
The Law — of the — Constitution

A.V. DICEY

Edited by J. W. F. ALLISON



OXFORD

LECTURES
INTRODUCTORY TO THE STUDY OF
**THE LAW OF THE
CONSTITUTION**

A. V. DICEY

THE OXFORD EDITION OF DICEY
VOLUME I

EDITED BY J. W. F. ALLISON

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© Editorial matter, J.W.F. Allison 2013

The moral rights of the author have been asserted

First Edition published in 2013

Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013938361

ISBN 978-0-19-957982-2

Printed in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Preface to *The Oxford Edition of Dicey*

In the late-nineteenth century and for much of the twentieth century, *The Law of the Constitution* by Albert Venn Dicey was the main doctrinal influence upon English constitutional thought. It was invoked in Parliament, likened to Blackstone's *Commentaries*, and more widely cited in English academic literature than any other constitutional authority. By its critics, it was still granted the status of orthodoxy and, by many others, it was treated as a canonical text embodying axiomatic principles or it was simply understood as indeed the law of the constitution, thus approximating to, or turned into, a kind of constitutional code for want of a written constitution.

In earlier works, I criticized both *The Law of the Constitution* and its reception. In my first book,¹ I sought to show, inter alia, how Dicey neglected political and historical context and how his neglect contributed to his own, and a more general Diceyan, rejection of an English administrative law that retarded, for decades, its development. In my second book,² I elaborated, inter alia, on Dicey's express adoption of an analytical legal view of the constitution, on his relegation of the historical view, and on his consequent focus on constitutional form, not formation, which rendered static his analytical scheme of rules and principles and of sets and distinctions. In proportion, I argued, to the considerable extent Dicey's analysis remained constant in necessarily multiple editions of the same analytical textbook, enjoyed influence or acceptance, and continued to be applied, it ossified or encapsulated a changing constitution.

The Oxford Edition of Dicey is intended to address the problematic extent to which *The Law of the Constitution* was canonized or had lasting authority conferred upon it, whether uncritically or despite extensive criticism. Volume One is intended to take readers first back to its pedagogical beginnings, by incorporating in Part I what simply were, as entitled, *Lectures Introductory to the Study of the Law of the Constitution*, and then to developments from those beginnings by incorporating in Part II the main addenda in later editions, which are particularly difficult to access in any one library at any one time. Volume Two is intended to take readers well beyond *The Law of the Constitution*'s canonical text by publishing lectures for changing versions of a comparative constitutional book that Dicey began but did not finish. It is to make readily accessible Dicey's largely

¹ *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law*, rev. pbk edn (Oxford: Oxford University Press, 2000), 18–23.

² *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007), especially 7 ff.

unpublished comparative constitutional lectures, the manuscripts of which are in the Dicey Papers entrusted by Dicey's literary executor Robert S. Rait to the Codrington Library.³ In other words, *The Oxford Edition of Dicey* is designed to facilitate looking both back to and well beyond what became Dicey's canonical constitutional text and to suggest implications of what comes to light or more clearly into view. By facilitating access to additional sources, my aim is further to historicize and to complement or broaden understanding of domestic English and comparative constitutionalism as expounded by Dicey.

Intending the publication of Volume Two to facilitate access to Dicey's many unpublished comparative constitutional lectures, I am mindful of the primacy of Dicey's previously published works in Volume One. The contents of *The Oxford Edition of Dicey* have been subject, further, to an important limitation. They have been generally limited to what Dicey chose to expound in print or lecture. They do not include a selection from Dicey's extensive private correspondence, which is here given little attention and only occasional mention by way of reference to the existing biographical studies. Although sources of considerable biographical insight and interest,⁴ Dicey's private letters differed much—in deliberation, elaboration, and real and expected publication—from his expositions in print or lecture. Often expressed in passing or in reaction to a recent occurrence, the thoughts evident in Dicey's private correspondence varied with context and correspondent. If thoughts or views he expressed there were, on the one hand, yet to be expounded in print or lecture, they were more open to development and could later be readily changed or deviated from. If, on the other hand, those thoughts related to what Dicey had already expounded in print or lecture, Dicey could assume or take for granted his existing exposition, on which his privately expressed thoughts could be expected to have a varying and complicated, conceivably dialectical, bearing—perhaps corrective and/or defensive, proud and/or diffident, obstinate and/or apologetic. In editing these volumes, I have been keen to avoid providing an uncritical extension of Dicey's already extensive body of constitutional writings into one in which coherence is more elusive and from which dubious authority is nonetheless derived for some or other highly selective, normative or ideological interpretation therefore more readily made to recreate Dicey in the image of its maker.

³ All Souls College, Oxford, MS 323.

