, ensures that those legislators will act to protect the rule against later amendment or circumvention. If the Clause's theory is correct, and if, in fact, the Clause itself represents good policy, it will be protected against change by the well-motivated officials the Clause effectively selects. Note, however, that the Clause may be self-stabilizing even if the rule is normatively flawed because (as its opponents argued) paying salaries attracts venal candidates to office.⁵⁹ In that case the rule is a bad policy, but nonetheless a self-stabilizing one: venal legislators will be as assiduous as well-motivated legislators in protecting the rule from amendment or circumvention, precisely because the rule 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 media defendants (such as the restrictive tests for defamation of public officials and public figures, restrictive rules about licensing, censorship and prior restraints, and the general precept the governmental regulation must be content-neutral). On this account, the Justices of 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. Justices who issue speech-protective decisions are praised for their wisdom and respect for precedent by elements of the large institutional media.⁶⁰ Justices who attempt to restrict media prerogatives are condemned as extremist or lawless.⁶¹ Over time, then, an equilibrium develops in which 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. And 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, maximize.⁶² 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.⁶³ 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

⁵⁹ See *supra* ---.

⁶⁰ *A Wise Ruling on Campus Fees*, N.Y. TIMES, March 24, 2000, at A20.

⁶¹ William Safire, *Free Speech v. Scalia*, N.Y. TIMES, April 29, 1985, at A17.

⁶² See Richard A. Posner, *What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 15 (1993).

⁶³ Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AMERICAN POLITICAL SCIENCE REVIEW 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 Judicial Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 JOURNAL OF POLITICS 801 (1998).

Selection Effects

ranks most Justices are now drawn; lower-court judges do not predictably receive a great deal of public attention).

But this critique itself suggests an improved version of the general account, one that sounds in selection rather than incentives. The relevant empirical work in the attitudinalist school of political science attempts to gauge Justices' ideology at the time of nomination by the party of the appointing president and, critically, by editorials written at the time of nomination in the major national newspapers,⁶⁴ who tend to praise nominees with strong free-speech proclivities.⁶⁵ To the extent that the anticipated reaction of the press influences presidential selection of Supreme Court nominees – and there is every reason to think that the press' influence is very real⁶⁶ – then the selection of nominees will be skewed, all else equal, 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, if at all? Two answers are prominent. In *Buckley v. Valeo*, the Supreme Court held that the sole valid interest underlying campaign-finance laws is the prevention of actual or apparent corruption – quid pro quo exchanges between legislators or candidates, on the one hand, and individuals or interest groups, on the other.⁶⁷ Any other rationale for regulation, in the Court's view, would unconstitutionally restrict the free speech rights of citizens who expend funds on campaigns and other political activity. Accordingly the Court (roughly speaking) upheld federal restrictions on contributions, invalidated restrictions on independent expenditures and self-financing by candidates, and upheld disclosure regulations that require candidates, including incumbents, to make important aspects of their campaign fundraising publicly available.

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.⁶⁸ On this view, the focus on corruption is misplaced; the core evil of unregulated campaign finance is to 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,⁶⁹ 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.⁷⁰

Selection analysis supplies a critique of the corruption rationale that is entirely distinct from the republican concern with political equality. The corruption rationale is

⁶⁴ See Segal & Cover, *supra* note ---.

⁶⁵ See *supra* notes ---.

⁶⁶ William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1, 3-5 (1990).

⁶⁷ *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁶⁸ See, e.g., Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 291-92 (1992).

⁶⁹ See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

⁷⁰ See *McConnell v. Federal Election Com'n*, 124 S. Ct. 619 (2003).

Selection Effects

incentive-based; it focuses on policy distortions arising from the behavior of legislators who are influenced by campaign contributions.⁷¹ 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 – to produce good legislators. There are several ways of cashing 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. And in the limiting cases, quality is not hard to define. At a minimum, any account of quality suggests that campaign finance rules should not deter candidates who would, absent the rules, be preferred outright by an electoral majority.

In some circumstances, however, the current forms of campaign finance regulation may produce just that indefensible result. One possibility is that limitations on cash contributions directly to campaigns – so-called “hard money” – have the perverse effect of protecting 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.⁷² 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.”⁷³ 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.

