
CONSTITUTIONAL DESIGN

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To appreciate what is most provocative about Professor Jamal Greene’s comment requires careful attention to its title: *The Supreme Court as a Constitutional Court*.¹ Although triggered by the Court’s decision in *National Labor Relations Board v. Noel Canning*,² which is surely one of the most notable products of the Court in its 2013 Term, Greene raises far broader questions than those dealing with *constitutional interpretation*, which requires accepting without question an existing constitution and then trying to resolve conundrums involving its meaning. He instead broaches the issue of *constitutional design*, which focuses not so much on meaning as on the wisdom of basic decisions made in the original design process and the possibility that those decisions should be revisited and changed.³ As someone who has now written two books expressing my own criticisms of the structural Constitution,⁴ I can only applaud Greene’s couching his Comment as an “invit[ation]” to think of “fundamental questions of constitutional design,” though I probably would not focus on “judicial design in particular.”⁵ Still, courts are important, and I agree that thinking about “judicial design” is valuable.

Greene begins by asking a deceptively simple question: Why has it taken until now for the Court to adjudicate the circumstances under which the President is authorized to make use of the Recess Appointment Clause to “work around,” as it were, the general requirement that high-level appointees to the executive and judiciary receive Senate confirmation? The clause, after all, has been used by Presidents since George Washington named John Rutledge to succeed John Jay as Chief Justice by a recess appointment on July 1, 1795, though the Sen-

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¹ Jamal Greene, *The Supreme Court, 2013 Term — Comment: The Supreme Court as a Constitutional Court*, 128 HARV. L. REV. 124 (2014).

² 134 S. Ct. 2550 (2014).

³ For the distinction between “meaning” and “wisdom,” see SANFORD LEVINSON, FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 17–23 (2012) [hereinafter LEVINSON, FRAMED].

⁴ See *id.*; SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006) [hereinafter LEVINSON, OUR UNDEMOCRATIC CONSTITUTION].

⁵ Greene, *supra* note 1, at 126–27.

ate rejected his formal nomination on December 15, 1795.⁶ Still, it cannot occasion surprise that the clause has found striking new life in contemporary American politics. Why, after all, did President Bill Clinton make 139 recess appointments in his eight years in office (95 to full-time positions), and his successor, President George W. Bush, make 171 such appointments (105 to full-time positions)?⁷ The answer surely lies in the increasingly polarized nature of American politics, where “divided government,” as we have been told by Professors Daryl Levinson and Richard Pildes, signifies the “separation of parties, not powers.”⁸ Not surprisingly, the appointments at issue in *Noel Canning* arose in the context of a partisan filibuster preventing a vote that would have undoubtedly resulted in confirmation. The future will presumably see far fewer such filibusters as a result of the Senate Democratic majority’s change in rules in November 2013 to eliminate appointments-related filibusters save, interestingly enough, for nominees to the United States Supreme Court.⁹ But this change does nothing whatsoever to guarantee that President Obama (or any other future President) will be able to place in office any nominees should the opposition party control the Senate. They need not filibuster; they need only bring the nominations to a vote and reject them.

Former Clinton speechwriter Jeff Shesol has caustically described the strategy of the congressional wing of the Republican Party as vindicating the “the liberty of the American people to have a non-functioning government.”¹⁰ One would, of course, like to dismiss this as mere partisan hyperbole, but I fear that would be a mistake. This view is congruent, after all, with the title of a book written by two eminently sober and mainstream inside-the-Beltway political scientists: *It’s Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism*.¹¹ The great Harvard Law School professor of constitutional law, Thomas Reed Powell, is famous for having said: “If you think that you can think about a thing inextricably attached to something else without thinking of the

⁶ See LOUIS FISHER, CONG. RESEARCH SERV., RL31112, RECESS APPOINTMENTS OF FEDERAL JUDGES 14 (2001), <http://www.senate.gov/reference/resources/pdf/RL31112.pdf> [<http://perma.cc/V9B3-6XKJ>].

⁷ See LEVINSON, FRAMED, *supra* note 3, at 206.

⁸ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

⁹ See, e.g., Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES, Nov. 21, 2013, <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html?pagewanted=all> [<http://perma.cc/RAL9-FCGZ>].

¹⁰ Jeff Shesol, *Did History Win in Noel Canning?*, NEW YORKER, June 26, 2014, <http://www.newyorker.com/news/news-desk/did-history-win-in-noel-canning> [<http://perma.cc/7CYL-CPVW>].