⁴ On these sources and their use, see generally R. S. Rait (ed.), *Memorials of Albert Venn Dicey, being chiefly Letters and Diaries* (London: Macmillan, 1925); R. F. Shinn and R. A. Cosgrove (eds), *Constitutional Reflections: the Correspondence of Albert Venn Dicey and Arthur Berriedale Keith* (Lanham, MD: University Press of America, 1996); R. A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill, NC: University of North Carolina Press, 1980); D. Sugarman, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science', *Review of The Rule of Law: Albert Venn Dicey, Victorian Jurist* by R. A. Cosgrove, (1983) 46 *MLR* 102; M. D. Walters, 'Dicey on Writing the *Law of the Constitution*' (2011) 31 *OJLS* 1.

In finding for Volume One the materials that were published abroad and not in English, namely the Prefaces for the French edition of *The Law of the Constitution* and Sir Paul Vinogradoff's Foreword to the two Russian editions, I am grateful to the Squire Law Library, to David Wills the Librarian, and especially to Lesley Dingle for her expertise, efficiency, and invariable willingness to help. I am also grateful to librarians in the Peace Palace Library in The Hague and in the Russian State Library in Moscow. Mark Walters kindly sent me a translation of Vinogradoff's Foreword to the second Russian edition and put me in touch with Eric Myles, who translated the Foreword as published in the first Russian edition. To both Mark and Eric, I am much indebted.

For first drawing my attention to the Dicey Papers in the Codrington Library of All Souls College, I would like to express thanks to the late Michael Taggart. In working towards his book entitled *An Index to Common Law Festschriften*,⁵ he sent me Geoffrey Hand's chapter 'A. V. Dicey's Unpublished Materials on the Comparative Study of Constitutions' in the *Festschrift* for L. Neville Brown.⁶ Mike was, I seem to remember, drawing my attention to significant statements by Dicey on the separation of powers but was perhaps also suggesting that I give the Dicey Papers substantial attention, which I am now pleased to have given them in selecting and introducing the contents of Volume Two.

I am grateful to OUP's two referees who recommended that OUP approach me to edit the comparative constitutional lectures from the Dicey Papers, and to Professor Ian Maclean, the Fellow Librarian of All Souls College, and the other members of the College's Governing Body, for granting permission to publish from those Papers entrusted to the College. I would also like to give special thanks to Vernon Bogdanor for his interest, encouragement, and advice, based in part on his own leading work on the Dicey Papers for the All Souls-Public Law Seminar, where in 1985, on the centenary of the publication of *The Law of the Constitution's* first edition, he first drew attention to those Papers.⁷

For friendly assistance in the Codrington Library and for taking numerous digital photographs of the Dicey Papers at OUP's request for the purposes of this project, I am grateful to Norma Aubertin-Potter and Gaye Morgan. In making research trips to Oxford and obtaining a computer with sufficient capacity to cope with dense digital images, I benefited from Yorke Fund Grants and am accordingly grateful to the Fund's Managers. I would like to thank OUP's Production Editor Matthew Humphrys for his efficiency and friendliness and Penny Dickman for the quality of her indexing. To Alex Flach and Natasha Flemming at OUP, I would like to express particular

⁵ Oxford: Hart, 2006.

⁶ In G. Hand and J. McBride (eds), *Droit Sans Frontières: Essays in Honour of L. Neville Brown* (Birmingham: Holdsworth Club, 1991), 77–93.

⁷ See 'All Souls-Public Law Seminar: Dicey and the Constitution' [1985] PL 583; V. Bogdanor, 'Dicey and the Reform of the Constitution' [1985] PL 652, especially 672, n.

thanks for their initiative, drive, and sustained support in this unusual, difficult, and protracted project. On editing issues, I was fortunate to benefit from useful discussions with Richard Rex and other Fellows of Queens' College. Finally, I would like to thank my family and friends for all their support.

Editor's Introduction to Volume One

In publishing *The Law of the Constitution* for the first time, Albert Venn Dicey stated that his objective was to provide 'a manual which may impress' on the minds of students 'two or three guiding principles which pervade the... constitution of England'.¹ Those principles were the legislative sovereignty of Parliament, the rule of law, and the dependence of conventions of the constitution upon the law of the constitution.² Dicey well surpassed his objective. Even in the last decade of the twentieth century, parliamentary sovereignty was widely understood in simple Diceyan terms, and Dicey has been credited with popularizing one term—'the rule of law'³—and with coining the other—'constitutional conventions'—in an analysis of conventions described by a leading critic of Dicey as 'a magnificent contribution to English public law'.⁴

The constitutional principles in Dicey's exposition became common currency. Generations of first-year law students have learnt about Dicey when they have learnt about parliamentary sovereignty, the rule of law, and constitutional conventions in their first few weeks of legal study. The consequent general understanding of Dicey's centrality, at least in orthodox English constitutional thought, has been little affected by criticism of Dicey's exposition and many changes in law and government since *The Law of the Constitution* was first published. In that understanding certain deficiencies have been apparent. They have included lost appreciation of the context in which *The Law of the Constitution* was first published, inattention to the evolution of Dicey's thought, and often unthinking acceptance of its continuing authority despite criticism and far-reaching change. Adding to the *The Law*

¹ *The Law of the Constitution* (1st edn, 1885), p. 5 below.

