What are the limits to parliamentary sovereignty? When should the people be able to vote directly on issues? The constitutional theorist Albert Venn Dicey (1835–1922) was a cogent advocate of the referendum. While his enthusiasm for the institution was widely acknowledged in his own day, thereafter this dimension of his career has been largely neglected. This fall into obscurity is partly explained by the fact that Dicey never collected his writings on referendums into a single volume. Consequently, during the prolonged crisis over Brexit, the implications of Dicey’s thought were unclear, despite his standing as a foundational figure in British constitutional law. This timely modern edition brings together Dicey’s sophisticated and intricate writings on the referendum, and it covers his attempts to construct a credible theory of democracy on a new intellectual and institutional basis. An original scholarly introduction analyzes Dicey’s thought in light of its contemporary context.

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ALBERT VENN DICEY

Writings on Democracy and the Referendum

EDITED BY

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Albert Venn Dicey is widely recognized as one of the most important of Anglophone constitutional lawyers. In particular, legal academics frequently read his landmark *Introduction to the Study of the Law of the Constitution* proleptically, by the standards of an analytic jurisprudence it supposedly established. Consequently, Dicey’s politics are often ignored or, when considered, treated in a lamenting or caricaturish fashion. His constant attentiveness to public affairs, his curiosity about different regime-types, his assertion of his own values, his immersion in texts that we would now place within the field of political theory – these are seen as having prevented Dicey from reaching his appointed telos of apolitical constitutionalism and as tainting his legacy as a jurist. Historians of Victorian/Edwardian Britain come from a different angle, but likewise end up neglecting Dicey as a political theorist. For while they have been intrigued by Dicey’s political activity, they usually treat him simply as a combatant in the party conflicts over Ireland, a perspective which encourages the presumption that his ideas were merely topical and thus beneath theoretical interest. Serious engagement with Dicey as a political thinker thus remains relatively rare, although encouraging signs of greater scholarly interest in this side of his work have appeared of late. This edition is meant as a contribution to the emerging understanding of Dicey as an important figure in political thought.

Such a reassessment is long overdue. For one thing, the conventional conceptions of Dicey have been misleading biographically. For Dicey, like so many of his generation, was extraordinarily prolific, making of steady intellectual work a spiritual substitute for the Evangelicalism of his ancestors in which he could no longer share. Though it is hard to quantify the
portions of his capacious corpus devoted to different subject areas, especially given that the Victorians operated with less firm boundaries between the humanistic/social-scientific subjects than we have today, political commentary and theorizing may very well have constituted the largest area of his literary output. To be sure, Dicey was interested in putting the academic study of law on a more professionalized footing and in demonstrating that legal inquiry could be conducted with a healthy measure of independence from contending political imperatives. But the development of his political ideas was not a departure from his true vocation of espousing non-partisan analytic legal positivism. It was, rather, a core component of his identity as a man of letters who sought to educate the hyper-literate Victorian public about the major dilemmas of modern society. It was not for nothing that his gravestone, beyond the customary listing of professional affiliations and family ties, accorded him three designations: “jurist – political philosopher – patriot.”

That second appellation, if judged by the standards of his time and not ours, indubitably fits Dicey. His was an age in which Tocqueville and Mill stood at the summit of political philosophy – both of whom were concretely engaged in power politics, held public offices of note, commented copiously on events in the periodical press, and wrote in a style that (according to today’s disciplinary distinctions) mixed sociology, political science, philosophy, religion, law, literature, and history. Dicey followed their example. His approach, which held across much of even his most topical journalism, was to tease out the key principles underlying different institutional dispensations, social trends, and bodies of thought; and his advocacy of particular policies, while it could give way to passionate declamation, generally sought both to tie his preferred measures back to fundamental values and to weigh ineluctable tradeoffs. Scholars today might therefore be inclined to call him, following Stefan Collini, a “committed observer” or “public moralist.” He styled himself variously; in addition to being a political philosopher, he was a “historical critic” seeking to divine “what are likely to prove the permanent characteristics of English democracy,” a scrutinizer of “State system[s],” a diagnostician of “states of opinion,” and an expositor of the “spirit of institutions.”