¹¹ THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS* (2012). A 2014 paperback edition, with a new afterward, is no more optimistic.

thing which it is attached to, then you have a legal mind.”¹² What is “inextricably attached” to any consideration of the contemporary use of the Recess Appointment Clause — as part of the wider system of separated powers — is precisely the full-scale display of bitterly partisan cleavages and, inevitably, debate over who should prevail. Even if one agrees with Professor John Manning’s overall paean to Congress as the principal decisionmaking body,¹³ it is not clear that it translates into a similar affirmation of the ability of a minority of the Senate (in a filibuster) or even a majority of that grotesquely malapportioned body¹⁴ to hinder the effective operation of the executive branch for base partisan motives.

In any event, *Noel Canning* presents a remarkably crisp array of the various “modalities”¹⁵ attached to “constitutional interpretation” and invites the reader to pick and choose her favorites. Moreover, what made *Noel Canning* truly important beyond the cloistered academy was the possibility that the National Labor Relations Board would be deemed to have rendered illegitimate decisions for several years because of the deficiency in its required membership that was not cured by the President’s attempt to invoke the Recess Appointment Clause. According to Greene, the prospect of such untoward consequences of the declaration that the appointments did not pass constitutional muster, as the Court ultimately held in *Noel Canning*, made it especially desirable that the legal question of their validity be answered as soon as possible.¹⁶

But in the United States, the federal judiciary is committed only to *ex post* adjudication. Greene treats this as a truly unfortunate aspect of our system, much in need of reform. He suggests that it is high time that the Supreme Court give up its fixation on waiting for concrete “cases and controversies” to provide the occasion for review and in-

¹² THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 101 (1935) (internal quotation marks omitted). Powell’s comment was quoted with appropriate acerbity by Justice Ginsburg in dissent from the Court’s opinion in *Fisher v. University of Texas at Austin*, a case involving my home institution. 133 S. Ct. 2411, 2433 n.2 (2013) (Ginsburg, J., dissenting).

¹³ John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014).

¹⁴ James Madison himself loathed and described this feature as simply a “lesser evil” relative to the greater evil of getting no Constitution at all should small states not be appeased by equal voting power in the Senate. See *THE FEDERALIST* NO. 62, at 376 (James Madison) (Clinton Rossiter ed., 2003).

¹⁵ See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

¹⁶ He similarly notes that it would have been advantageous to know whether legislative vetoes were constitutional long before *INS v. Chadha*, 462 U.S. 919 (1981), by which time Congress had passed more than 200 separate statutes that included one or another form of the legislative veto, all of which were invalidated by the Court’s decision. See Greene, *supra* note 1, at 149.

stead engage in the kind of “abstract review”¹⁷ (sometimes labeled “advisory opinions”) that one finds in many foreign constitutional systems established after World War II¹⁸ and, for that matter, in at least some American states, including Massachusetts.¹⁹ After all, no serious person can possibly claim that inherent in the very idea of a “well-functioning judiciary” is the almost byzantine set of jurisdictional rules established by the Supreme Court over the past two centuries, which often work, by design, to make it effectively impossible for a litigant to gain judicial resolution of his or her claim. Too many other judicial systems seem to operate just fine without going down the road developed by the Supreme Court. The Supreme Court’s jurisdictional rules should be treated as one more instance of “American exceptionalism” or, perhaps, even “national judiciary exceptionalism,” when contrasted with those American state judiciaries that seem to work well under more latitudinarian rules and practices.

Much would have to change for Professor Greene’s arguments on behalf of a new vision of the Court to be accepted. Consider only that one of the *Harvard Law Review*’s most famous forewords was the late Professor Alexander Bickel’s full-throated defense of the Court’s exercise of its “passive virtues”²⁰ (or, as Professor Mark Graber has valuably suggested, the “passive-aggressive virtues”²¹) to avoid deciding issues that might threaten the Court’s own power within the American political system. Whatever might be said on Law Day about the purported “province and duty of the judicial department to say what the law is,”²² we know that this “duty” is honored as much in the breach as in the observance, especially where the nation’s apex court is concerned. The Supreme Court, perhaps, leaves most suitors distinctly unsatisfied even as they return with hope that the next entreaty will achieve a better outcome.²³

As Professor David Cole has recently pointed out, “the Roberts Court has been unremittingly conservative” with regard to granting “access to judicial remedies for legal wrongs,” instead “[a]t every stage”

¹⁷ Greene, *supra* note 1, at 142–44.

¹⁸ See VÍCTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES 66–70 (2009).

¹⁹ See LEVINSON, FRAMED, *supra* note 3, at 170–71.

²⁰ Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 40 (1962).