² *Ibid.*, p. 25 below.

³ R. A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill, NC: University of North Carolina Press, 1980), 87, n. Dicey seems first to have used the term 'the rule of law' in 1875: *ibid.*, 67. Lawson thought Dicey had also coined the term: F. H. Lawson, *The Oxford Law School, 1850–1965* (Oxford: Oxford University Press, 1968), 72. The term 'the general rule of law' was, however, used a decade earlier in *Mersey Docks Trustees v Gibbs* (1866) 11 HLC 686, 710. 'The supremacy of the law' is the title to para. 7, ch. 3, in W. E. Hearn, *The Government of England: Its Structure and its Development* (London: Longmans, Green, Reader, and Dyer, 1867), p. iii, and was treated by Dicey as synonymous with the rule of law (see, e.g., *The Law of the Constitution*, (1st edn, 1885), p. 95 below). See generally H. W. Arndt, 'The Origins of Dicey's Concept of the "Rule of Law"' (1957) 31 Australian Law Journal 117.

⁴ W. I. Jennings, 'In Praise of Dicey 1885–1935' [1935] Public Administration 123, 130. See *Law of the Constitution* (1st edn, 1885), p. 186 below. Dicey developed his analysis of constitutional conventions in view of Freeman's account of the growth of 'a whole system of political morality, a whole code of precepts for the guidance of public men' in the formation of 'an unwritten or conventional Constitution' alongside written law: E. A. Freeman, *The Growth of the English Constitution from the earliest times*, 3rd edn (London: Macmillan, 1876), 114.

of the *Constitution's* existing editions requires justification, and this edition's justification lies in those deficiencies.

In the composition and introduction of its contents, this first volume of *The Oxford Edition of Dicey* is intended to address deficiencies in the general understanding of *The Law of the Constitution*. Its purpose is to facilitate reconsideration of Dicey's exposition and of its authority, and its method is to extend the readily available sources by which *The Law of the Constitution* is understood. This volume contains, in Part I, the original first edition, thus published in its original educative lecture form and introduced here in its educational context. Then, in Part II, the volume supplies the main addenda in later editions—principally new Notes, redrafted chapters, and Dicey's own Introduction—each of which Dicey himself explained in the prefaces of the later editions, which are also published below as sources with which to understand the *The Law of the Constitution's* textual history. It contains, further, in this introduction, a critical account of *The Law of the Constitution's* reception as authoritative, of its long retention of authority despite extensive criticism, and of the implications of its pedagogical beginnings and Dicey's educational purposes for that reception, retention, and criticism.

In introducing *The Law of the Constitution*, I will first explain the problematic extent to which it has had lasting authority conferred upon it and, so as to illustrate the resulting areas of controversy and to provide a background against which to suggest what each of these volumes brings to light, I will outline the range of approving and critical responses it has elicited or provoked. I will then consider the first edition's educative form and educational context, their significance, and the critical implications for those responses. Finally, I will explain the editorial approach I have adopted in view of this volume's purpose and method.

Acclaim and Authority

Nothing succeeds like success, and, although Dicey experienced frustration and disappointment in his political and professional life,⁵ the success of his leading constitutional text is beyond doubt according to most common criteria. In terms of recognition, acclaim, influence, and importance, *The Law of the Constitution's* success was early and has been long lasting.

Within a year of being published in 1885 for the first time, William Gladstone, when introducing the Government of Ireland Bill 1886 before the House of Commons, cited 'the valuable work of Professor Dicey on the Law of the Constitution', which, he said, brought out 'in a more distinct and emphatic manner' than any other work he had ever read 'the absolute

⁵ Cosgrove, *Albert Venn Dicey*, n. 3 above. Cosgrove portrays 'two Diceys, the famous lawyer and the frustrated politician', particularly as a Unionist preoccupied with Irish politics: *ibid.*, 299.