Introduction

In this multifaceted handling of cultural-political questions Dicey was of his epoch, which was a high-point for the influence and ability of bourgeois intellectuals. His lifetime broadly coincided with the shift from the highbrow press, dominated by the rationalistic but eclectic journals of general culture, to the academy as the centre of British intellectual life, and he was not alone in carrying the habits of mind forged in the former arena with him into the latter. (Even his friend Henry Sidgwick, presumed to be the progenitor of specialized academic moral philosophy, wrote tomes which would now fall into the camp of history or political sociology, and he penned numerous addresses and articles on public controversies.) Tellingly, both Dicey’s first and last books, released sixty years apart, investigated the character and consequences of major historical institutions in a way that, he avowed, could not be cabined off as either strictly legal or political. More than to legal writers or judges, references to a kind of moral-political canon proliferate across Dicey’s pages. Beyond the omnipresent Mill, his writing was littered with references to: great “geniuses” of political speculation such as Tocqueville, Burke, and Walter Bagehot; Enlightenment luminaries like Voltaire, Jean-Louis de Lolme, Bentham, and William Paley; contemporaneous social philosophers like Sidgwick and Herbert Spencer; romantics like Wordsworth (whom he read as a theorist of a salutary form of nationalism); fellow public moralists such as his cousins James Fitzjames and Leslie Stephen; Whig-liberal historians such as T.B. Macaulay and Henry Hallam; and a slew of then-cutting-edge social scientists such as A. Lawrence Lowell, Moisei Ostrogorski, and his close friend James Bryce.

Even in the Law of the Constitution – a work which he framed as taking a legal angle on the constitution and which has so frequently been assimilated to today’s notions of analytic jurisprudence – Dicey was unable, or rather hardly bothered, to prevent the spillover of political themes. Dicey’s most famous book is predominantly devoted to showing how certain core principles of political theory (e.g. parliamentary sovereignty and the rule of law) are realized in the legal, cultural, and conventional underpinnings of the constitutional order. As the writer of the foreword to the first Russian edition perceived, the subject of the Law of the Constitution was nothing less than “a mode of life.”

We cannot, therefore, have an accurate understanding of Dicey’s thinking – or really of the mentalité of Victorian letters more generally – if we neglect or rue the pervasively political character of his oeuvre. But there is also much to be gained substantively for political theory and the history of political thought by studying Dicey on these more accurate terms. For Dicey’s was a fertile mind. He was a font of classifications and categories which remain useful. Some of these are descriptively ideal-typical, and reminiscent of Weber: for instance, he distinguished between parliamentary and non-parliamentary executives; between flexible and rigid constitutions, and between historical and non-historical ones; between the legal, civil, and military spirits of different regimes. Other dichotomies were more openly evaluative, as when he set natural partisanship (good) against party government (bad), or government by parliament (bad) against parliamentary government (good). Furthermore, his hunt for the essential properties of systems of government yielded results that one can test one’s own assumptions against even now, as in his multi-pronged definition of federalism as: resting on a desire for “union” but not “unity”; inherently requiring the supremacy of the constitution, which in turn brought both an inevitable institutional correlate (judicial review) and an underlying cultural spirit (legalism); and producing both governmental weakness and political conservatism (187). Today, we can still ask profitably whether federal systems ineluctably exhibit these characteristics.

But what will be of greatest interest for most political theorists is that Dicey defended a vision of a legitimate and morally desirable political order, even if he did not do so with the systematicity of a Leviathan or Social Contract. From the 1880s onward, he set himself the task of describing (what he considered) a healthy liberal democracy and of assessing the threats to it which fellow holders of “democratic assumptions” were inclined to overlook. Intriguingly for twenty-first-century readers, Dicey was in several respects one of history’s losers: many of the causes for which he fought failed, and many of what he regarded as pillars of a liberal polity have been fundamentally altered or fallen into the dustbin between his day and ours. And yet he was the first Anglophone thinker of note to appreciate what has become an absolutely central institution of the modern age: the referendum. Consequently, if in some ways Dicey’s thought testifies to the vastness of the gulf between the liberalism

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hegemonic as he came of age – what he called the “old liberal” worldview of “Benthamism” – and the liberalism of our world, in others he sounds more contemporary than do other eminent Victorians, and his democratic convictions were more pronounced than those of the liberal and liberal-conservative intelligentsia in which he circulated. In Dicey the old and the new, the past and the present, mingle in fascinating ways.

