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# Book Review: The British Constitution Now: Recovery or Decline? by Ferdinand Mount.

Edward B. Foley

# Book Reviews

## THE BRITISH CONSTITUTION NOW: RECOVERY OR DECLINE? By Ferdinand Mount.[1] London, England: William Heinemann Ltd. 1992. Pp. viii, 289.

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Anyone who follows developments in American constitutional theory should be interested in this new book on the British constitution by Ferdinand Mount, a journalist of considerable stature in Britain. Bruce Ackerman has recently written that this century's preeminent American constitutional scholars have failed to appreciate the virtuous complexities of the U.S. Constitution—especially the institution of judicial review—because of their misplaced affection for the British constitution and its apparent simplicity.[3] Mount's book now argues that British constitutional law is much more complicated than everyone, including the American Anglophiles, has thought it to be.

### I

Although Ackerman may overstate his case against the Anglophiles, there is at least some truth to his charge. Such prominent American scholars as Bickel and Ely do appear to imagine pure democracy as being an omnipotent Parliament of the kind that Britain is thought to have.[4] And with this conception of democracy in

1. Editor, *Times Literary Supplement*. Mount's previous positions include Director of the Centre for Policy Studies, a British think tank, and political correspondent for *The Spectator*. Perhaps because of Mount's talents and training as a writer and editor, his book is a joy to read for the elegance of its style as well as the substance of its ideas.

2. Assistant Professor of Law, The Ohio State University. Thanks to all who gave me comments on an earlier version of this essay.

3. See Bruce Ackerman, *We The People: Foundations* 7-8 (Belknap Press, 1991) ("*We The People*"). Ackerman sees this Anglophile tendency in American constitutional scholarship passing from Woodrow Wilson and James Thayer to Felix Frankfurter and Alexander Bickel, and then to John Hart Ely and other contemporary theorists. See id. at 11; see also id. at 84, 222 (discussing Wilson's preference for the British parliamentary system).

4. See Alexander M. Bickel, *The Least Dangerous Branch* (Bobbs-Merrill, 1962); John Hart Ely, *Democracy and Distrust* (Harv. U. Press, 1980).

mind, judicial review of the Legislature's enactments certainly does look like a "deviant institution,"[5] which must be restrained to a narrow role (and only then if special circumstances warrant).

Ackerman seeks to rehabilitate judicial review as an entirely legitimate institution in America's constitutional democracy, and he proposes to do this by replacing parliamentary omnipotence as the guiding image of democracy with a different and more complicated conception of democracy, which he calls "neo-Federalism" because he attributes its origins to the *Federalist Papers*.[6] By invoking the *Federalist Papers* in this way, Ackerman hopes to return American constitutional scholarship to its roots, thereby repairing the damage done by a century of misguided Anglophiles.[7]

Given the nature of Ackerman's mission, and the prominence of his project,[8] it is certainly noteworthy that Mount's new book on the British constitution relies heavily on the *Federalist Papers* to attack the idea of parliamentary omnipotence. Mount recognizes, of course, that for over a century the prevailing view of British constitutional scholars has been that the British constitution establishes

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5. Bickel, *The Least Dangerous Branch* at 18 (cited in note 4).

6. As readers of this journal already know, see Terrance Sandalow, *Abstract Democracy*, 9 Const. Comm. 309 (1992), Ackerman's neo-Federalist conception of democracy is "dualist" because it distinguishes between two different types of lawmaking: (1) ordinary legislation enacted by the legislature; and (2) extraordinary legislation adopted by the People themselves. According to this dualist feature of neo-Federalism, the enactments of the legislature are not supreme; rather, they are subordinate to the more authoritative pronouncements of the People themselves. Moreover, even with respect to the ordinary operations of government, the legislature is not omnipotent. On the contrary, the legislature is understood as merely one of three co-equal branches of government, each given sufficient power to check and balance the other two, with the precise purpose of making it implausible for the legislature to claim omnipotence on the ground that it alone speaks authoritatively for the People themselves. Once judicial review is viewed in light of these neo-Federalist principles, it does not seem such an anti-democratic anomaly—or so Ackerman argues. See Ackerman, *We The People* at 9-10, 261-64 (cited in note 3).

7. See Ackerman, *We The People* at 252 (cited in note 3): "Anglophile critique has been important in diverting American constitutional thought from its Federalist roots." See also id. at 222: "Within the increasingly Anglophile world inhabited by leading constitutionalists, the *Federalist Papers* were not so much forgotten as drained of their deeper meanings."

