



Incentives in the Supreme Court

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Response

Incentives and the Supreme Court

Mark Tushnet*

Introduction

Good-government reform proposals like those offered by Professors Craig Lerner and Nelson Lund generally confront several difficulties. Details matter, but most reform proposals are understandably sketchy.¹ The details ordinarily would be fleshed out as the proposal works its way through the process of enactment, but this process is difficult to navigate. The politics of good-government reforms are messy because they are bound up with ordinary partisan politics, and they are obscure because it is hard to understand why politicians might be interested in (merely) good-government reforms. This brief Essay explores these difficulties as they arise in connection with some of the proposals put forth in the article by Professors Lerner and Lund.²

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¹ A related difficulty is that if reform proposals directed at a single institution were adopted, they would have to mesh with the operation of other institutions. Reformers typically, though not always, do not think through the issues associated with integrating their proposals with the rest of the government. Sometimes, of course, reform proposals are comprehensive, addressing legislative, executive, and judicial institutions, but then the analysis of how the reforms would operate in practice is even more difficult.

² Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255 (2010). I note here some quibbles with their analysis that do not raise serious problems. First, their discussion of the Court's deliberative processes relies on information about the Rehnquist and earlier Courts, *id.* at 1270–71, and there is some reason to

I. *The Incentive Effects of the Lerner-Lund Proposals*

The analysis of the incentive effects of the Lerner-Lund proposals is incomplete. Professors Lerner and Lund seem to ask how the people now serving on the Court would behave if their proposed changes were made.³ That, however, is the wrong question because the changes would also affect the pool from which nominees are drawn.

Professors Lerner and Lund rightly focus on the Justices' preference functions. To simplify in ways that do not affect the general analysis: Justices are interested in money, leisure, and celebrity.⁴ Professors Lerner and Lund aim to reduce the contribution that celebrity makes to the Justices' (psychic) income.⁵ That in itself would change the pool of prospective nominees, as some of those who would accept the job *with* the associated celebrity would find the overall compensation less attractive than the alternatives available to them.⁶

think that those processes have changed a bit recently. The chatter among Supreme Court watchers is that the near absence of inter-Justice deliberation on the Rehnquist Court resulted from the reaction of Chief Justice William Rehnquist and his colleagues to Chief Justice Warren Burger's mismanagement of the Court's deliberations. See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 33–35 (2007). In reaction, Chief Justice Rehnquist used an iron hand to run the Justices' conferences, a practice that Chief Justice John Roberts may have relaxed. See *id.* at 358. Second, their account is inaccurate to the extent that it fails to discuss the role of the so-called cert pool of law clerks in shaping the discretionary docket and the pool's independence from the individual Justices. Clerks participating in the pool cannot prepare memos acting as acolytes for their Justices, and, as I understand it, they do not. Third, a minor point, but one of personal privilege: Professors Lerner and Lund assert that law clerks for every Justice appointed after Earl Warren prepared bench memos for their Justices. See Lerner & Lund, *supra* note 2, at 1291. In 1972–73, Justice Thurgood Marshall's law clerks did not do so. The Justice read the briefs and used the memos written at the cert stage to organize his thinking before oral argument. Finally, the connection between the cult of celebrity and its asserted causes—the use of signed opinions and the growth of the discretionary docket—is unelaborated and the timing seems odd, with events in the early nineteenth century and the 1920s having their effects only in the late twentieth century. See *id.* at 1265–67, 1276–78. A causal account in which discreet policy changes accumulate and eventually have a dramatic and unintended effect is of course possible, but it ought to be provided. If the causal account is absent or is implausible, the good-government reforms Professors Lerner and Lund offer might have no effect on the cult of celebrity surrounding the Justices.

³ See Lerner & Lund, *supra* note 2, at 1281, 1294. Their discussion appears to suggest that the pool of potential nominees would change in ways of which they approve, but I find no systematic consideration of how it would change, or why the changes would be of the sort supported by Professors Lerner and Lund.

⁴ See *id.* at 1267–68.

⁵ See *id.* at 1281, 1303.