supremacy of Parliament' as a peculiarity of the British constitution.⁶ In the same year, Frederick Pollock commented that 'Dicey's book, designed for peaceful uses, has become an armoury for political combatants' and doubted 'whether the untried weapons snatched out of it by untrained hands are altogether safe for those who wield them.'⁷ Its early success was not restricted to England. Within a few years it had also made Dicey's name on the Continent and in the USA.⁸ Apart from the eight English editions published in his lifetime, an edition was published in French (1902) and two editions in Russian (1891, 1905). A quarter of a century after *The Law of the Constitution* was first published, Dicey was cited as the pre-eminent constitutional authority on both sides of the House of Commons during the Parliamentary debates about the fundamental reforms that culminated in the Parliament Act 1911. After Prime Minister Asquith referred to Dicey's 'great authority' and 'classical work on the Law of the Constitution', and quoted from his work, Arthur Balfour as Leader of the Opposition did likewise in reply.⁹

Dicey's successor to the Vinerian Chair at Oxford, William Geldart, compared Dicey favourably to Blackstone in learning and style, and he claimed that Dicey had added greater clarity as well as 'a critical insight and analytical power, of which Blackstone could not boast'.¹⁰ William Holdsworth, Geldart's own successor to the Vinerian Chair, went further in suggesting that Dicey did for English public law in the nineteenth century at least as much as Blackstone had done for the public law of the eighteenth century and predicted that Dicey 'will hold in the history of the legal literature of the nineteenth century a place not unlike that which Blackstone holds in the history of the legal literature of the eighteenth century'.¹¹ Holdsworth's prediction has proved well made in respect of more than simply the historical significance he attributed to Dicey. Even Dicey's fierce critic Ivor Jennings described Dicey's book as 'the great classical authority on the legal principles of the British Constitution' and expressed indebtedness to Dicey commensurate with the frequency with which he had quoted him.¹² Shortly before the Second World War it was still said that it was 'to Dicey that the politician as well as the lawyer turns whenever a threat to individual liberty is proposed'.¹³ Fifty years later, Dicey still seems to have enjoyed a preponderance

⁶ Hansard, *Parliamentary Debates* (series 3), vol. 304, col. 1048 (8 April 1886).

⁷ F. Pollock, 'Oxford Law Studies' (1886) 2 LQR 453, 457.

⁸ R. S. Rait (ed.), *Memorials of Albert Venn Dicey being chiefly Letters and Diaries* (London: Macmillan, 1925), 91 f.

⁹ Hansard, HC, vol. 24, cols. 1108, 1117 (20 April 1911). See also *ibid.*, cols. 1673 (25 April 1911), 1838–9 (26 April 1911).

¹⁰ W. M. Geldart, 'Legal Personality', Inaugural Lecture, All Souls College, 5 November 1910 (Oxford: Oxford University Press, 1924), 2 f.

¹¹ W. S. Holdsworth, 'Charles Viner and the Abridgments of English Law', Inaugural Lecture, All Souls College, 25 November 1922 (1923) 39 LQR 17, 18 f., especially 18.

¹² *The Law and the Constitution* (London: University of London Press, 1933), p. x.

¹³ E. C. S. Wade (ed.), *Introduction to the Study of the Law of the Constitution*, 9th edn (London, Macmillan, 1939), pp c1v f.

of citations in widely used works on the British constitution, which is evidence that his work had acquired and retained the status of orthodoxy if not necessarily that it was still accepted as strong authority.¹⁴ In short, *The Law of the Constitution* enjoyed early success, and its influence and importance were sustained by the eight editions that appeared in Dicey's lifetime and, unabated by Dicey's death in 1922, lasted through the twentieth century.

Nothing succeeds like success unless or until it contributes to its own undoing. The success of *The Law of the Constitution* affected its authority to an extent various commentators have had good reason to present as problematic. E. C. S. Wade, the editor of the ninth edition of *The Law of the Constitution*, claimed that Dicey's reputation had suffered through the role his successors played in erecting his constitutional ideas 'into axiomatic principles which must be abide for all time'.¹⁵ For this and related inattention to the changing state of the law, Wade blamed, on the one hand, Dicey's exposition of constitutional principle rather than description of detail. On the other hand, he credited Dicey's very 'mastery of exposition by the written word' for conveying conviction in the truth of his assertions and thus contributing to their adoption as axiomatic by succeeding generations regardless of their increasing untenability in view of the actual working of the whole of modern government.¹⁶ For one leading commentator, *The Law of the Constitution* was a great book that like other great books in standard use at university became a 'phantom to replace the reality in the memory of those who have finished their university course, even if they then go on to teach'.¹⁷ For others, *The Law of the Constitution's* 'elegant simplification... carried the risk of tempting future generations to treat its terms as holy writ',¹⁸ or 'Dicey's clarity of style and economy of expression', in the absence of a written constitution, made the book serviceable to lawyers who, tending to neglect the context in which Dicey worked, were 'tempted... to read Dicey as if his book were a constitutional statute'.¹⁹ For David Sugarman, 'Dicey's *Law of the Constitution* was an attempt to reduce Britain's unwritten constitution to a partially written code'.²⁰ According to him, in the very writing of what was

¹⁴ For evidence that Dicey continued 'to hold a pre-eminent position as Britain's most authoritative constitutional interpreter' in the 1990s, see generally M. Foley's comparative survey of references to Dicey and to other authorities, *The Politics of the British Constitution* (Manchester: Manchester University Press, 1999), 34 ff, especially 34.