8. In addition to the essay on *We the People* that appeared in this journal, see Sandalow (cited in note 6), Ackerman's book has been widely reviewed elsewhere as well. See William W. Fisher III, *The Defects of Dualism*, 59 U. Chi. L. Rev. 955 (1992); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 Stan. L. Rev. 759 (1992); Frederick Schauer, *Deliberating About Deliberation*, 90 Mich. L. Rev. 1187 (1992); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 Harv. L. Rev. 918 (1992). Moreover, Cass Sunstein credits Ackerman's work as being a substantial influence on the development of his own constitutional theory (although he does not subscribe to all of Ackerman's ideas). See Cass R. Sunstein, *The Partial Constitution* 7, 23, 357 n. 3, 359 n. 15, 362 n. 29, 370 n. 21 (Harv. U. Press, 1993). Likewise, the philosopher John Rawls credits Ackerman's work as a major influence on his understanding of the role of judicial review in American democracy. See John Rawls, *Political Liberalism* §§ VI:5 n. 19, VI:6 n. 12 (Columbia U. Press, 1993). Rawls, too, however, does not agree with all of Ackerman's ideas. See id. at § VI:6 n. 25.

an omnipotent Parliament.[9] But Mount rejects the prevailing view, arguing that it is an inaccurate description of the British constitution's true nature, which he sees as being much closer than others realize to the American Constitution.[10] In any event, Mount is interested not only in *describing* what the British constitution *is*, but also in *prescribing* what the British constitution *ought to be*, and he makes it very plain that he thinks the British constitution ought to be much more like the American Constitution than the prevailing view would allow.

Mount points to three fundamental features of the American Constitution that should become revitalized in British constitutional law: separation of powers, judicial review and federalism.[11] In the ensuing pages I will summarize how Mount uses each of these principles to attack the idea of parliamentary omnipotence, and then offer some observations on how Mount's work might contribute to the development of American constitutional theory. One might be tempted to say simply that Mount proves Ackerman correct,[12] but the lesson to be learned is more complex than that.

## II

Quoting *Federalist* No. 47,[13] Mount reminds his British readers that separation of powers does not require that each branch of government be completely independent from the others, but only

9. "The Constitution, we are told, is parliamentary supremacy and nothing but parliamentary supremacy; it admits no considerations of natural law or human rights, just as it admits no powers for subordinate or external law-making bodies, except in so far as Parliament has defined and granted such powers." Mount adds: "And Parliament itself is a thinned-down version of what it once was, the threefold bundle of King, Lords and Commons having given way to a single all-powerful body impeded only faintly by the incrustations of tradition."

10. Mount blames the prevailing misconception of the British constitution on three leading British scholars: Walter Bagehot, Albert Venn Dicey and Ivor Jennings.

11. The term "federalism" refers to the vertical dimension of constitutional law and should not be confused with the term "neo-Federalism," which Ackerman coined to describe his theory because of its reliance on *Federalist Papers*. Ackerman's theory of neo-Federalism concerns the horizontal dimension of constitutional law at the national level of government; indeed, Ackerman's *We the People* barely mentions the vertical dimension of constitutional law and the significant issues it raises for any attempt to develop a complete and coherent theory of constitutional law. See note 47, infra.

12. After all, if even a thoughtful British writer like Mount thinks that our Constitution is better than theirs, then surely we should not try to make our Constitution more like theirs, as the Anglophiles have tried to do.

13. '[Montesquieu] did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye (i.e. England), can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power in another department, the fundamental principles of a free constitution are subverted.'

that each branch be sufficiently independent to *check* and *balance* the others. Such checks and balances, Mount argues, "are crucial to the British Constitution no less than to the Constitution of the United States." Without them, he points out, an unfettered Parliament "might act in a terrifyingly arbitrary and lawless fashion, arresting people it disapproved of, silencing minorities, seizing property on trumped-up excuses." Thus, Mount reiterates the classic Madisonian argument that separation of powers is necessary to protect individuals and minorities from a tyranny of the majority.

While this argument might seem stale to many Americans, Mount is challenging a society which assumes that parliamentary democracy rather than separation of powers is key to British freedom and good government, and he means to attack this assumption at its foundations. He sees the prevailing British faith in "parliamentary monotheism" as "a kind of vulgar Rousseauism," pursuant to which "the general will must flow unimpeded through both the legislature and the executive, unchecked, unbalanced, unchallenged." In short, Mount thinks that the contemporary understanding of British constitutional law is premised on a mistaken conception of democracy. Democracy should be understood, not as an effort to implement public opinion with the minimum of delay and impedance, but rather as a *deliberative* process (of the kind Madison envisioned) through which popular sentiments would be refined and distilled into sensible and coherent policy—policy which reflects "not only . . . the will of the majority but also . . . the aspirations, fears and interests of minorities."[14] And if one accepts that this sort of deliberative democracy is the goal of constitutional law, then one easily recognizes that a system of checks and balances is more appropriate than an omnipotent Parliament.