⁶ Here Professors Lerner and Lund stumble in assuming that changing the Justices' compensation would not affect the willingness of potential nominees to accept a nomination. They suggest that “a President would [not] need to engage in much arm-twisting to persuade any law firm partner to forego a seven-figure salary in private practice to become a Supreme Court Justice.” *Id.* at 1263. This is simply wrong as a matter of economics. Even if no arm-twisting is

Anonymous opinions might reduce the celebrity associated with the job directly, but other mechanisms proposed by Professors Lerner and Lund operate by increasing the costs of taking the job. Eliminating law clerks⁷ obviously does, and so does circuit riding to the extent that it requires actual physical presence outside of the District of Columbia.⁸ But, of course, making the job “more challenging”⁹ changes the pool of potential nominees.

My strong intuition is that, holding everything else constant, reducing the income associated with the job while simultaneously increasing the costs of holding the position would have a selection effect, diminishing the average quality of the pool as high-quality potential nominees discover that the alternatives available to them provide higher net incomes.¹⁰ Consistent with the proposal for

required given the present income associated with the position, reducing that income would necessarily affect the nominee’s willingness to accept the position. It is also wrong empirically. In recent years several people declined nominations when approached, including Mario Cuomo and George Mitchell. Douglas Jehl, *Mitchell Rejects President’s Offer of Seat on Court*, N.Y. TIMES, Apr. 12, 1994, at A1, B13; Kevin Sack, *Cuomo Announces He Is Not Seeking Seat on High Court*, N.Y. TIMES, Apr. 8, 1993, at B5; see also Lerner & Lund, *supra* note 2, at 1263 n.25 (discussing Justice Arthur Goldberg’s resignation from the Supreme Court to accept the position of Ambassador to the United Nations). I should note that I find Justice Goldberg’s resignation a patriotic act, hardly baffling as Professors Lerner and Lund seem to suggest. See *id.* Admittedly, Cuomo and Mitchell were politicians, not partners in major law firms, but the principle is the same. In any event, the seeming emergence of a norm that nominees must have some judicial experience suggests that few partners in major law firms are in the pool of prospective nominees (although the recent nomination of Solicitor General Elena Kagan may signal a new trend). The assumption that no one would turn down a nomination regardless of the compensation associated with it reflects either the legal academy’s parochialism or the acceptance by Professors Lerner and Lund of something like the cult of celebrity.

⁷ Lerner & Lund, *supra* note 2, at 1294.

⁸ *Id.* at 1297–99. It seems to me that Professors Lerner and Lund assume that circuit riding would involve travel to other courthouses, but it is not clear that this assumption holds given modern technology. Additionally, imposing circuit-riding duties on sitting Justices would raise anew the constitutional question addressed in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), which upheld the reimposition of circuit riding by Supreme Court Justices, a practice which had been abolished only one year earlier, *id.* at 309. The Court relied exclusively on the fact that Congress had reimposed circuit-riding duties after a brief interruption, that is, on a traditionalist analysis. *Id.* With circuit riding abolished for more than a century, such an analysis is weaker today than in 1803, leaving in place the textualist analysis—that judges are confirmed to positions with statutorily defined characteristics, which cannot be altered to the judges’ disadvantage—that was at the heart of the challenge in *Stuart*. *Id.* at 305.

⁹ Lerner & Lund, *supra* note 2, at 1294.

¹⁰ See Adrian Vermeule, *Selection Effects in Constitutional Law*, 91 VA. L. REV. 953, 961–62 (2005) (discussing the effect of judicial compensation on the nominee pool, leading to a pool which may be more focused on the nonpecuniary benefits of judicial office). Perhaps Professors Lerner and Lund assume that their proposals’ marginal effects on net income are too small relative to gross income to change the pool’s composition significantly. If so, that assumption seems in tension with their treatment of the cult of celebrity, which seems to assume that the

anonymous opinions, Supreme Court Justices might become relatively anonymous legal bureaucrats with exceptionally strong civil service protections. Whether that would improve the quality of our law seems to me to be an open question.¹¹