Although these possibilities need empirical confirmation, they 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 re-election, thereby preventing any beneficial change in the campaign finance rules, and so on ad nauseam. This example also makes clear that a legal regime whose selection effects are self-stabilizing may entrench a bad equilibrium, in which poor-quality incumbents exclude high-quality competitors;⁷⁴ 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

⁷¹ See David A. Strauss, *What’s the Problem? Ackerman and Ayres on Campaign Finance Reform*, 91 CAL. L. REV. 723, 726-27 (2003).

⁷² See Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L. J. 1049, 1073-74 (1996).

⁷³ See David Epstein and Peter Zemsky, *Money Talks: Detering Quality Challengers in Congressional Elections*, 89 AMERICAN POLITICAL SCIENCE REVIEW 295 (1995).

⁷⁴ See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L. J. 491, 522 (1997) (discussing campaign finance); Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 AMERICAN POLITICAL SCIENCE REVIEW 469, 490-91 (1978).

Selection Effects

reforms, although many have suggested that the purpose or effect of the reforms is to further strengthen, rather than 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, in general, 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, for example, a policy is valuable in the short run but costly 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 Article I Ascertainment Clause is a simple example of a self-stabilizing rule. Not so the Article III Compensation Clause – a ratchet-type rule that authorizes Congress to set judicial salaries, and allows future increases, but that forbids Congress from ever reducing salaries once they are set. Here the dynamic, over time, has been that Congress has systematically failed to provide judicial salary increases sufficient to keep pace with inflation.⁷⁵ 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.”⁷⁶ The guarantee “ensures a prospective judge that . . . the compensation of the

⁷⁵ RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 345-50 (1985).

⁷⁶ *Hatter*, 532 U.S. at 568 (Scalia, J., concurring) (quoting James Kent, *Commentaries on American Law* 294).

Selection Effects

new post will not diminish.”⁷⁷ 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. The result is that 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 bench,⁷⁸ and talented lawyers decline to serve as judges.⁷⁹ These effects occur at the margin, but they are hardly marginal; commentators increasingly describe the law of judicial compensation as a system in crisis.⁸⁰

Affirmative action. The Supreme Court has recently revisited the constitutional law of affirmative action⁸¹ – with the Court’s only black Justice, who may plausibly be viewed as a beneficiary of affirmative action, strongly of the view that colorblindness is both constitutionally mandated and morally just. The striking fact that some prominent beneficiaries of affirmative action are also its most vehement opponents suggests a possible causal account: over time, the selection effects of affirmative action make it a self-negating or self-limiting legal policy.

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.⁸² (For simplicity, I will simply 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, a constitutional decision that permits affirmative action, and accompanying legislative or executive decisions to pursue affirmative action in selecting officials, will have self-negating effects. Affirmative action will tend to promote a cohort of new beneficiaries to important official posts and influential social positions, 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

⁷⁷ *Will*, 449 U.S. at 221.

⁷⁸ See Michael J. Frank, *Judge Not, Lest You Be Judged Unworthy of a Pay Raise: An Examination of the Federal Judicial Salary “Crisis,”* 87 MARQ. L. REV. 55, 56 (2003) (noting that “these same salaries encourage veteran judges to seek the greener pastures of private law firms”).

⁷⁹ See *id.* (“The “paltry salaries of federal judicial officers are so insufficient that they discourage qualified attorneys from seeking federal judicial positions”).

⁸⁰ See *id.* (noting the increase in this point of view); Linda Greenhouse, *Pay Erodes, Judges Flee, and Relief is Not at Hand*, N.Y. TIMES, July 17, 2002, at A14.

⁸¹ *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

⁸² See *Grutter*, 123 S. Ct. at 2362 (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.’”). 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 Robin Lenhardt, *Understanding the Mark: Race, Stigma and Equality in Context*, 79 N.Y.U. L. REV. --- (forthcoming 2004) (draft on file with author).

Selection Effects

I, this is an example of the causal aftereffects 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 sort of 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, the first cohort of beneficiaries will not be able to shed their own status. Several conditions, however, might make 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 even group members who would have attained the relevant offices or successes even without preferences. Group members who fall in this special subset of beneficiaries – plausibly Justice Thomas is an example – may strive to signal to indicate their special position, and opposition to affirmative action might, for complex sociological reasons, constitute a signal of that sort. Finally, beneficiaries might simply act irrationally; they might behave as though stigma is a form of “moral taint”⁸³ that can be diluted or washed away by vigorous opposition to racial preferences.