What is more, Mount thinks that such checks and balances can be found within existing British institutions, if only these institutions are resuscitated in accordance with longstanding British traditions.[15] Indeed, he points out that Madison, relying on Montesquieu, used Britain as his example of a government with a well-developed system of checks and balances.[16] Thus, in his effort to revive these traditional British institutions, Mount finds Madison, and other eighteenth century thinkers, to be more appropriate authorities than modern British constitutionalists, who have

14. Cass Sunstein, in his new book, also emphasizes Madison's distinctive conception of *deliberative* democracy. See Sunstein, *The Partial Constitution* at 20-23 (cited in note 8).

15. Mount states: "What I call . . . 'the old spirit of our constitution' . . . has in it a great deal more than the recognition of the law-making supremacy of Parliament."

16. See note 13, supra.

allowed these institutions to atrophy.[17]

The monarchy is one institution which Mount wishes to reinvigorate. He thinks the requirement that the monarch must sign all Acts of Parliament for them to become law should not be treated as a mere vestigial formality but instead should be understood as giving the monarch the power to veto legislation that is either procedurally or substantively unconstitutional. A law would be procedurally unconstitutional if Parliament had failed to comply with certain procedural rules governing special types of legislation (for example, a rule requiring a supermajority vote to repeal a Bill of Rights).[18] An Act of Parliament would be substantively unconstitutional if it "runs so contrary to justice that it is incompatible with [the monarch's] oath of office." For example, should the Queen "sign Acts legalising the deportation or murder of minorities?"[19] Obviously not, in Mount's view, since the Queen has taken an oath, as ultimate "guardian of the Constitution," to preserve the basic liberty of her subjects.[20]

The House of Lords is another institution that, according to Mount, should have the power to reject unconstitutional legislation adopted by the House of Commons. But if the House of Lords is to perform this function, the percentage of hereditary peers must be reduced—so that the party composition of Lords is not too far out of line with that of Commons.[21] Mount also suggests that some number of seats in the House of Lords be allocated to various industry or labor groups. Although recognizing that this suggestion might be rejected for being a kind of "corporatism," he thinks it worth raising if only to provoke discussion of the various different ways in which the British people might be represented in Parlia-

17. Mount sees no incongruity in using the *Federalist Papers* as a guide to reconstructing British constitutional law, since he considers the *Federalist Papers* to be "an offshoot" of the same British tradition that boasts the likes of Burke and Blackstone.

18. In such a circumstance, "the Queen would have an extremely good case for saying that to give assent to such legislation would be contrary to her Coronation Oath and that she would not assent until the correct procedures had been followed."

19. Mount states: "The fact that such contingencies may never come the way of any particular monarch does not mean that his guardianship is an empty thing; the guardian's profession is, as Bagehot said of bankers, 'a watchful rather than a busy trade.' "

20. In contemplating this veto power, Mount is unconcerned that the monarchy is a hereditary institution. To be sure, he acknowledges, the same power could be lodged in the office of an elected President so long as the President was elected directly and therefore independent of the legislature. But for Mount the crucial issue is the existence of the power and not the means by which the holder of this office comes to office. Thus, although Mount is not a monarchist in the strictest sense of the term, he is by no means a true republican either, notwithstanding his extensive reliance on the *Federalist Papers*.

21. Under present arrangements, life peers are appointed by the monarch based on a list developed by the Prime Minister; therefore, the composition of the life peerage is not entirely immune from democratic politics.

ment *other than* the simple, straightforward way they are represented in Commons.[22]

## III

One might think that if both the Queen and the House of Lords have the power to veto unconstitutional laws, there would be no need in Britain for *Marbury*-style judicial review. But on the contrary: just as the President and the Senate do not make *Marbury* superfluous in the United States, so too Mount considers judicial review necessary in Britain even if there are other institutional checks on the House of Commons. Indeed, Mount explicitly identifies the following two "indispensable elements" of constitutional reform for Britain: (1) "an entrenchment clause covering certain basic essentials of the Constitution," including a Bill of Rights;[23] and (2) "a supreme court which includes among its duties the interpretation and safeguarding of the entrenched provisions." Thus, Mount wants the practice of constitutional law in Britain to look essentially as it does in the United States.

Mount truly appreciates the U.S. Constitution in a way that some Americans, regrettably, do not. Perhaps because he is a foreigner he, like de Toqueville and Bryce, has a perspective that Americans lack. In any event, he makes an assertion about the abortion controversy in American constitutional law that seems quite remarkable, especially considering the intellectual energy that has been devoted to the abortion issue among American constitutional scholars:

> All constitutions, whether written or unwritten, are vulnerable to overworking; any statement of right or duty, however carefully phrased, can be pressed to the letter of its phrasing and beyond by legal and political activists. But a constitution which is properly articulated and generally understood will suffer, at worst, surface damage from the campaigners' probes; the majesty of the US Constitution—with all the space and civil certainty it confers

22. Thus, this suggestion is in keeping with Mount's basic desire to develop a more complex and multi-faceted conception of representative democracy than the one that underlies the idea of unicameral omnipotence. Moreover, in this particular respect, Mount's views are very close to Ackerman's Neo-Federalist theory of representative democracy, which attempts to fracture the representation of the electorate into multiple parts so that no single part is entitled to claim to speak for the People as a whole. See Ackerman, *We the People* at 185 (cited in note 3).