II. *The Effects of Anonymous Opinions*

Professors Lerner and Lund's proposal that the Supreme Court issue anonymous opinions with unsigned separate opinions reinforces the image of Justices as bureaucrats.¹² In addition to their proposal, this Essay considers several variants because examining the variants helps to identify some difficulties associated with their proposal.¹³

cult of celebrity provides significant psychic income. See Lerner & Lund, *supra* note 2, at 1267–68. Here, their analytic unclarity is particularly problematic. Adrian Vermeule pointed out to me that there might be two selection effects, one reducing the pool's average quality and the other reducing the pool's average narcissism. The effects might interact so as to increase the average quality of the Court's output. I agree that this is a possibility, which is part of the reason for my tentativeness in the text, but we would need a much more thorough analysis of these mechanisms than Professors Lerner and Lund supply to be confident that their proposed reforms would improve the average quality of the Court's work product.

¹¹ Professors Lerner and Lund write that if the reforms they propose were adopted, Justices would be “less inclined to pursue individual glory and more concerned with the Court's overall reputation.” Lerner & Lund, *supra* note 2, at 1288. The first observation is true; the latter is more questionable. Indeed, I find it difficult to imagine why Justices with reduced incomes would substitute concern for the Court's reputation for their lost celebrity. I would assume that after these reforms, the Justices would substitute leisure for work, as we tend to assume ordinary bureaucrats do by leaving the job precisely at 5:00 p.m. It would be helpful to have an analysis of the possibility of doubling or tripling the size of the Court; this is perhaps a more obvious way of eliminating the cult of celebrity, although it is no less politically unrealistic than Professors Lerner and Lund's proposals.

¹² *Id.* at 1302–03. Here is an area where Professors Lerner and Lund could offer more detail about the interaction among their proposals. They reassure readers that the importance of the Court's cases would give the Justices an incentive not to shirk despite the anonymity of their work product. *Id.* at 1281. At the same time, their proposal for certification from circuit courts, and especially their hope that such certification will bring larger numbers of “mundane” cases to the Court, *id.* at 1288 n.166, would change the importance of the cases considered by the Court, thereby raising questions about the persistence of the incentive against shirking.

¹³ I do not consider the possibility of reversion to the pre–Chief Justice John Marshall practice of seriatim opinions because it falls outside the scope of the proposals offered by Professors Lerner and Lund. The use of seriatim opinions by some courts does cast some doubt—not much, I concede—on part of the causal account of the rise of the cult of celebrity in the United States. Both the Supreme Court of Canada and the High Court of Australia use seriatim opinions, although often with a lead opinion. Peter McCormick, *Standing Apart: Separate Concurrence and the Modern Supreme Court of Canada, 1984–2006*, 53 MCGILL L.J. 137, 160 (2008). Before its replacement by a supreme court, the British House of Lords also used seriatim opinions. See WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* 42 (2007). It would be interesting to investigate whether there is a cult of celebrity associated with members of those courts, but my impression is that there is not, although of course individual judges are well known among legal elites. Seriatim practice seems

The variants are: unsigned opinions with no dissents allowed and unsigned opinions with signed dissents and concurrences. Similar variants exist in other judicial systems¹⁴ and examining experience elsewhere might provoke some thoughts about the variants' potential effects.¹⁵

I begin with a general observation, derived from a comment by Thomas Jefferson on anonymous opinions. Writing in 1820, Jefferson referred to the Court as “huddled up in conclave” dominated by a “crafty chief judge who sophisticates the law to his mind, by the turn of his own reasoning.”¹⁶ Anonymous opinions, that is, can spur conspiracy theories that impugn the claim that the Justices are performing their judicial duties.

Now, consider the specific variant in which the Court issues anonymous opinions with no dissent allowed. Within a court operating under such a rule two norms compete. One is a norm of going along, in which those who disagree with the majority swallow their disagreement and go along with whatever the majority produces. The other is a norm of consensus, in which the majority accommodates those who disagree with it to the extent that it can do so without impairing the ultimate judgment's integrity. The European Court of Justice (“ECJ”), which apparently operates under the norm of consensus, has been criticized for issuing opinions that are terse and unilluminating.¹⁷ The majority accommodates potential dissenters by issuing a lowest-

even more likely to generate celebrity for the writing Justice than the current practice in the United States, and the seeming absence of a cult of celebrity elsewhere suggests that the cult in the United States arises from other aspects of the legal culture. For additional discussion, see *infra* text accompanying notes 36–41.