¹⁵ Wade, Introduction, *The Law of the Constitution* (9th edn), n. 13 above, p. xv.

¹⁶ Ibid., pp xxvii and xxxiv f., especially xxvii.

¹⁷ F. H. Lawson, 'Dicey Revisited' [1959] *Political Studies* 109, 207, especially 109.

¹⁸ N. Johnson, 'Dicey and his Influence on Public Law' [1985] *PL* 717, 719.

¹⁹ J. F. McEldowney, 'Dicey in Historical Perspective—A Review Essay' in P. McAuslan and J. F. McEldowney (eds), *Law, Legitimacy and the Constitution: Essays Marking the Centenary of Dicey's Law of the Constitution* (London: Sweet & Maxwell, 1985), 39–61, 40 f., especially 41.

²⁰ D. Sugarman, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science', *Review of Cosgrove, Albert Venn Dicey*, n. 3 above, (1983) 46 *MLR* 102, 110. Cf. M. D. Walters, 'Dicey on Writing the *Law of the Constitution*' (2011) 31 *OJLS* 1.

one of the new textbooks, Dicey was producing 'juristic legislation', 'a kind of "natural code", a new form of codification.'²¹

The impression that Dicey was expounding the provisions of the written constitution that Britain lacked was created through more than *The Law of the Constitution's* success and Dicey's style—its clarity, economy, and apparent conviction or sense of certainty. In the absence of a written constitution as a ready source of authority, Dicey himself contributed to that impression by his description, in places, of the role or duty he professed to have. In the first and later editions of *The Law of the Constitution*, he did liken himself only to leading American commentators, whom he envied for having a written constitution to work with, but he also twice stated that his duty was 'to expound the unwritten or partly unwritten constitution of England': '[w]hatever may be the advantages of a so-called "unwritten" constitution, its existence imposes special difficulties on teachers bound to expound its provisions.'²² Later in his lectures, when Dicey introduced topics in the application of the rule of law, such as the right to personal freedom, the right to freedom of discussion, etc., he actually described the topics as '“articles”, so to speak, of the constitution' in anticipation of their potential to become 'sections' of a constitutional code.²³

Dicey was, further, reluctant to alter the main text of *The Law of the Constitution*, and that reluctance contributed to the impression of its continuing authority. He updated the third and later editions, in part, by adding Notes to the Appendix of each and an Introduction to the eighth edition, which he explained as follows: 'The constant amendment of a book republished in successive editions during thirty years is apt to take from it any such literary merits as it may originally have possessed. Recurring alterations destroy the original tone and spirit of any treatise which has the least claim to belong to the literature of England.'²⁴ As editor of the ninth and tenth editions, E. C. S. Wade, sharing Dicey's reluctance, added a few footnotes, a new Introduction, and a new Appendix for each edition, but he refused to change the main text for fear that he would then be tampering with or even vandalizing a classic.²⁵

The apparent consistency of successive editions of *The Law of the Constitution* and the constitutional, even canonical, authority conferred upon it encouraged or popularized, according to various commentators, a static view of the constitution, stunted its development,²⁶ and further detached

²¹ D. Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in W. Twining (ed.), *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986), 26–61, 33, 32.

²² *The Law of the Constitution* (1st edn, 1885), pp 10 f., 24 below, especially pp 24, 10.

²³ *Ibid.*, p. 121.

²⁴ *The Law of the Constitution* (8th edn, 1915), p. 419 below.

²⁵ *The Law of the Constitution* (9th edn), n. 13 above, pp xi and xiv.

²⁶ See, e.g., Johnson, 'Dicey and his Influence', n. 18 above, 719 f.; H. G. Calvert, 'Comment' [1985] PL 672, 675; J. W. F. Allison, *A Continental Distinction in the Common Law: A Historical and Comparative*

The Law of the Constitution from the context in which it was written. In a scathing description, the repeated treatment in its successive editions of *The Law of the Constitution*, as of certain other classic law texts, has been likened to the 'literary equivalent of face-lifts' producing a detached and 'smooth-surfaced entity known as "Dicey"'.²⁷

This volume is designed to help address the problem of the presumed, axiomatic, or canonical authority conferred upon and long retained by *The Law of the Constitution* despite extensive criticism and its changing context. It is to do so by extending the readily accessible sources by which *The Law of the Constitution* is understood. It is thus to facilitate focus both upon the book's foundational first edition in its original educative form and educational context, and upon the main changes when they were made in the later editions published in Dicey's lifetime. In place of a classic or canonical single text—a smooth-surfaced entity known as "Dicey"²⁸—there are, in this volume, the multiple dated texts of the first edition and the main addenda to later editions. Its multiple texts are in contrast with Dicey as known or commonly understood and to which many responses to *The Law of the Constitution's* reception and its retention of authority have been oriented.