23. By "entrenchment," Mount means a provision that would prohibit the Bill of Rights from being amended by a simple majority of the legislature. One should not confuse Mount's use of the term "entrenchment" with Ackerman's. Ackerman defines an "entrench[ed]" Bill of Rights as one that is entirely unrepealable, even by a supermajority of voters. See Ackerman, *We the People* at 321 (cited in note 3).

> upon its citizens—is not much impaired by, for example, enthusiastic over-interpretation by campaigners for and against abortion on demand.

This passage is a useful reminder to Americans (e.g., Ely and Bork) whose constitutional theories sometimes seem contrived as a response to *Roe v. Wade*: do not discredit the essential nature of America's liberty-preserving structure just because the Supreme Court may have made an error or two.[24]

Mount thinks he can fit a Bill of Rights and judicial review within the existing framework of British constitutional law, although he recognizes that, according to the prevailing view, neither an "entrenched" Bill of Rights nor judicial review is consistent with the idea of parliamentary supremacy.[25] In support of his position, Mount relies upon the elementary proposition that Parliament always must be bound by some antecedent set of procedures in order to be able to enact any measure into law. These rules of legislative procedure typically define a quorum and what percentage of the quorum must vote in favor of a bill for it to be enacted. While the requisite percentage is usually a simple majority, Mount argues that it need not always be so. For special sorts of bills a supermajority might be required.

Mount acknowledges that any supermajoritarian rule, to be legally operative, would have to be adopted in an Act of Parliament pursuant to whatever procedural rules that then prevailed. Therefore, if the prevailing procedural rules required only a simple majority for all Acts of Parliament, then to enact a two-thirds supermajority requirement for certain special legislation would itself require only a simple majority. But just because a two-thirds supermajority rule can be adopted by a simple majority vote, it does not follow that the two-thirds supermajority rule, once enacted, may be *repealed* by a simple majority vote. Suppose a Bill of Rights enacted by Parliament explicitly provides: "Any amendment or repeal of any provision of this Bill requires assent by two-thirds of all members of Commons." According to Mount, the law of the land would then be that repeal of this Bill requires a two-thirds vote, even if the Bill originally was enacted by a simple majority.[26]

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24. The joint opinion in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), may reflect an attitude similar to Mount's in this respect.

25. An entrenched Bill of Rights is thought incompatible with the idea that an omnipotent Parliament cannot enact a law that reduces its own power. The consequence for judicial review is obvious: "Parliament, and Parliament alone, [has the power] to define and redefine the Constitution; the judges were to know their place."

26. As Mount puts it, "the rules can only be changed according to the rules as they stand." Thus, in response to the parliamentary supremacists, Mount says: "In this proce-

Because it would be unlawful for Parliament to repeal this entrenched Bill of Rights by a simple majority vote, Mount believes the judiciary would be justified in refusing to give effect to a measure, adopted only by a simple majority, that purported to repeal the Bill of Rights. In other words, the judiciary would be entitled to declare the purported repeal measure as being without force of law since it was not promulgated pursuant to established procedures. In precisely this way, Mount believes that the institution of judicial review is already latent in British constitutional law.

Furthermore, however, Mount thinks that the institution of judicial review, like the monarch's veto power, should not be limited to declaring legislation null and void if its enactment failed to comply with procedural requirements, but rather should extend to invalidating legislation that fails to comply with the substantive standards of basic justice. He applauds those few contemporary British judges who are willing to follow, however hesitantly, in the footsteps of Coke and the celebrated *Doctor Bonham's Case*:

> Above all, there has been Lord Denning . . . who has kept alive in the minds of Englishmen an idea of law which is broader and higher and more enduring than the ever fattening annual volumes of Acts of Parliament. Now and then, this aspiration has led Denning into "making the law as it ought to be, instead of administering it as it is." That [is] an accusation [which] cannot altogether be dodged. But . . . the oath that judges take is to do justice according to law and, since they cannot help making law as well as administering it, justice requires that the law they make should be reasonable.

Wishing, however, to secure a firmer footing for the kind of fundamental rights jurisprudence that we have in the United States, Mount thinks that Parliament ought to enact legislation that, in addition to entrenching a Bill of Rights, explicitly establishes a "constitutional court" with the power to review Acts of Parliament for consistency with this Bill of Rights.