To comprehend Dicey’s political vision, one of the first points to recognize is simply that his was a long life. He was born in 1835, shortly after the First Reform Act and still a couple years before Victoria’s coronation, and he died after the Russian Revolution and World War I. The crucial decade of his life was the 1880s. His greatest literary success, the Law of the Constitution, which set the terms of British constitutional analysis for generations, came out in 1885 and was received as an instant classic. Shortly thereafter, the political contest which consumed much of Dicey’s attention for the rest of his life was launched when Liberal Prime Minister William Gladstone announced the First Home Rule Bill, which would have granted considerable autonomy to Ireland and set up an Irish legislature and executive in Dublin while keeping Ireland within the United Kingdom; Dicey was from then on an implacable opponent of Home Rule (preferring even Irish independence to it) until the end of his days. Despite a congenital handicap, he lived (improbably, in his own mind) to 87; his correspondence over the last few decades of his life is full of reflections on the loss of friends and of predictions that he would imminently shuffle off his mortal coil. In his judgment, the Reform Act of 1832 had inaugurated political modernity in Britain. It constituted a “pacific revolution” that, in addition to transferring electoral power from the landed nobility to the commercial/industrial middle classes, had the more seismic effect of transforming the country’s political culture from one averse to change and complacent about the blessings of its immemorial constitution to one that embraced consistent legislative innovation in the name of improvement. Hence Dicey, who was keenly interested in questions of periodization, saw his own life as coextensive with that of modern Britain.

Two notions prevail about the trajectory of Dicey’s thought over his nearly nine decades, though they sit somewhat uneasily with one another. On the one hand, it is alleged that his ideas were fixed in amber as a young man and that he stubbornly refused to modify them as the world changed around him; on the other, he is charged with having
frequently adjusted his views to serve partisan interests, especially regarding the Unionist fight against Irish Home Rule. Neither is accurate, and the truth, as usual, falls somewhere in-between. Dicey was, as he recognized, largely faithful to certain core tenets to which he had been committed by the 1860s, tenets which we would now call (partly due to Dicey’s own influence) “liberal individualist”; it was precisely because he retained his confidence in these beliefs even as they lost their ascendancy over the British public that in the last third of his life he consistently spoke of having lived past his day. And yet his ideas did undergo revision, and in particular he came to rethink the institutional means available for realizing his values.

Dicey came to maturity in the “intellectual aristocracy” – that lofty stratum of familially interconnected members of the burgeoning knowledge-classes who did so much to set the tone of Victorian morals and letters – at Oxford, where he thrived in the discussion groups and politically charged sociability of “academic liberalism.” These university liberals took inspiration from John Stuart Mill and also from now lesser-known prophets of the application of science to social questions such as Auguste Comte. At their zenith as young men in the late 1850s through the mid-1860s, they championed such causes as free trade, the extension of the franchise, national liberation movements abroad, nonsectarian education, the rationalization of administrative structures and reduction of government waste, and modernizing legal reform.

Dicey was an active presence in this milieu, and the culmination of this formative period for him came in the essay “The Balance of Classes.” It was published as a chapter in the influential 1867 volume *Essays on Reform*, a series of arguments in favor of what would become the Second Reform Act; alongside another essay collection from the same year, *Questions for a Reformed Parliament*, this book stands as the best testament of the academic-liberal mindset. For our purposes Dicey’s piece is important for two related reasons: first, because it set up Dicey on the most pro-democratic end of the liberal spectrum, and second, because it gave early expression to certain themes that would persist in his thinking.

“The Balance of Classes” was above all an attack on what Dicey (in agreement with Mill) regarded as the strongest plank of the anti-democratization platform: the theory of Parliament as “a mirror of every class” (4). While there were many variations on this theme, the core of the mirroring outlook was that the electoral system had to be engineered (by constructing constituencies with an eye to sociological conditions and
applying appropriate qualifications for the vote) such that the major classes and interests in society would be present in the Commons in accordance with their “due” weight and importance (9). This approach opposed the notion that individual “persons” and their preferences were the appropriate objects of representation. Instead, the creation of a truly representative assembly required (depending on the author) securing sufficient seats for “organic interests” such as local communities, economic interests, class divisions, and religious groups and/or granting appropriate influence to valuable “social powers” such as experience, intellect, property, and education. To fail to take these elements into account was to commit a conceptual error: it was to proceed on the false notion that the “nation” was “a mere aggregation of millions . . . a homogeneous mass of units,” rather than a community of communities.4 But it was also to deny the country certain essential goods. For in a system of uniform universal suffrage, the majority (usually figured as manual labourers, but also potentially a grouping of a different sort, such as Catholics in Ireland) could impose its will unhindered. Such a situation threatened the rights of minorities, undermined parliamentary deliberation, and compromised stability by alienating marginalized sections of society from the political process. As is evident in the essay, Dicey’s rebuttal to the class representation theory was multi-pronged. But the crux of his position was that there was no way to avoid arbitrariness in the attempt to sort citizens into relevant groups and assess their relative importance. Consequently, the only fair principle of parliamentary reform was what we might call socio-logically agnostic egalitarian individualism.