²¹ Mark A. Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT. 67, 68 (1995).

²² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

²³ Manning’s superb Foreword certainly calls into question many of the Court’s assertions of passivity when based only on “prudential” considerations. See Manning, *supra* note 13, at 74 n.415. But even if rules of standing, ripeness, etc., are constitutionally required, that only raises Greene’s question about whether such constitutional rules are wise in the twenty-first century and, if not, whether the Constitution should be amended to do away with them.

favoring “rules that make it more difficult to pursue justice in the courts.”²⁴ One might contrast the stinginess of our Supreme Court with the high courts of Israel and India, which are well known for welcoming, as a practical matter, almost any and all potential litigants. Israeli judges have declared that “closing this Court’s doors before [any] petitioner . . . who sounds the alarm concerning an unlawful government action, does damage to the rule of law. Access to the courts is the cornerstone of the rule of law.”²⁵ It is, for better or worse, impossible to imagine such language being issued by the current majority of the Supreme Court. One wonders what Greene thinks of an earlier suggestion by Professors Paul Carrington and Roger Crampton (and supported by an array of legal academics) that a new court be created whose sole duty would be to issue writs of certiorari and therefore trigger mandatory decisions on the merits by the Supreme Court.²⁶

But, of course, all such protests about judicial niggardliness rest on an important begged question: How much do we want courts — and, in particular, the United States Supreme Court — to step up to the plate whenever questions going to the operation of our basic institutions are involved? Greene seems to be a far greater admirer than Manning, for example, of the “judicial resolution”²⁷ that would attend his proposed “power to review legislation or executive action before there is an injury to a private plaintiff.”²⁸

But what is it, exactly, that he would wish the Court to do in such cases? It is not clear that he has in mind any particular notion of “judicial role” or approach to “constitutional interpretation,” whether Scalia (or Manningesque) textualism or Breyerian purposivism and pragmatism. Perhaps Greene’s real point is that we would be better off had the issues raised by the Recess Appointment Clause been settled long ago, whatever answer would have actually been given by a particular Court. Is this an appropriate occasion for recalling Justice Brandeis’s comment that “it is more important that the applicable rule of law be settled than that it be settled right”?²⁹

²⁴ David Cole, *The Anti-Court Court*, N.Y. REV. BOOKS, Aug. 14, 2014, <http://www.nybooks.com/articles/archives/2014/aug/14/anti-court-supreme-court/> [http://perma.cc/5TC5-D9PV].

²⁵ LEVINSON, FRAMED, *supra* note 3, at 282 (quoting HCJ 910/86, *Ressler v. Minister of Defence*, 42(2) PD 411 [1988] (Isr.)).

²⁶ See Letter from Professor Vikram D. Amar, et al., to Joseph R. Biden, Vice President of the United States 10–13 (Feb. 2009), <http://www.scotusblog.com/wp-content/uploads/2009/02/judiciary-act-of-2009.doc> [http://perma.cc/3SVK-8QW7]. I should note that I was one of the signatories of the letter.

²⁷ Greene, *supra* note 1, at 150.

²⁸ *Id.* at 142.

²⁹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). Importantly, Justice Brandeis immediately went on to distinguish between statutory and constitutional cases on the grounds that mistakes with regard to the former could be overruled by Con-

Thomas Hobbes, perhaps the greatest of all English-speaking political theorists, defined the “sovereign” basically as a completely authoritative dictionary, who could, by stipulating particular definitions to otherwise controversial words such as “justice,” “general welfare,” or, perhaps, even “the Recess,” prevent the discord attached to disputation over meaning.³⁰ One need not praise the sovereign as an “expert” expositor of linguistic meaning, only as a final one.³¹ But, of course, we are all too aware that many “final” decisions of the Court have been little short of disgraceful, and some have been far worse.³² So why plump for greater judicial resolution of constitutional controversies unless one has a relatively high confidence that the Justices are more likely to “get it right,” on whatever metric one wishes? In the absence of such confidence, perhaps we would be better off leaving resolution of such disputes to the sometimes abrasive political processes of what Professor Mark Tushnet has called “constitutional hardball”³³ or Professors Adrian Vermeule and Eric Posner have labeled “constitutional showdowns.”³⁴

Unfortunately, it is impossible to engage in such a discussion without making quite specific reference to the current Supreme Court and asking why anyone would really wish to grant its current members enhanced power. After all, what Greene is suggesting is that the new “constitutional court” be empowered to more frequently make fundamental decisions about the allocation of institutional power in our twenty-first-century political order. One need not attack the intelligence or integrity of current Justices in order to be skeptical that they are just the right persons to “resolve” the kinds of truly political questions raised by the operation of the Recess Appointment Clause in the twenty-first century.