¹⁴ The European Court of Justice (“ECJ”) uses unsigned opinions with no dissents, as do the French courts. See Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT'L J. CONST. L. 618, 635 (2006). In its decisions on the merits, the European Court of Human Rights uses unsigned majority opinions, separate opinions listing the names of the dissenters, and occasional separate opinions issued under a single name (a practical necessity in the event that only one judge writes separately). See Lech Garlicki, *Judicial Deliberations: The Strasbourg Perspective*, in THE LEGITIMACY OF HIGHEST COURTS' RULINGS: JUDICIAL DELIBERATIONS AND BEYOND 389, 396 (Nick Huls et al. eds., 2009). In its preliminary opinions, the European Court of Human Rights uses unsigned majority opinions accompanied by an indication of how many judges dissented. See *id.*

¹⁵ Cf. *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (stating that “comparative analysis . . . was of course quite relevant to the task of writing” the Constitution).

¹⁶ FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 307 (1993) (quoting Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820)).

¹⁷ See, e.g., Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 VA. J. INT'L L. 307, 310 (2009) (asserting that the ECJ's “justificatory style has often been criticized as overly abstract, vague, and elliptical” and citing a former member of the court as saying that the court's “judgments read . . . like documents drafted by committee”).

common-denominator opinion that provides relatively little guidance to litigants and courts subject to the ECJ's review, often listing the case facts as if they alone were dispositive.¹⁸ These effects might be avoided by developing a going-along norm within the Court, but the reforms Professors Lerner and Lund propose provide no reason to think that such a norm would arise. Even if it did arise, I suspect that there would be cases in which the norm of consensus would kick in anyway.

Next, consider anonymous majority opinions with signed separate opinions. The authors of the signed opinions might thereby generate a cult of celebrity. Worse, the existence of such opinions can provide the foundation for identifying the authors of (other) majority opinions. Plagiarism-detecting software can rather reliably match the stylistic characteristics of individual documents.¹⁹ This matching can be supported by inside-the-Beltway speculation about authorship, which already occurs in connection with the Court's per curiam opinions.²⁰ Indeed, these problems would arise even if separate opinions were accompanied by a list of the Justices who joined them, because at least occasionally only one Justice will issue a separate opinion. Those opinions would then provide the database for plagiarism-detecting programs.²¹

The only variant with any possibility of real success is the one Professors Lerner and Lund offer: anonymous opinions and anonymous separate opinions, each indicating only how many Justices joined the opinion.²² Even this variant is not without its problems. Supreme Court Justices generally have written records—either the prior opinions of those who have served as judges, or speeches, law

¹⁸ See *id.* Professors Lerner and Lund express a similar set of concerns with the United States Supreme Court. See Lerner & Lund, *supra* note 2, at 1281 (referring to the Court's "unintelligibly splintered decisions that so frustrate the bar [and] the lower courts"); *id.* at 1287 (referring to the Court's "fact-bound opinions").

¹⁹ See, e.g., Mary Pilon, *Anti-Plagiarism Programs Look over Students' Work*, USA TODAY, May 23, 2006, at 10D (discussing the growing use of plagiarism-detecting software by universities).

²⁰ See, e.g., Posting of Orin Kerr to The Volokh Conspiracy, <http://volokh.com/2010/01/13/hollingsworth-v-perry-bush-v-gore-and-manipulating-procedural-rules-in-high-profile-litigation-impacting-the-political-process/> (Jan. 13, 2010, 6:39 PM EST) ("[I]f I had to guess, I would guess that both per curiam opinions had the same author, Justice Kennedy."). Such speculation can also fuel the conspiracy theories previously mentioned.

²¹ This "reverse engineering" of opinions might diminish the risk that Adrian Vermeule pointed out to me that anonymous opinions combined with signed separate opinions might produce a lack of accountability for majority opinions while permitting Justices to be self indulgent in their separate opinions.