In addition to this central thread, “Balance of Classes” contained in its short space a number of themes which would recur down the decades of Dicey’s political writing. For one, he aligned his positions with an original liberal-radical tradition. The theory of class representation occupied a dominant position in mid-Victorian political culture; as Dicey acknowledged, it was avowed by self-declared liberals and conservatives alike. But like Burke appealing from the new to the old Whigs, Dicey called back to an “old Liberal” tradition, one that had formerly united “all democratic or radical Reformers,” against more recent trends in liberalism with which he was less in sympathy (4). This would prove one of his favored rhetorical moves.

Dicey’s identification with a more authentic liberalism was closely linked to one of the deepest dimensions of his thought: an allergy to the recognition in state institutions of class or sectional interest. In contrast to the political formations of the ancien régime – which provided separate representatives and embedded distinct privileges for numerous corporate bodies, estates, and orders – the modern state, Dicey held, strove for formal agnosticism toward the various substate allegiances and identities of citizens. For Dicey, this insistence on impartiality vis-à-vis the cleavages in civil society both inhered analytically in the ideal of equality before the law and was supported by pragmatic concerns for stability. “Incalculable evils,” he wrote, followed from the “tendency to intensify differences” inherent in plans for class representation, for the members elected thereupon would see themselves as “special representatives of a class” and hence “from their very position” inclined to “display and intensify class feeling” in its “most fanatical” forms (13).

As was true of Victorian liberalism broadly, Dicey was fixated on class harmony as a necessary foundation for social progress and civic peace; more controversially, he would consistently locate the non-recognition in law and government of class differences as essential to such harmony.

The desire of the class-mirrorers to imprint a sociological image onto the electoral system struck Dicey, further, as objectionably essentialist. Democracy was characterized not by the effort to “stereotype” a notion of the nature of society and therefore to tilt the parliamentary playing-field in favor of certain outcomes (16), but by an open-ended conception of politics in which one accepted that through persuasion and voluntary mobilization a range of coalitions might come to power.

It is noteworthy that Dicey’s antipathy to earmarking seats on a communitarian or corporatist basis extended to federalist versions of apportionment. “America,” he averred, “is a standing warning . . . against artificial schemes for insuring a definite amount of power to certain classes, since the whole theory of State Rights is nothing but a theory of class rights carried out on a larger scale” (13). While Dicey was not opposed to federalism in contexts in which it seemed to arise naturally out of historical conditions, he would be an implacable adversary of all measures to federalize the United Kingdom and the empire.

This mention of Dicey’s attentiveness to trajectories of development dovetails with another feature of his political writing: its historicism. Dicey occasionally mocked what he considered an excessive reverence for history among his peers, which he judged an overweening swing of
the pendulum in the direction contrary to Bentham’s supposed indifference on that front. And he fretted that “the fashion of the day,” which prescribed “one-sided devotion to the historical method,” was inculcating a kind of relativism that was indistinguishable from complacent conservatism, for it was “leading the world to forget that . . . to show how an opinion grew up is a different matter from proving its truth or falsehood.” And yet throughout his work he invoked the movement of history in favor of his conclusions, and he was not averse to deploying one of the key tools of the post-Constant/>Tocqueville liberal toolbox: the accusation of anachronism, of being behind or on the wrong side of history. Hence Dicey was not satisfied merely to charge class-representation schemes with being arbitrary and unfair; he also faulted them for hearkening back to the conditions of “the Middle Ages” and being unsuited to a “society like that of modern England” (13–14).