Approving and Critical Responses

Responses have varied in orientation and have usually been of one or more of the following kinds, each of which will receive at least brief attention below. Commentators have responded, first, to Dicey's method, secondly, to his institutional preoccupation, particularly to his treatment of legal relative to other governing institutions, thirdly, to his basic constitutional principles, fourthly, to how *The Law of the Constitution* related to its context, and, fifthly, to the effect of Dicey's personal characteristics or development upon the style and substance of his exposition.

First, Dicey's analytical method has been much criticized but has also been the subject of significant praise. Conventionally,²⁹ it has been seen as one of abstracting constitutional principles, such as parliamentary sovereignty and the rule of law, from wide-ranging legal, comparative, and historical materi-

Perspective on English Public Law, rev. pbk edn (Oxford: Oxford University Press, 2000), 18–23, 157 ff; J. W. F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: Cambridge University Press, 2007), especially 8 f.

²⁷ S. Collini, *Public Moralists: Political Thought and Intellectual Life in Britain 1850–1930* (Oxford: Oxford University Press, 1991), 288.

²⁸ Ibid.

²⁹ With reference to a wide range of Dicey's published and unpublished writings, Mark Walters has recently argued that the 'orthodox view of Diceyan constitutional theory as analytical, formalist, scientific, descriptive and positivist is inaccurate' and that for Dicey 'writing the law of the constitution meant engaging in a discourse on general principles': 'Dicey on Writing the *Law of the Constitution*', n. 20 above, 27, 29.

als and then presenting them in an Austinian classificatory scheme of sets and distinctions: between one set of laws in the strictest sense and a second set of rules consisting mainly of conventions; between the positive and negative dimensions of parliamentary sovereignty; between sovereignty's legal and political senses; between the rule of law's three meanings, etc. E. C. S. Wade described Dicey's application of the analytical method to constitutional law as the 'supreme merit' of *The Law of the Constitution*,³⁰ but views have varied widely. According to one leading commentator, Dicey's express adoption of the legal view of the constitution in outlining his book's subject at its start and his relegation of the historical and political views of the constitution established a tradition of legal formalism in public law and an artificial legal autonomy by which common law principles were maintained and the common law itself was defended.³¹ According to another commentator, the basic principles derived by Dicey for determining the working of existing institutions, even if obtained by sound reasoning, 'were subject to change and differing influences', might not work in future, and therefore needed to be treated with particular care when used prescriptively.³²

In the *The English Historical Constitution*, I contributed to the criticism of Dicey's method. I attributed to Dicey's relegation of the historical view of the constitution a diminution of constitutional fidelity and a common view of the constitution that was both static and insular.³³ In *A Continental Distinction in the Common Law*, I argued that Dicey's neglect of both historical and political context caused him to take insufficient account of the evolution of *droit administratif* in nineteenth-century France and of the further development of English administrative law in the changing political context of the twentieth century. It thus contributed, in my account, to the maintenance of Dicey's basic thesis, and a lasting Diceyan view, that administrative law violated the English rule of law.³⁴

Dicey's treatment of both comparative and historical materials in deriving constitutional principles or demonstrating their significance has been subject to particular criticism. His comparative treatment of French *droit administratif* and the English rule of law has long been recognized as seriously flawed, misleading, and damaging to English administrative law.³⁵ His

³⁰ *The Law of the Constitution* (9th edn), n. 13 above, p. c1i.

³¹ M. Loughlin, *Public Law and Political Theory* (Oxford: Oxford University Press, 1992), 13–23. See also C. Harlow, 'Disposing of Dicey: From Legal Autonomy to Constitutional Discourse?' (2000) 48 *Political Studies* 356.

³² McEldowney, 'Dicey in Historical Perspective', n. 19 above, 58 ff, especially 58.

³³ N. 26 above, 7 ff.

³⁴ N. 26 above, 18 ff.