²² Lerner & Lund, *supra* note 2, at 1282.

review articles, and the like for others. These materials would provide the database for plagiarism-detection programs to match prior writing with anonymous Supreme Court opinions.²³

Eliminating the identification of specific opinions with individual Justices might be possible, but effectively doing so is more difficult than Professors Lerner and Lund imagine. Their proposal might have some effects on the cult of celebrity, but I think that it is important not to claim too much about such effects.

III. The Politics of Good-Government Reform of the Supreme Court

The discussion of the opinion forms used in other legal systems suggests another perspective on the reforms proposed by Professors Lerner and Lund. Mitchel Lasser's important recent work on opinion form in France and the ECJ argues powerfully that opinion form is deeply embedded in each system's legal and political culture.²⁴ For example, Lasser argues that the French system secures legitimacy for judicial decisions that are terse and uninformative in themselves by accompanying them with extensive scholarly commentary²⁵ and by ensuring that the judges who issue them are vetted through an extensive bureaucratic process.²⁶

I do not suggest that anonymous opinions in the United States would have to be accompanied by precisely the same supplementary devices.²⁷ Lasser's perspective, however, does raise questions about

²³ Perhaps the prior writings would have all been ghostwritten by law clerks, law firm associates, or speechwriters and would betray nothing about the Justice's personal style. The proposed elimination of law clerks would mean that Supreme Court opinions would be written without such assistance and could therefore be quite distinct from a Justice's prior writings. I am skeptical, however, that even ghostwritten works betray nothing about a person's individual style, at least over an extended period during which a number of different law clerks, associates, and speechwriters provide assistance. An additional wrinkle arises from transition problems, which affect the politics of getting the proposal adopted. A database of signed opinions exists for sitting Justices, and plagiarism-detecting programs—and ordinary common sense—would find it easy to determine which of the sitting Justices wrote an anonymous opinion. (For example, the distinctive writing styles of Justices Antonin Scalia and Ruth Bader Ginsburg would persist into the era of anonymous opinions.) These effects might dissipate as sitting Justices are replaced, but the fact that the proposal would not have any significant immediate effects reduces the incentive for politicians to adopt it. For additional discussion, see *infra* Part III.

²⁴ See generally MITCHEL LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* (2004).

²⁵ This would empower the scholarly community, a phenomenon that I suspect Professors Lerner and Lund would view with skepticism.

²⁶ See LASSER, *supra* note 24, at 39–40, 309.

²⁷ Such a system would not fit, partly because Professors Lerner and Lund do not suggest that anonymous opinions should lose the discursive quality of current Supreme Court opinions.

the possibility of altering existing practices with respect to opinion form without altering other aspects of the legal and political culture. Professors Lerner and Lund's set of proposals, focused as they are on the Supreme Court alone, do not address this possibility.²⁸ Considering the incentives that politicians have for adopting good-government reforms shows the difficulty of instituting reforms that would address this broader set of concerns.²⁹

The basic difficulty with getting good-government reforms through the legislative process is twofold. First, good-government reforms tend to have payoffs in the long run, but most politicians have time horizons that lead them to severely discount benefits accruing in the distant future.³⁰ Second, to the extent that good-government reforms have benefits that accrue in the short run, politicians have incentives to identify the short-term winners and losers and convert advocacy of a good-government reform into advocacy of a partisan one, triggering ordinary partisan contention over the proposal.³¹ Typically, though not always, good-government reforms are adopted precisely because they have become associated with a larger partisan program consisting of reforms in the political system as a whole, which have been presented as good-government initiatives but also benefit some identifiable and immediate coalition of constituencies.³² In this way, good-government reforms accompany larger transformations in legal and political culture. It seems to me that the proposals of Professors Lerner and Lund do not yet have the characteristics that would make them plausible candidates for any serious politician's agenda.

As this Essay suggests, even the immediate implementation of Professors Lerner and Lund's proposals would have few short-term effects,³³ which is a serious obstacle to their being taken seriously by

I suspect, though, that a system of anonymous opinions would reduce the present level of discursiveness, both because of the pressures for compromise were a norm of consensus to emerge and because an anonymous opinion's author has less incentive to devote time to the opinion's development and polishing.