This is the first Court in our history, for example, to have not a single member who has ever run for elected public office, let alone actual-

gress, whereas constitutional errors would be far more entrenched against correction unless the Court itself changed its mind. *See id.* at 406–08.

³⁰ *See, e.g.*, SHELDON S. WOLIN, *POLITICS AND VISION* 238 (expanded ed. 2004) (discussing “the sovereign definer”).

³¹ Recall Justice Jackson’s comment that “[w]e are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result).

³² *See, for example*, Professor Greene’s earlier essay, *The Anti-Canon*, 125 HARV. L. REV. 380 (2011), on which I commented in *Is Dred Scott Really the Worst Opinion of All Time? Why Prigg is Worse than Dred Scott (But Is Likely to Stay Out of the “Anti-Canon”)*, 125 HARV. L. REV. F. 23 (2011), <http://harvardlawreview.org/2012/01/is-dred-scott-really-the-worst-opinion-of-all-time-why-prigg-is-worse-than-dred-scott-but-is-likely-to-stay-out-of-the-aeoecanona/> [<http://perma.cc/4684-SQN9>].

³³ *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

³⁴ Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 993 (2008).

ly experienced the challenges of filling an elective office, including, if one is a legislator, having to participate in the “sausage-making process” of drafting and voting on actual legislation.³⁵ Only Justice Kagan has had the real opportunity to observe the modern executive up close, which no doubt contributed to the plethora of insights contained in her truly seminal article, *Presidential Administration*.³⁶ She did not, however, like Justice Thomas, actually have to administer a reasonably important federal agency. Many of the Justices proclaim their deep regard for states, but other than Justice Sotomayor — who worked for New York District Attorney Robert Morgenthau — and Justice Kennedy — who worked with Governor Ronald Reagan of California more than forty years ago — none has spent a significant amount of time experiencing the operations of state government up close. This is the first Court in our history that has no one on it who served as a state judge (such as, say, Justices O’Connor and Souter). Moreover, I suspect that one explanation for the frequent “distrust of Congress” identified by Professor Karlan in her contribution to the *Harvard Law Review* two years ago³⁷ is that only Justice Breyer has ever spent “quality time” on the Hill, as Chief Counsel of the Senate Judiciary Committee. As a result, he has a genuine (even romanticized) respect for Congress that is diminished or totally absent in the rest of his colleagues. (A major disagreement I have with Manning is his consistent reification of “the Court” rather than any acknowledgment that that institution is composed of specific human beings with their own relevant biographies, including political ideologies.)

Past Courts included former Secretaries of State (Marshall and Hughes); Secretaries of the Treasury (Taney, Chase, and Vinson); Attorneys General (Taney, McReynolds, Stone, Jackson, and Clark); significant governors of significant states (Hughes and Warren, both of whom were also nominees for the presidency and vice-presidency, respectively); important senators (think only of Chase, Sutherland, and Black); and even a former President (Taft). Justice Thurgood Marshall was the last Justice who actually represented criminal defendants in trial courts (sometimes literally risking his life by doing so). I would be stunned if any member of the current Court had ever visited a client in jail or, even more to the point perhaps, negotiated a guilty plea

³⁵ On the link between legislation and sausage-making, often misattributed to German Chancellor Otto von Bismarck, see Fred R. Shapiro, *Quote . . . Misquote*, N.Y. TIMES MAG., July 21, 2008, <http://www.nytimes.com/2008/07/21/magazine/27wwwl-guestsafire-t.html> [<http://perma.cc/US7P-HA2V>].

³⁶ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

³⁷ See Pamela S. Karlan, *The Supreme Court, 2011 Term — Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 47 (2012). My own view is that the “distrust” often manifests itself as ill-disguised “contempt.”

with an overbearing prosecutor. One can well imagine wanting such figures, whatever their inevitable imperfections, to take part in a convention-like discussion within the chambers of the Supreme Court about how best to interpret certain structural provisions, including the Recess Appointment Clause, in a way that would best serve the contemporary national interest. But, as already noted, the contemporary Court — and, quite likely, the successors of its current members — lacks the wide range of experience of the Justices mentioned above.