³⁵ See, e.g., J. A. G. Griffith and H. Street, *Principles of Administrative Law* (London: Pitman, 1952), 3 f.; S. A. de Smith, *Judicial Review of Administrative Action* (London: Stevens & Sons, 1959), 6; H. W. R. Wade, *Administrative Law* (Oxford: Oxford University Press, 1961), 7 f. For the critical view of a French administrative lawyer, see R. Errera, 'Dicey and French Administrative Law: A Missed Encounter?' [1985] *PL* 695.

historical method, particularly in his *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*,³⁶ has been fiercely criticized for imposing a reductionist legal method on historical materials, for dispensing with detailed historical research, and for using history to reinforce his own existing beliefs and convictions.³⁷

The conclusion, however, that Dicey was an unreliable comparativist and a poor historian has been far from unanimous. On the one hand, the famous legal historian William Holdsworth claimed that Dicey's *The Law of the Constitution* and *Law and Public Opinion* 'show that his gifts as a legal historian were equal to his gifts as a lawyer'.³⁸ On the other hand, in contrast to his flawed account of *droit administratif*, his comparative treatment of Swiss federalism has been praised for its early and innovative insight into 'the cultural conditions of constitutional law' and for producing an analysis with 'a great deal of truth'.³⁹ Further, despite widespread recognition of the flaws in his account, at least his attempt to compare English and French law has been regarded as deserving of admiration, and his 'fumbling approach' as 'characteristic of a pioneer' and one of genius at that.⁴⁰ In similar vein, Dicey's analytical attempts have been excused as those of a doctrinal explorer struggling to establish and rationalize the principles of English constitutional law without the help of clear authority.⁴¹ Even Ivor Jennings, the early and influential critic of Dicey's whig assumptions and narrow legal view of the constitution, emphasized Dicey's influence and that he had been 'the first to apply the juridical method to English public law'.⁴²

Secondly, commentators have criticized Dicey's institutional preoccupation with Parliament and the common law courts and his relative inattention to government. To Jennings, that inattention was already evident when the first edition was published and worsened with twentieth-century collectivist government policies. He attributed it to Dicey's whig or liberal view of the constitution as a means to protect the rights of individuals rather than enable the provision of services by the community.⁴³ In editing the ninth edition, E. C. S. Wade similarly emphasized *The Law of the Constitution*'s whig, *laissez faire*, inattention to the expansion of government through the new welfare and regulatory functions assumed by the state.⁴⁴

³⁶ London: Macmillan, 1905.

³⁷ Cosgrove, *Albert Venn Dicey*, n. 3 above, especially ch. 8.

³⁸ 'Charles Viner', n. 11 above, 19.

³⁹ D. A. Brühlmeier, 'Dicey and the Swiss Constitution' [1985] PL 708, especially 711, 714.

⁴⁰ Lawson, 'Dicey Revisited' n. 17 above, 116 ff, especially 121; Cosgrove, *Albert Venn Dicey*, n. 3 above, 80.

⁴¹ Lawson, 'Dicey Revisited', n. 17 above, 113 f.; S. Flogaitis, *Administrative Law et Droit Administratif* (Paris: LGDJ, 1986), 34, 36.

⁴² *Law and the Constitution*, n. 12 above, p. x; Jennings, 'In Praise of Dicey', n. 4 above, 133.

⁴³ 'In Praise of Dicey', n. 4 above. See generally *Law and the Constitution*, n. 12 above.

⁴⁴ See, e.g., Introduction, *The Law of the Constitution* (9th edn), n. 13 above.

Critics have demonstrated Dicey's institutional preoccupation, *inter alia*, by reference to the contents of *The Law of the Constitution* and the three meanings Dicey attributed to the rule of law.⁴⁵ Dicey expounded on the sovereignty of Parliament in what became Part I of *The Law of the Constitution*'s third and later editions, the rule of law in what became Part II, where, of the branches of executive government, he devoted separate chapters only to the Army and the Revenue. Further, by the rule of law in its first meaning, Dicey excluded the exercise of wide discretionary authority by government and, by the rule of law in its second and third meanings, he subjected individuals (citizens, officials, and crown servants), and not government or the administration as such, to its principles of jurisdictional equality and judicial determination of constitutional right.⁴⁶ Mainly to the courts armed with the writ of *habeas corpus* and partly to Parliament through the political working of ministerial responsibility, Dicey entrusted control of the whole of an administration, the expansion of which he barely came to recognize. Through the writ of *habeas corpus* in particular, Dicey claimed that the judges 'therefore are in truth, though not in name, invested with the means of hampering or supervising the whole administrative action of the government'.⁴⁷

In an influential article, Paul Craig suggests that in *The Law of the Constitution* Dicey presupposed self-correcting English democracy through the working of the representative system in Parliament and through the influence of cross-currents of public opinion beyond it. He argues that Dicey therefore envisaged that individuals would only occasionally need the protection of the ordinary courts under the rule of law as Dicey understood it. Craig's critical overall conclusion, however, is that Dicey's political premises were crucially mistaken. In brief, Dicey's institutional preoccupation led him to underestimate the growth of governmental power in the late-nineteenth and early-twentieth centuries, and to overestimate the capacity of the representative parliament to control it.⁴⁸