## IV

As Mount wryly observes, the "religion of parliamentary monotheism" does not tolerate the idea that Scotland or Wales might have its own legislature, sovereign in its own sphere, i.e., with a jurisdiction independent of the national Parliament at Westminster. Even more clearly incompatible with the doctrine of parliamentary

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dural sense, far from it being the case that 'no parliament can bind its successor,' *every parliament cannot help binding its successor*; the binding is what defines its successor as a true parliament and endows its decisions with proper authority." (emphasis in original).

omnipotence is the idea of a pan-European legislature with supreme powers in its areas of jurisdiction. But this rigid doctrine is no longer tenable, if it ever was, in view of changing economic and social conditions.[27]

Moreover, Mount reminds us, the simplistic conception of democracy upon which the idea of parliamentary omnipotence is premised is flawed at its foundations. The doctrine assumes that constitutional law is to be designed solely for the British people, as if the British are the only relevant *people* in need of a legal structure for the purposes of self-government. Mount points out that there are the people of Scotland, and the people of Europe, as well as the people of Britain. Thus, Mount explains generally that there is no single *people* that one can regard as the ultimate source of all constitutional authority but, instead, multiple groupings of *peoples*, defined in different and sometimes overlapping ways, owing allegiances to different and sometimes overlapping constitutional structures.

Constitutional law, Mount insists, must take account of these intricacies—even if the subject at hand is "British" constitutional law. "Having oversimplified, we need to recomplicate," he proclaims—this proclamation expressing the main point of his whole approach to constitutional law. And to help understand these rediscovered complexities, he articulates two key concepts: "subsidiarity" and "patriation."

*Subsidiarity*. This term, which Mount acknowledges to be unartful, refers to the idea that the functions of government "should be exercised at the lowest practicable level of government." This means, first and foremost, that the European Community should not swallow up all the functions of the British government. At the same time, however, Mount identifies several functions of government that can be performed practicably only at a pan-European, or perhaps even worldwide, level: environmental protection,[28] free trade[29] and monetary policy.[30]

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27. Mount was anticipating the ratification of the Maastricht treaty, and significantly increased European integration, when he wrote his book. Although this process of centralization may have been set back somewhat by subsequent events, Mount's basic points about constitutional theory still hold true.

28. Mount relies upon the work of public choice theorists to point out that polluters are less likely to thwart environmental regulation if the regulation occurs at the more centralized level of two governmental units.

29. Once again, Mount looks to the U.S. Constitution as a model: "A really dedicated free-marketeer surely ought to welcome the installation of a supranational legal framework which would take the principles of free trade out of reach of the political lobbyists. He would look for a constitutional settlement which would include assertions of principle on the scale of those contained in the U.S. Constitution."

The principle of subsidiarity also requires that the British Parliament devolve to regional and local legislatures the task of resolving truly local problems. Mount condemns the Thatcher government for its wholesale destruction of local government in Britain, with all policy made at the national level. The consequences include a loss of civic pride at the local or municipal level, thereby undermining the sense of collective responsibility in local communities. Mount believes that the remedy for this condition is to entrench the status of local institutions as a matter of constitutional law, so that Parliament could no longer tinker with them by a simple majority vote.[31]

*Patriation*. This principle refers to the organization of government along geographical lines that reflect existing ethnic or cultural divisions among peoples. Familiar to Americans, it is the idea behind the rule that each state in the United States gets two votes in the Senate and, also, the rule that electoral districts for the House of Representatives do not cross state lines. But the principle was abandoned in Britain, with disastrous consequences according to Mount.[32]

Mount recognizes that the principle of patriation requires deviations from one-person-one-vote. But he defends these deviations with the following argument:

> An insistence on mathematical equality and symmetry may be less genuinely democratic, in that it betokens an indifference to the grievances of those regions or peoples who feel themselves unfairly dealt with by the application of unvarying rules.

In other words, deviations from one-person-one-vote, like separation of powers and judicial review, can help to protect minority groups from a tyrannous majority. Such was the justification for giving Rhode Island the same number of votes in the Senate as New York, despite the disparities in their populations, and Mount believes that the same principle remains valid today.

Mount would also tolerate other "asymmetries" in the structure of government.[33] These asymmetries may be "untidy," but

30. Mount favors a common European currency controlled by a European Central Bank.

31. "The unbudgeable establishment of lower tiers of government in federal systems may be one of their principal virtues."

32. Mount sees an urgent need to return to a system of local government organized along traditional county lines. "Such a rearrangement would correspond more naturally and exactly to the hierarchy of felt loyalties than these arbitrary and administratively feckless entities such as Tayside, Merseyside and Humberside—which are patently river gods with no worshippers."