As one looks at constitutional courts around the world — or, for that matter, state courts within the United States, one often finds that they include persons with significant experience in governance. Belgium, for example, actually requires that half the members of its constitutional court be former members of Parliament.³⁸ Perhaps it is also worth noting that almost all constitutional courts have term limits on service by the judges, usually somewhere between 10 and 14 years. What all of this adds up to is that Greene’s invitation to a national dialogue must be expanded well beyond the kinds of jurisdictional questions that he raises or the merits of “abstract review” to include the extent to which we are well served by the present structure of the Supreme Court (and, perhaps, other federal courts). They are all, in significant ways, exceptional not only among courts around the world but also with regard to most courts in the United States itself, which operate under the aegis of quite different state constitutions.

Justice Holmes famously reminded us of the importance of “experience” as, at the least, a complement to legal “logic.”³⁹ So consider in this context one aspect of Justice Scalia’s opinion in *Noel Canning*, which, quite independently of his general reliance on “textualism,” illustrates my hesitation to embrace the Supreme Court as a Greene-like “constitutional court.” Early in his opinion, Justice Scalia chides the majority for “disregard[ing]” an “overarching principle[] that ought to guide our consideration of the questions presented here.”⁴⁰ That principle is captured in the assertion that “the Constitution’s core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights.”⁴¹ What follows this assertion is a plethora of citations to previous opinions of the Supreme Court *and nothing else*. The problem, of course, is that previous opinions of the Supreme Court do not count as what anyone

³⁸ See Adelaide Remiche, *Belgian Parliament Introduces Sex Quota in Constitutional Court*, OXFORD HUM. RTS. HUB (Apr. 21, 2014), <http://ohrh.law.ox.ac.uk/?p=6183> [<http://perma.cc/Q9KU-9AN4>].

³⁹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

⁴⁰ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring in the judgment).

⁴¹ *Id.*

other than a particular kind of lawyer (or Justice) would seriously present as evidence about the empirical world. To be blunt, there is no evidence whatsoever that most of the institutional features of the American constitutional order can be demonstrated, as a general matter, to be more likely to be liberty-enhancing *or* liberty-destructive. In another context, Professor Franz Neumann convincingly argued that federalism, another institutional feature of our system about which the contemporary Court often waxes rhapsodic, has no necessary connection with any particular values.⁴² As Manning implies in his own Foreword, notions like “separation of powers” or “federalism” may be the equivalent of “ink blots” inviting the Justices to project their own favorite stories, both highly contested and contestable, about American constitutionalism.⁴³ Moreover, one should applaud Manning’s citation of Justice Jackson’s important reminder that “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government,”⁴⁴ an issue presented, as Shesol notes, by the Recess Appointment controversy itself.⁴⁵

Anyone seriously interested in “constitutional design” should be aware of, and truly interested in, what might be learned from the empirical study of political institutions — what James Madison called “the lessons of . . . experience.”⁴⁶ There is, alas, no evidence that Justice Scalia, or many of his colleagues, share any such interests. To assert, as he does, that “checks and balances were the foundation of a structure of government that would protect liberty,”⁴⁷ ought to begin, and not end, a conversation. After all, is it not the case that checks and balances have very often served to entrench unjust and anti-libertarian status quos because of the ability of those groups — indeed, sometimes even particular especially wealthy individuals or families who invest wisely when dispensing their political contributions — who benefit from stasis to be able to veto necessary changes simply by capturing only one among the many institutions necessary actually to pass legislation in the United States? No doubt one can find happier examples of the consequences of the form of checks and balances adopted in 1787 — and rejected by almost all constitutional designers in the late twentieth and early twenty-first centuries — but the ultimate

⁴² See Franz L. Neumann, *Federalism and Freedom: A Critique*, in *FEDERALISM: MATURE AND EMERGENT* 44 (Arthur W. MacMahon ed., 1955).

⁴³ See Manning, *supra* note 13, at 55–57.

⁴⁴ *Id.* at 57 (alteration in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

⁴⁵ See *supra* note 10 and accompanying text.

⁴⁶ *THE FEDERALIST NO. 14* (James Madison), *supra* note 14, at 99.

⁴⁷ *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring in the judgment) (quoting *Bowsher v. Synar*, 478 U.S. 714, 722 (1986)) (internal quotation marks omitted).

question involves the frequency distribution of “pro-” or “anti-liberty” outcomes that can plausibly be related to the structures of governance, assuming there is any relationship at all. There is, alas, no reason to rely on any Justice’s (or “the Court’s”) views on such matters.

Greene’s proposal with regard to a new “constitutional court” for the United States raises a host of troubling questions that must be included in any ensuing discussion. But this in no way lessens the appreciation we should all have for his call to shift discussion from “interpretation” to design and even, if need be, the desirability of addressing the possibility of long overdue constitutional amendments.