Ultimately, the key questions seem empirical, not methodological. It is clear that some beneficiaries of affirmative action share Justice Thomas' view of its effects, while other beneficiaries see affirmative action as a socially justified, even morally compelled, policy; Colin Powell is an example.⁸⁴ 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 Thomas' 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 sometimes 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 opportunity in the short run. Justice Blackmun suggested that “in order to get beyond racism, we must first take account of race”;⁸⁵ and one of the Court's recent decisions also suggests that affirmative action should terminate, or “sunset,” within another generation.⁸⁶ From this standpoint, the

⁸³ Anthony Appiah, *Racism and Moral Pollution* in COLLECTIVE RESPONSIBILITY: FIVE DECADES OF DEBATE IN THEORETICAL AND APPLIED ETHICS 219-226 (Larry May & Stacey Hoffman eds., 1991).

⁸⁴ *The Republicans; Excerpts from General Powell's Address to Republicans*, N.Y. TIMES, Aug. 1, 2000, at A18.

⁸⁵ *Regents of the University of the California v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

⁸⁶ See *Grutter*, 123 S. Ct. at 2346.

Selection Effects

possibility that affirmative action has self-stabilizing selection effects would be cause for concern. A protracted dynamic in which affirmative-action beneficiaries who attain government office perpetuate affirmative-action benefits for favored groups might become an entrenched system of “racial spoils,”⁸⁷ extending affirmative action policies beyond their justified duration. 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, the 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.⁸⁸ Much more would have to be known about the views of affirmative-action beneficiaries in general, about the crucial subset 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 inutile. Perhaps these questions are underexplored, 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 fresh perspectives on old debates.

Commerce and enumeration. In principle, a constitutional rule might produce self-negating selection effects that either contract the scope of the rule or that 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 of elite minorities who will work to restrict the constitutionally permissible scope of affirmative action. Here I will 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 commits the fatal mistake of anthropomorphizing 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.⁸⁹

⁸⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

⁸⁸ For references to the current literature, see Lenhardt, *supra* note ---.

⁸⁹ Thanks to Daryl Levinson for insisting on this point.

Selection Effects

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 to individuals of holding federal legislative office. I will not pretend to offer an historical account, but merely a stylized sketch that generates a hypothesis for historical inquiry. Suppose that just after the founding era federal legislative service was seen as far less prestigious than it is today, in part because the powers of the federal government are far less sweeping than they are today. (Note that some important members of the founding generation passed up opportunities to serve in the new federal government, but accepted official posts in state governments.⁹⁰). 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 compensation.

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. Service in Congress would then have become relatively more attractive for legislators who derive enjoyment – implicit compensation – from holding authority or power over 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 class of legislators desires 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, maximizes the power of Congress as a necessary side effect or byproduct, because an individual federal legislator holds power in proportion to her fractional share in the power of Congress as an institution.

This story is only partially sketched, and is speculative in the extreme. To test it further specification would be required, 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 the cash value of selection analysis is just 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

⁹⁰ Many examples of this exist, such as Thomas Jefferson, Jonathan Dayton and Gunning Bedford Jr.. Thomas Jefferson served as governor of Virginia before his eventual election as President. ALF J. MAPP, JR., THOMAS JEFFERSON 133-58 (1987). Jonathan Dayton of New Jersey initially turned down election as a representative to the newly formed House of Representatives to instead serve in New Jersey's state government. FRAMERS OF THE CONSTITUTION 138-39 (James H. Charleton, Robert G. Ferris and Mary C. Ryan, eds., 1986). And, finally, Gunning Bedford Jr. of Delaware served as attorney general and judge for that state for the rest of his career rather than pursuing a career in the federal government. SIGNERS OF THE CONSTITUTION 143-44 (Robert G. Ferris, ed., 1975).

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 governments to extend rights of political speech, association and participation, including voting, to illiberal individuals or groups whose professed ideals themselves 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: that 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, irrevocably 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 -- seizing power through elections and turning it to 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.⁹¹ Indeed, a useful generalization from comparative politics is that the trend in the 20th 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.⁹² An ambiguous case is Hitler's seizure of power after the Nazi party's successes in the elections of 1933;⁹³ clearer, and more recent, cases involve theocratic Islamist parties in Algeria and other nations.⁹⁴

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 the proletarian dictatorship are destined to be accepted by the

⁹¹ *Introduction* in *POLITICAL EXTREMISM AND RATIONALITY* xi-xxi (Albert Breton, Gianluigi Galeotti, Pierre Salmon, and Ronald Wintrobe, eds., 2002).