33. For example, just because Scotland or Northern Ireland is given a local parliament

Mount sees "untidiness" rather than "symmetry" as "a characteristic of justice." He is, indeed, emphatic on this point: "[T]he maturity of any political culture is to be measured very largely by the extent to which this is understood." This point, moreover, is yet another count in his general indictment of the parliamentary supremacists for having based their understanding of constitutional law on a much too simplistic conception of democracy.

## V

From this review of Mount's book, it is obvious that Mount shares with Ackerman two basic beliefs: (1) an efficient unicameral legislature is an insufficient model of a well-designed democracy, even if the election of representatives to this assembly complies with one-person-one-vote and other requirements of political equality;[34] and (2) the *Federalist Papers* provide a rich source of ideas for articulating an alternative, more sophisticated conception of democracy upon which to base the development of constitutional theory. These two propositions are quite sound. To the extent that they have been inadequately appreciated by leading American constitutional theorists, Mount's book serves as a useful reminder that Americans should heed Ackerman's call to reread the *Federalist Papers*, so that they can rediscover the distinctively complex conception of democracy that underlies the U.S. Constitution.[35]

But we must not take Mount as corroborating every aspect of Ackerman's constitutional theory. For example, there is nothing in Mount to support Ackerman's idea that the task of the Supreme Court is to interpret (if that is the right word) an unwritten amendment to the Constitution that occurred during the New Deal.[36] My point is that there are different ways one might use the *Federalist Papers* in contemporary constitutional theory—different versions of "neo-Federalism," to use Ackerman's term. Ackerman may be correct in claiming that contemporary constitutional theory needs to be rooted in a "neo-Federalist" conception of democracy, but it does not necessarily follow that we should adopt Ackerman's particular brand of neo-Federalism.[37]

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of its own, it does not follow that England also must have its own local legislature. The English, unlike the Scottish, may think that the British Parliament at Westminster adequately represents their interests, and there is no need to create a new layer of bureaucracy in England if the English people themselves do not find it necessary.

34. For an extensive and thoughtful discussion of the requirements of political equality, see Charles R. Beitz, *Political Equality* (Princeton U. Press, 1989).

35. See Ackerman, *We the People* at 200 (cited in note 3).

36. For criticism of this aspect of Ackerman's theory, see Sandalow, 9 Const. Comm. at 330-37 (cited in note 6).

37. Ackerman himself distinguishes between "dualist" and "Burkean" readings of the

Moreover, we must not be overly enthusiastic in embracing any form of neo-Federalism. No matter how many times we reread the *Federalist Papers*, they will not answer all our questions concerning the optimal design of constitutional structures. Despite all the arguments of Mount and Ackerman, there are legitimate reasons why many constitutional theorists—American as well as British—have been left unsatisfied by Madison's conception of democracy and are drawn, instead, to the idea of parliamentary supremacy. We ignore these reasons at our peril, just as it is also a mistake to ignore the wisdom of the *Federalist Papers*.

Separation of powers is a good thing (for all the reasons Mount elaborates), but it is possible to have too much of a good thing. Checks and balances have their obvious costs as well as their obvious benefits: they make the operation of government more cumbersome and inefficient, causing waste, delay and even gridlock or paralysis.[38] The task of constitutional architects is to design a structure that will achieve an optimal balance between the conflicting goals of maximizing efficiency and minimizing majoritarian tyranny. It is not obvious that the system designed by Madison and his compatriots is satisfactory when judged by this standard.[39]

More fundamentally, no matter how sophisticated a neo-Federalist conception of democracy may be, it cannot escape the fact that judicial review is countermajoritarian and therefore potentially undemocratic.[40] Ackerman wants to prove that judicial review is compatible with democracy because it is the enforcement of the People's will as expressed through the special lawmaking processes that exist for amending the Constitution. But, as Ackerman acknowledges, the processes for amending the Constitution are supermajoritarian—as they must be, if judicial review is to fulfill its appointed mission of protecting individual and minority rights

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*Federalist Papers*, characterizing himself as a dualist. See, Ackerman, *We the People* at 17-22 (cited in note 3). Mount, however, is heavily influenced by Burke, and therefore his work might be taken as supporting a Burkean, rather than dualist, version of neo-Federalism. See also Sunstein, *The Partial Constitution* at 130-31 (cited in note 8) (discussing Burkean constitutional theory).

38. See generally James L. Sundquist, *Constitutional Reform and Effective Government* (Brookings, rev. ed. 1992).

39. In other words, our current system may have too many checks on the House of Representatives: the Senate, with its 60-vote rule for closing debate; the presidential veto; *and* judicial review. Notwithstanding Mount's arguments, perhaps the British should be wary before emulating *all* these elements of our constitutional law.