²⁸ Put another way, Professors Lerner and Lund offer a partial equilibrium analysis when what is required is a general equilibrium one.

²⁹ I developed this argument in Mark Tushnet, *How Different Is Writing Small from Writing Large?*, 18 *THE GOOD SOCIETY* 16 (2009), a comment on ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL* (2007).

³⁰ See Tushnet, *supra* note 29, at 17.

³¹ See VERMEULE, *supra* note 29, at 66.

³² See Tushnet, *supra* note 29, at 19.

³³ See *supra* note 23.

any politician.³⁴ One important effect is to make the job of Supreme Court Justice attractive to a different pool of people.³⁵ Implementing some of the proposals would immediately reduce the attractiveness of the position to those already holding it, giving the Justices now on the Court an incentive to retire sooner than they would have. Interestingly, although we know who the Justices immediately affected by this change are, we cannot be sure about who will respond to the change first. The most we can say is that the eldest of the sitting Justices will find the increased costs more burdensome than the youngest.³⁶ Until the retirement of Justice John Paul Stevens, this had a slight political tinge, with three of the four eldest Justices being liberals. Although the Court is now more balanced, in a few years the political valence of age might change again.³⁷

Seen as good-government proposals, Professors Lerner and Lund's reforms are not yet part of a larger package of reforms that might itself form the core of a partisan agenda. Judicial reforms have on occasion fit into such an agenda. Judicial elections, for example, were advocated in conjunction with larger democratizing trends aimed at breaking the power of politicians over the judiciary.³⁸ Additionally, Progressive Era reformers included judicial reform within their package of proposals to professionalize government administration.³⁹ It is unclear to me how Professors Lerner and Lund's proposals might fit into such a larger program. Their good-government character means that both conservatives and liberals might sign on to them, but for precisely that reason neither conservatives nor liberals have the politi-

³⁴ See VERMEULE, *supra* note 29, at 66–70 (discussing the difficulties associated with adopting proposals where implementation is delayed).

³⁵ See *supra* text accompanying notes 10–11.

³⁶ As this Essay suggests, the anonymous opinion proposal on which I have focused most of my attention would not have any effect on Justices like those now on the Court who have a substantial database for use by plagiarism-detecting programs. See *supra* note 23. The increased workload that would arise from the proposed change in the use of law clerks and the imposition of circuit-riding duties could place a heavier burden on older Justices.

³⁷ I can imagine a political world in which Professors Lerner and Lund's proposals would be enthusiastically endorsed by liberals and opposed by conservatives, and that might be the world a few years from now when the political process grinds its way to taking those proposals seriously. I can also imagine a political world in which the proposals would be endorsed by liberals and conservatives alike, in a coalition formed around dismay at an "activist" Court, with liberals and conservatives identifying different decisions as exemplifying activism. I think this quite unlikely, however.

³⁸ See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1097–99 (2010) (describing the rise of judicial elections during the decades immediately preceding the Civil War).

³⁹ See Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 854–55 (2002).

cal incentive to do so. Perhaps the implicit endorsement of a more bureaucratic judiciary could be incorporated into a larger program of reform of a political system infected by corruption, but the fact that that endorsement remains implicit suggests that it will be difficult to do that, too.⁴⁰

Sometimes, though, good-government reforms slip through the political system. An entrepreneurial politician chances upon the proposal and makes it his or her hobbyhorse. Other politicians do not care much about the proposal, seeing no political benefit for themselves (which is why they do not sponsor it) nor much political harm from its adoption (which is why they do not work against it), but want to induce the proposal's sponsor to sign on to their own initiatives. Under these circumstances a good-government reform might get adopted on its own. So might Professors Lerner and Lund's.⁴¹

⁴⁰ The endorsement probably will remain implicit not for any Machiavellian or Straussian reasons, but because bureaucratization is the long-run effect of the incentives the proposals offer to prospective Justices, and it is likely to be extremely difficult to explain that effect in ordinary political venues.

⁴¹ I note, however, that a condition for this process is that the proposal or proposals must have no obvious partisan valence, and that, if nothing else, the tone of Professors Lerner and Lund's article gives it a rather strong partisan tinge.