⁹² JUAN LINZ, *THE BREAKDOWN OF DEMOCRATIC REGIMES: CRISIS, BREAKDOWN, AND REEQUILIBRATION* 15 (1978).

⁹³ See sources cited in *ibid.* at 105 n. 6

⁹⁴ Luisa Giuriato and Maria Cristina Molinari, *Rationally Violent Tactics: Evidence from Modern Islamic Fundamentalism* in *POLITICAL EXTREMISM AND RATIONALITY* 183-216 (Albert Breton, Gianluigi Galeotti, Pierre Salmon, and Ronald Wintrobe, eds., 2002).

Selection Effects

dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”⁹⁵ The basic paradox implicit in Holmes’s remark is that a commitment to liberal democracy in the long run may short-circuit itself if it permits illiberal and antidemocratic forces to seize power in the short run, at some given moment. On a dynamic 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,”⁹⁶ the dynamic 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.

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 behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal republic of Germany, shall be unconstitutional”; in other nations, constitutional provisions or statutes may vaguely commit all parties to “respect” for democracy, or may proscribe particular parties with historical resonance (such as the Italian Fascists).⁹⁷ In the German case, and in some others, 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.⁹⁸ 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 20th-century communists.⁹⁹

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 is 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.¹⁰⁰

⁹⁵ *Gitlow v. New York*, 268 U.S. 652, 673 (Holmes, J., dissenting)

⁹⁶ Geoffrey R. Stone, *Reflections on the First Amendment: The Evolution of the American Jurisprudence of Free Expression*, 131 *PROCEED. AMER. PHIL. SOC.* 251 (1987)..

⁹⁷ John Finn, *Electoral Regimes and the Proscription of Anti-Democratic Parties*, in *THE DEMOCRATIC EXPERIENCE AND POLITICAL VIOLENCE* 51, 72 (David C. Rapoport and Leonard Weinberg eds., 2001).

⁹⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁹⁹ U.S. Const. amend. XIV; Smith Act of 1940, 18 U.S.C. §2385 (2003).

¹⁰⁰ Cass R. Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 *YALE L. J.* 71 (2000).

Selection Effects

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 dispositions.¹⁰¹ In that case, proscription may reduce the membership of extremist parties, but increase the average radicalism of the remaining members, plausibly making the party a more serious threat to liberal democracy 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 co-opting 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.¹⁰² Comparative political history suggests that 20th-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.

It is hard to say anything very general about such questions; the effects of the opposing mechanisms depend largely on contextual factors involving demography, culture and local political institutions. It is clear, however, that incentive-based arguments cannot even identify the right questions, let alone answer them. Both the initial dynamic concern – that tolerating the intolerant may bring intolerant officials to power – and the key mechanism that casts doubt on the utility of proscription laws – the exclusion from radical parties of individuals with the least radical dispositions – 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 incomplete; 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 officeholding. I will take up these ideas in turn.

¹⁰¹ Cf. Russell Hardin, *The Crippled Epistemology of Extremism* in POLITICAL EXTREMISM AND RATIONALITY 3 (Albert Breton, Gianluigi Galeotti, Pierre Salmon, and Ronald Wintrobe, eds. 2002).

¹⁰² ADAM PRZEWSKI, CAPITALISM AND SOCIAL DEMOCRACY 35-38 (1985).

Selection Effects

Long-term versus short-term analysis. Constitutional analysis may legitimately concern itself with shorter or longer time-slices. 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 this 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, just 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, as far as it goes; 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 dominates incentive analysis over large time scales. An example, discussed above, involves game-theoretic analysis of the conditions under which constitutions can become self-enforcing.¹⁰³ 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 identity 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.¹⁰⁴ 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 officeholding. 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

¹⁰³ See supra ---.

¹⁰⁴ This is a basic theme of Brennan and Hamlin, supra note ---.

Selection Effects

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 officials. In such cases incentive-based constitutional rules may discourage the well-motivated from seeking public office, and may thus exacerbate, rather than alleviating, 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.

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