40. I say *potentially* undemocratic, because judicial review is not *necessarily* undemocratic—unless one adopts the unjustified assumption that only simple majority rule qualifies as democratic. Ackerman and Mount are surely right to reject this assumption. But it does not follow from rejecting this assumption that judicial review is necessarily democratic. On the contrary, it still poses the risk of being undemocratic.

against a potential tyranny of the majority. As we have seen, Mount's version of neo-Federalism is particularly clear in showing the link between judicial review and supermajoritarian voting procedures.[41]

While supermajoritarian procedures of the kind Ackerman and Mount envision may be sensible constitutional devices for protecting individual and minority rights, the unavoidable fact remains that all supermajoritarian devices—including judicial review—inevitably pose a risk of tyranny of the *minority*. One need not be a disciple of Ely or Bork to hold this view. Indeed, the dangers of supermajoritarian voting—and judicial review—have been stated most persuasively by one of America's most respected political scientists, Robert Dahl.[42]

Now a tyranny of the minority is obviously undemocratic, and because judicial review necessarily creates a risk that this kind of tyranny will occur, it is impossible to guarantee that judicial review is compatible with democracy. Perhaps for this reason, Mount does not make the effort that Ackerman does to square judicial review with democracy. Instead, Mount argues that judicial review is necessary to secure justice. Perhaps one lesson to be learned from Mount is that constitutional law needs to be concerned more with justice and less with democracy.

The problem with this lesson, of course, is that tyranny of the minority is unjust as well as undemocratic.[43] Moreover, insofar as citizens of good faith disagree about the fundamental requirements of justice, how else are they to resolve their disagreement except by majority vote? Any other procedure runs the risk of minority tyranny, and we are faced again with this form of injustice. It is precisely the inability to avoid this risk that has caused sensitive political scientists like Dahl ultimately to favor simple majority rule of a unicameral legislature over sophisticated systems with judicial review and supermajority voting.[44]

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41. If a Bill of Rights has been entrenched so that Parliament may not amend it without a supermajority vote, and if the judiciary has declared a subsequent Act of Parliament invalid because (in the court's judgment) it conflicts with the Bill of Rights, then a supermajority is necessary to legitimate the invalidated Act—even if a simple majority of Parliament strongly believe that the judiciary has misinterpreted the Bill of Rights.

42. Dahl explains that in a system with supermajoritarian voting, "the protection of majorities against abusive minorities can be no stronger than the [commitment of protected] minorities not to abuse their opportunities to veto majority decisions they dislike." See Robert A. Dahl, *Democracy and Its Critics* 156 (Yale U. Press, 1989). For Dahl's eloquent and sensitive critique of judicial review, see id. at 188-92.

43. Indeed, it is unjust because it is undemocratic. Democracy is an essential component of justice.

44. See also Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043 (1988) (arguing that it would be legitimate to amend the

Yet even if one adopts a neo-Federalist perspective on constitutional theory, one can—and should—retain a wariness about the dangers of judicial review. Cass Sunstein, for example, in his new contribution to constitutional theory, adopts a Madisonian perspective, yet his approach to judicial review is essentially a sophisticated form of Ely's representation-reinforcing theory.[45] Sunstein is hesitant to have the judiciary impose its substantive value choices when the citizenry has deliberated about an issue and a majority disagree with the judiciary.[46] Sunstein's reluctance is one reason why his approach to judicial review is ultimately more persuasive than Ackerman's or Mount's.

Finally, perhaps the most useful lesson American scholars can learn from Mount's work is the continuing importance of constitutional law's vertical dimension: the structures that define the relationships between local, national and supra-national bodies. American constitutional theorists—at least contemporary ones—have devoted little serious consideration to the vertical dimension. But the points that Mount makes about vertical issues are important ones and should be appreciated by neo-Federalists, like Ackerman and Sunstein, who recognize the complexities of constitutional law.[47]

Consider, for example, the relevance of what Mount says about one-person-one-vote to the problem of Staten Island's place within New York City government. The U.S. Supreme Court has insisted that New York City comply with the requirement of one-person-one-vote,[48] and as a consequence Staten Island feels the need to secede because it doubts that its distinctive regional interests can be represented adequately within a New York City government that

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U.S. Constitution by a simple majority vote of the American people in a national referendum).

45. For a critique of Sunstein's new theory, see James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex. L. Rev. — (1993).

46. See Sunstein, *The Partial Constitution* at 123 (cited in note 8). Of course, to hesitate before one nullifies a law does not preclude nullification after careful consideration. It simply means that one fully recognizes the costs, as well as benefits, of judicial review.

47. Sunstein has considered the vertical dimension in an article on secession, see Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. Chi. L. Rev. 663 (1991), but he does not address the issue in his new book on constitutional theory. Ackerman apparently thinks the issue of federalism is obsolete in American constitutional law. See Ackerman, *We the People* at 105 (cited in note 3).