Critics of Dicey's institutional preoccupation have needed, however, to take full account of his treatment of constitutional conventions in what became Part III of the third and later editions of *The Law of the Constitution*. Dicey brought constitutional conventions to the forefront of constitutional thought and practice, albeit solely as the object of the political view of the constitution that Dicey expressly differentiated from the legal view and thus marginalized in legal study. Although their particular character and distinctness from law have been much debated and Dicey's own analysis of the prospect of an ensuing breach of law as reason for obeying conventions has

⁴⁵ See, e.g., *ibid.*, pp lxxvi f.; Allison, *Continental Distinction in the Common Law*, n. 26 above, 78 f.

⁴⁶ *The Law of the Constitution* (1st edn, 1885), pp 118 f. below.

⁴⁷ *Ibid.*, p. 130.

⁴⁸ P. P. Craig, 'Dicey: Unitary, Self-correcting Democracy and Public Law' (1990) 106 LQR 105.

been much criticized,⁴⁹ constitutional conventions provide crucial guidance to key actors in the working of government and are standards by reference to which they may be called to account in the working of politics. For its importance to government and politics, Dicey's treatment of conventions was praised by Jennings and described by E. C. S. Wade as 'perhaps the most valuable part in the book'.⁵⁰

Thirdly, responses have been oriented to Dicey's main constitutional principles in *The Law of the Constitution*, namely parliamentary sovereignty and the rule of law. Dicey has been credited with coining or at least popularizing the term 'the rule of law', but beyond that credit⁵¹ how he conceived of the rule of law has been the subject of disagreement and much criticism.

Most commentators have interpreted Dicey's conception of the rule of law as formal because of its emphasis on legal certainty (in excluding arbitrary or wide discretionary powers of government) and on the jurisdictional equality of individuals and officials alike before the ordinary law of the ordinary courts.⁵² In contrast, according to one interpretation, it is rendered substantive by Dicey's assumption that the ordinary law embodies the common law's principles and precedents,⁵³ and the Diceyan rule of law is itself 'a *common law constitution*' in the sense that 'the rule of law serves in Britain as a form of constitution' in the absence of the higher law of a written constitution.⁵⁴ It was, however, by way of a formal, jurisdictional, conception of equality and what has been seen as a purely nominal error—a 'purely verbal misunderstanding' of the term 'administrative law' to entail the separate administrative courts of *droit administratif*⁵⁵—that Dicey denounced both French and English administrative law. Dicey was thus the source of the 'fallacious creed' that 'systematic administrative law was repugnant to the constitution'.⁵⁶

⁴⁹ See *The Law of the Constitution* (1st edn), lecture 8, especially pp 199 ff below. See generally, e.g., Jennings, *Law and the Constitution*, n. 12 above, ch. 3; E. C. S. Wade, Introduction, *The Law of the Constitution* (9th edn), n. 13 above, pp cxxiii ff; C. R. Munro, 'Law and Conventions Distinguished' (1975) 91 LQR 218; O. Hood Phillips, 'Dicey's *Law of the Constitution*: A Personal View' [1985] PL 587, 593 f; C. R. Munro, 'Dicey on Constitutional Conventions' [1985] PL 637; T. R. S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Oxford University Press, 1993), ch. 10; T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001), 179 ff.

⁵⁰ Jennings, 'In Praise of Dicey', n. 4 above, 130 (see also p. xiii above); Wade, Introduction, *The Law of the Constitution* (9th edn), n. 13 above, p. cxlvii.

⁵¹ See p. xi above.

⁵² See, e.g., J. Jowell, 'The Rule of Law and its Underlying Values' in J. Jowell and D. Oliver (eds), *The Changing Constitution*, 7th edn (Oxford: Oxford University Press, 2011), 11–34; P. P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467, 470 ff; Allison, *English Historical Constitution*, n. 26 above, 158 ff.

⁵³ *Constitutional Justice*, n. 49 above, 18 f. Cf. Allison, *English Historical Constitution*, n. 26 above, 209 ff.

⁵⁴ Allan, *Law, Liberty, and Justice*, n. 49 above, 4. Cf. J. Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671, especially 673 n. and 676; Allison, *English Historical Constitution*, n. 26 above, 30 ff.

⁵⁵ Wade, *Administrative Law*, n. 35 above, 7.

⁵⁶ B. Schwartz and H. W. R. Wade, *Legal Control of Government: Administrative Law in Britain and the United States* (Oxford: Oxford University Press, 1972), 322. For leading advocacy of a British