A final ingredient of Dicey’s Reform tract that would persist beyond his academic-liberal period was a minimalist conception of democracy. For Dicey, democracy was simply that system of government in which “the greater number of citizens” was “ultimately supreme in the affairs of the State,” in which “the greater number may be able to carry out their own wishes” over the objections of the “smaller number” (6). He would repeatedly enunciate this majoritarian-proceduralist view, which he took to be a simple extension of Bentham’s philosophy; as he put it in a later work, “Democracy’ in its stricter and older sense . . . means, not a state of society, but a form of government; namely, a constitution under which sovereign power is possessed by the numerical majority of the male citizens.” While Dicey was not altogether consistent in this respect, he generally resisted substantive definitions of democracy that equated it with a broad social ideal. The only values inherent in democracy were those necessary to justify and spell out the notions of political non-arbitrariness and majority consent touched on so far; democracy was therefore consistent with a variety of socioeconomic and cultural formations. Dicey was insistent on this point, against both socialists who wished positively to identify democracy with economic equality or state control of industry and conservatives who, “confused by the memories

6 Dicey, Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century (Indianapolis, 2008), 52.
of the Reign of Terror,” were still associating “democratic government and revolutionary habits.” Dicey recognized that there were tricky questions to resolve about what a “majority will” entailed and how it could be discerned. But he belabored the message that “democracy [could] not be identified with any one kind of legislative opinion” and, conversely, that one could not be a democrat and reject majority decisions of fundamental political questions. These convictions would slot in frictionlessly to his later argumentative arsenal in favor of the referendum.

Along with attempts to imbue the concept of democracy with broader social ideals, his 1867 advocacy contains hints of his enduring frustration with another side of the democratic ledger: a hard version of what today we call the theory of epistemic democracy. The supposition that majorities did not “fall into errors” was no part of his democratizing philosophy. Dicey distanced himself from extreme egalitarians who were inclined to assume the people were always right. Indeed, it was a common Diceyan refrain that in prior centuries a wider electorate would likely have led to a less “liberal” course of policy and fallen into major blunders that aristocratic government avoided. By contrast, Dicey highlighted that “the passing or the maintaining of good or wise laws” and the making of law “in conformity with the demands of public opinion” were irreducibly distinct ends, and that no guarantee of the coincidence of “wise” and “popular” government could be provided. Fortunately, there were measures available to render the people wiser, or at least to render their verdicts more deliberate. But at the end of the day, it was the mark of the true democrat to accept the judgments of majorities even when he fervently disagreed.

As the foregoing indicates, if Dicey was unspiring toward the “enthusiasts” who proclaimed that “the People will always govern rightly” and trumpeted such mantras as “vox populi, vox Dei,” he was nevertheless keen to dispel the nightmare scenarios purveyed by antidemocrats. For instance, he dismissed the fear that democracies were especially liable to tyrannical action and denied the thesis that there was any tyranny peculiar to majority rule. Sensible exponents of democracy sought a

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middle path: they steered clear of strong epistemic arguments which rested on implausible romanticizations of the wisdom and virtue of the people, left hostages to fortune, and could be gainsaid by inconvenient historical facts. But they also put forward reasons for cautious optimism about popular capacity, at least in a propitious institutional-cultural setting. Thus, he averred that while “of course, the majority is no infallible ruler,” it was still the case that “belief in free government rests ultimately on the conviction that a people gains more by the experience, than it loses by the errors, of liberty” (9). Or in characteristic words from a couple of decades later: “This rule may be, and ... often is, unenlightened, dull, and (occasionally) oppressive. But no one who is really a democrat does not hold that on the whole it is best in a given state or nation that the will of the majority should be supreme.”

A sober acceptance both of popular competence and of its limits was the appropriate concomitant of democratic commitment.

At just 32 years of age, then, Dicey had put in place the outlines of a vision within which he would continue to work. But it cannot be said that he had painted a full picture. Over the next decade-and-a-half he would churn out reams of journalism, practice law (without great success), and compose a couple of legal treatises. From the mid-1880s, however, he would elaborate both a diagnosis of the major problems of modern politics and a set of prescriptions for reforming the British political system to meet these challenges. For this reason, even if his thoughts were never systematized in a magnum opus, he has a claim to be ranked among the first truly modern democratic theorists in the English language. For unlike Bentham or Mill, Dicey observed institutions and conditions which remain fundamental to liberal societies today but which the former had not been able to appreciate. These included: a truly mass suffrage; the intensification of Irish nationalism; the bureaucratization of government and the growth of the civil service; centralized, disciplined parties with significant extra-parliamentary apparatuses, and the rise of direct action in uneasy conjunction with these parties; increasing executive control of parliamentary business; the laying of the foundations of the welfare state and greater government intervention into economic life; and, most of all, the referendum. For Dicey, these developments amounted to nothing less than a crisis of classical parliamentarism and Victorian liberalism.