Ackerman believes that, as a consequence of the New Deal, "the federal government [is authorized to] operate as a truly national government, speaking for the People on all matters that sufficiently [engage] the interest of lawmakers in Washington, D.C." Id.

A majority of the current Supreme Court disagrees with Ackerman on this point. See *New York v. United States*, 112 S. Ct. 2408 (1992) (5-4 decision) (prohibiting Congress from regulating radioactive waste management in ways that violate state sovereignty).

48. See *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

complies with one-person-one-vote.[49] The Supreme Court might have served justice and democracy better in this case had it heeded Mount's warning: "to understand that political arrangements . . . can never be perfectly . . . symmetrical in every respect is the condition of a durable polity."

More speculatively, the time has come for American constitutional theorists to think about the relationship between the Constitution of the United States and the Constitution of the United Nations. In keeping with the kind of questions that Mount asks about the British law's relationship to European law, we must ask ourselves whether American law adequately recognizes the supremacy of international law in those areas of jurisdiction where international law ought to be supreme. As we prepare for the next millennium, perhaps Mount's two principles of subsidiarity and patriation can help us think through the appropriate relationship between U.S. law and U.N. law.[50] In this review, I can do no more than put these matters on the agenda of American constitutional scholarship. But I sincerely hope that America's leading constitutional theorists begin to develop an adequate constitutional theory for the United Nations and not just the United States.

## VI

Thus, Mount confirms Ackerman's view that constitutional theory is more complicated than simple-minded parliamentary supremacists would have us think. But many parliamentary supremacists are not so simple-minded, leading us to realize that constitutional theory is actually even more complicated than Ackerman and Mount would wish us to believe. In the end, perhaps the best that can be said on the topic of judicial review is that all of us—including neo-Federalists—must be ever mindful of the need to balance risks of majority rule against the risks of minority rule, realizing that a perfect balance can never be struck once and for all, but instead must be continuously recalibrated in light of new evidence

49. See Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 Colum. L. Rev. 775, 816 (1992).

50. Following the principle of subsidiarity, we would not wish the U.N. to assume preemptive responsibility over any issue that could be addressed adequately at the U.S. level. At the same time, however, must we not recognize that some issues (like global warming, ozone depletion and other environmental problems of worldwide concern) require international legislation—and therefore a international legislature with the power to enact such legislation? And following the principle of patriation, we would want representation in this international legislature, as in the present U.N. General Assembly, to be based (at least in part) on a principle of one-nation-one-vote, for surely we are not yet ready to accept the principle of one-person-one-vote on a worldwide basis.

and insights about how the constitutional system actually works in practice.

Moreover, when the vertical dimension of constitutional law is taken into account, the complexities facing constitutional theory become much greater still. In short, notwithstanding the important contributions of Ackerman, Mount and others, much work still needs to be done.

## METAPHOR AND REASON IN JUDICIAL OPINIONS.

By Haig Bosmajian.[1] Carbondale, IL: Southern Illinois University Press. 1992. Pp. xiv, 240. Cloth, $22.50.

*Eileen A. Scallen*[2]

One of my colleagues, a tax professor, heard that I was reviewing Haig Bosmajian's book and bet that I would not find a metaphor in the regulations to the United States Tax Code. It took less than ten minutes of paging through the tax regulations to hit a couple—"safe harbor," "golden parachute"—then I stopped, lest I be accused of overkill.[3] My colleague's challenge illustrates and extends one of Bosmajian's central points: "[a]t all judicial levels,

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3. My correspondence with the judge of our bet—the good professor's spouse, a distinguished student of literature—follows. The names have been changed to protect the innocent. And me.

To: Ms. Susan Spouse
From: Professor Eileen A. Scallen
Re: Metaphors in the Tax Code & Regs

As you will recall, I bet your distinguished husband that I could find a metaphor in the regulations to the United States Tax Code. He was, to put it politely, skeptical. You kindly agreed to judge my efforts, which I set forth herein.

A metaphor, as you know, is "[a] figure of speech in which two unlike objects are compared by identification or by the substitution of one for the other." Karl Beckson and Arthur Ganz, *Literary Terms: A Dictionary* 156 (Noonday Press, 3rd ed. 1989).

My assignment was not difficult. I will not tax you with the boring details, but I discovered that metaphors are pervasive in both the tax regs and the tax code. Just a few examples should suffice. I.R.C. section 280G sets forth the rule for "Golden Parachute Payments." Both the code and the regs refer to "safe harbors," see, e.g., Treas. Reg. § 1.62-2(g)(2).

Of course, there are also the less transparent figures of speech. For example, property is described as being "in the hands of" someone (over 600 times in the regs alone, according to Lexis). If the drafters wanted to eschew metaphorical language, why didn't they say "in the possession of," or "in the control of" someone?

Oh well, I'm glad they didn't. I believe I have won our bet. Hope to see you again soon Susan.