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In the mid-1880s, two causes, one political and one intellectual, spurred Dicey on to a sustained, if dispersed, endeavor to theorize liberal democracy that would occupy much of the rest of his life. The former was noted earlier: the Liberal party’s conversion to Irish Home Rule in 1886. The second, more a process than a specific incident, was the considerable attention that Dicey began paying to Switzerland. While his well-documented horror at Home Rule was undoubtedly the lodestar of his political activity in the second half of his life, it is not true that it determined all his political thinking. Indeed, his interest in Switzerland – and his suspicion that its two most un-English features, the non-partisan executive and the referendum, might offer an alternative to British parliamentarism and party government that was superior for a democratic age – preceded Gladstone’s commitment of the Liberal party to Home Rule.

In rebuffing Home Rule, Dicey has been alleged to have made a “conservative” turn, but this label is liable to be far too bluntly handled. From the mid-1880s onward, it is most appropriate to say that Dicey belonged to a category of disillusioned liberals, which included Sidgwick, who had come to harbor grave reservations about the Liberal party precisely because they saw it as having abandoned true liberal principles. Dicey tended to think of himself from then on as ideologically homeless, and he could identify in partisan terms only with the Liberal Unionists – the set of former Liberals who split over Home Rule and maintained a fraught alliance of necessity with Conservatives, toward whom Dicey never felt deep affection. Dicey did sometimes evoke “a rational Conservatism.” But this was in his mind little distinguishable from the Tocquevillian–Millian liberalism in which he had grown up, updated to be more mindful of threats to political stability, individual liberty, and the Empire that he judged had recently arisen. To equate Dicey with any deeper tradition of political-philosophical conservatism is thus liable to obscure more than it reveals, for few of the conventionally identified hallmarks of conservatism applied in his case. To give a few examples: he did not see prejudice as a source of imbedded wisdom; he did not treat the landed aristocracy as a specially beneficent political class; he was, depending on the day, either indifferent or hostile to organized religion; 

11 He hoped to “increase the power of rational Conservatism, for which I care much without increasing the power of the conservative party, for which I care nothing”; letter to Leo Maxse, 12 Oct. 1909, quoted in Richard Cosgrove, The Rule of Law: Albert Venn Dicey, Victorian Jurist (Chapel Hill, NC, 1980), 109.
and he saw the French Revolution as justified by the injustices of the ancien régime. Most of all, he despised “reaction” and the refusal to recognize “accomplished facts.” Chief among these faits accomplis was the arrival of democracy, and Dicey repeatedly chided conservatives for not embracing democracy with sufficient speed and sincerity. Indeed, Dicey’s response to the pessimism that the Home Rule movement and other late-century trends inspired in him was to push further the democratic leanings of his salad days and to expose his countrymen to models of liberal-representative government alternative to the British parliamentary heritage. In other words, in his thirties, Dicey had believed that the sine qua non of political improvement was the defeat of the class-representationists and the melioration of the composition of the Commons, thereby ensuring a more democratic parliamentary system. In his fifties and beyond, however, he came to believe that “the sovereignty of the nation” within the framework of constitutional government required the techniques of extra-parliamentary democracy (208).

To grasp why Dicey made this switch, it is helpful to turn to the Law of the Constitution. The timing of Dicey’s most famous work, which received its first edition in 1885, makes for a real irony in the history of political-legal letters. There is doubtless a patriotic aspect to the book – especially to his famous and not exactly impartial comparison between the English conception of the rule of law and French droit administratif – so it is perhaps pardonable that the Law of the Constitution has been persistently read as an unambiguous endorsement of contemporaneous English constitutional arrangements. This reading, however, is misleading. As mentioned above, Law of the Constitution was an effort to condense into a few principles the basic logic of a mass of law, conventional rules, and constitutional practices. The fact that it was primarily interpretive of the existing constitutional-legal situation and only secondarily or indirectly normative contributed to its being both universally acclaimed and enlisted for diametrically opposed political causes – including its citation by Gladstone a year later in justification of the Home Rule proposals to which Dicey would ardently object. Dicey was not, as has been claimed, a complacent worshipper of the Victorian status quo. He warned against seeing any constitutional setup as fixed in amber, and he poked fun at those who threw around the epithet “unconstitutional” as if its application

proved dispositive against a proposed reform. In truth, while the 1885 edition certainly conveyed a sense that the English Constitution had, all told, performed well, it made clear that this satisfactoriness rested on certain assumptions holding true. And in a key regard, Dicey was already becoming convinced that the requisite conditions were eroding. Along one of its principal axes, the *Law of the Constitution* illustrated well Hegel’s dictum that the owl of Minerva flies at dusk.

Like all great books, the *Law of the Constitution* is ill-served by a quick summary. But its basic promise was that the British Constitution, for all its famous unwritten-ness, could nevertheless be understood in terms of three “guiding principles”: parliamentary sovereignty, the rule of law, and constitutional conventions. Dicey’s treatments of the second and third of these themes are of tremendous significance, but for our purposes now what is important is his famous but oft-misunderstood analysis of the first principle.

Understandably, attention from constitutional lawyers has been focused on Dicey’s formal definition, which focused on the reception of acts of Parliament by the judiciary:

Parliamentary sovereignty may, looked at from its positive side, be thus described; any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts. The same principle, looked at from its negative side, may be thus stated; there is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the Courts in contravention of an Act of Parliament. (LC 36)

Importantly, though, this was only one of the concepts of sovereignty which the book supplied. For Dicey was careful to distinguish between two senses of sovereignty. The above, classical judicially focused formulation of the absoluteness of parliamentary sovereignty was, he insisted, true only from a legal point-of-view. Dicey was wary of the tendency for juridical notions to balloon and engulf the field of political-constitutional analysis. Just because, in the English system, the courts could not decline

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to enforce a parliamentary statute did not mean there was nothing else to say about sovereignty. Quite the contrary: since everyone recognized that there were many policies which Parliament itself would never consider enacting and others which, if enacted, would provoke overwhelming resistance from the populace, it was necessary to accept that sovereignty had multiple meanings and avoid confounding them. For while “any expressions which attribute to Parliamentary electors a legal part in the process of law-making are quite inconsistent with the view taken by the law,” they were nevertheless “not without real meaning” (LC 55). They simply pointed us to “a political, not a legal fact,” namely, that that body is “politically” sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be . . . the body in which sovereign power is vested. For, as things now stand, the will of the electorate and certainly of the electorate in combination with the Lords and the Crown is sure ultimately to prevail on all subjects to be determined by the British government . . . we may assert that the arrangements of the constitution are now such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country.

This “political sense of the word ‘sovereignty’,” Dicey went on, was “fully as important as the legal sense or more so” (LC 67, my italics). To think that one could grasp (as he would call it regularly in later years) the “spirit” of the British constitutional order simply by noting that there was no authority which courts could invoke against Parliamentary statute was to succumb to a “fiction” (LC 65).

Right at the heart of his country’s regime, then, there appeared to be a disconnect between two sovereignties. And yet it hardly troubled Dicey. Why did it not? The reason was that the mechanisms of representation worked to harmonize the two:

Representative government presents a noteworthy peculiarity . . .

The aim and effect of such government is to produce a coincidence, or at any rate diminish the divergence between the external and the internal limitations14 on the exercise of sovereign power . . . Where a

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14 Dicey had picked up the terms of art “internal and external limits on legislative sovereignty” from his cousin Leslie Stephen’s *Science of Ethics*. Dicey used *internal* to correspond to the wishes of Parliament itself about what to do and not do, and the *external* to what the subjects would and would not tolerate from their legal sovereigns.
The genius of effective representation was that the gap between the formal armature underpinning the British state (legal Parliamentary sovereignty) and the basic reality that in a democratizing society, one with a literate, politicized public and modern communications, the people felt themselves rightly to be in charge (political popular sovereignty) constituted more a conceptual curiosity than a practical problem. Before proceeding further in our treatment of the development of Dicey’s thought, it is worth highlighting a few other important aspects of his 1885 examination of sovereignty. First: Dicey is often associated, and not without some justification, with classical Whiggery; the label accords with the general sense that Dicey lived past his time, and he occasionally applied it to himself. But he recognized that there was considerable distance between a number of his ideas and those of Whiggism from Burke to Macaulay, and on no front was this truer than in his reinterpretation of parliamentary sovereignty. For Whigs, the doctrine had served as an alternative to both monarchical and popular sovereignty; Burke and his ilk fashioned themselves no more friendly to democracy than to the divine right of kings, and the point of asserting the absoluteness of parliamentary supremacy was to assure a considerable margin of autonomy for parliament as a corporate body alike from crown and populace. This understanding was, Dicey was cognizant, antithetical to his own, on which the standing of Parliament as sovereign in law drew its legitimacy ultimately from the legislature’s perceived reliability in tracking a political reality external to it – namely, the national will. Indeed, in contrast to the Whig tendency to identify representative regimes as those in which legislative assemblies were considered the only institutions by which the general will could be expressed, Dicey had
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already abandoned any such exclusive conceptions. Although in England the people’s opinion could be legally expressed through Parliament alone, he cautioned that “this is not a necessary incident of representative government. In Switzerland no change can be introduced in the constitutions which has not been submitted for approval or disapproval to all male citizens who have attained their majority” (LC 55). Though Britons plumed themselves on having perfected representative government, representative government did not in fact require parliamentary supremacy as they had enshrined it in law. “This omnipotence of an elected assembly is not the result, or at any rate, the final result, of democratic progress or development, but the result of the peculiarities of English history.”

In the service of a more democratic theory, he had transformed the dictum that only parliament could speak for the nation from an incontestable truth about the nature of sovereignty into a defeasible presumption.

Second, we can glimpse in these passages from the Law of the Constitution a change in the way that Dicey spoke about democracy. In the 1860s, as we saw, Dicey defended a more popular electoral settlement by appealing to moral first principles, or, perhaps more accurately, by attacking alternatives to democracy for violating certain fundamental values. From the mid-1880s (following the Third Reform Act which had expanded the suffrage yet again, and with the French Third Republic now well entrenched), however, he relied on a more historicist posture, one which stressed that Britain, the “Anglosphere,” and much of Europe had irreversibly entered a democratic age. Like Tocqueville, he framed democracy as the necessary conclusion of a long historical trajectory; the task of the intellectually honest analyst was, correspondingly, to help readers judge how well certain institutions and practices suited democratic times.

At the very heart of a work which has all too commonly been depicted as a lodestar of analytic legal positivism or an apotheosis of Victorian complacency, there was thus already an attempt to set the shibboleth of parliamentary sovereignty within a background context that explained why it was politically tolerable, as well as a recognition that the British model was not the sole attractive model of representative government on offer. What Gladstone’s adoption of Irish Home Rule in the following

15 Dicey, “Introduction,” to Lectures on Comparative Constitutionalism, 12.

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The year did to Dicey’s thought was to put a large tear in the fabric of assumptions which had made British parliamentary arrangements seem an acceptable structure for liberal democracy. It did this more by confirming and accentuating preexisting worries than by sparking a whole new set of ideas. The battle against Home Rule that Dicey would wage, beginning the year after *Law of the Constitution* and lasting the rest of his life, was theoretically fruitful because he generalized from it to diagnose a crisis of representative assemblies and liberal values. Dicey of course opposed Home Rule on the substance, and with a striking vehemence. But what is of most interest here is that in the movement to implement Home Rule he believed he espied the metastasis of modern political pathologies.

What the Home Rule issue demonstrated, in Dicey’s eyes, was the grave danger of *minority usurpation* on constitutional, foundational matters. In other words, it revealed the tenuousness if not outright falsity of the *harmonizing* view of representative government, the confidence that with elections conducted on a wide suffrage only those policies would become law which were clearly approved by the citizenry.

Although Gladstone’s initial effort did not pass the Commons, Dicey treated the episode as exposing several grave perils of the parliamentary system, and this conviction only deepened as the struggle over Home Rule and against other “New Liberal” programs continued through his remaining decades. In particular, it alarmed Dicey (as it did many who would become Unionists) that Gladstone was prepared to wrangle his party behind a change that altered profoundly the relations between the constituent parts of the United Kingdom (and, as Dicey saw it, permitted the ultimate federalization of the British state and the unraveling of the Empire) without having clearly campaigned on the issue. That the sizable majority of Liberal MPs followed their leader and the whip on a matter of such import despite lacking “the deliberate and undoubted sanction of the people of the United Kingdom” suggested that the government of Britain had de facto transformed into a party-plebiscitary operation wherein the very nature of the state was subject to the private whims of the premier (94).

Furthermore, since there was no reason to think that the issue, having been broached in the Commons and with the agitation for it showing no signs of abating, would be permanently dropped, every election that returned a Liberal majority would potentially precipitate a constitutional