From Pseudochrony to Diachrony

A.V. Dicey, Home Rule and the Invention of Legal History

By DOJ

> *Ireland stands at your bar expectant, hopeful, almost suppliant. Her words are the words of truth and soberness. She asks a blessed oblivion of the past and in that oblivion our interest is deeper than even hers.*
>
> WE Gladstone, on the Government of Ireland Bill[1]

INTRODUCTION

Pupils of the common law are weaned on a familiar diet: Coke, Blackstone, Maitland, Pollock and, on questions constitutional, Albert Venn Dicey. With Dicey, the great 'mid-Victorian'[2] intellectual aristocrat,[3] the encounter is usually brief: a few, foundational hours on 'common law constitutionalism', where students are taught to epitomise the man's varied career into three apothegms:[4] parliament is sovereign;[5] the rule of law has near-absolute value;[6] the

[1] United Kingdom, *Parliamentary Debates,* House of Commons, 7 June 1886, vol 306, col 1239 (WE Gladstone).
[2] As Dicey himself conceded: A. V. Dicey to James Bryce, 4 Aug. 1911, *Bryce Papers* 3: 100–108; Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (London, 1980) xiv–xv.
[3] Noel Annan, 'The Intellectual Aristocracy' in JH Plumb (ed), *Studies in Social History: A Tribute to G.M. Trevelyan* (London, 1955) 243. Cf. John McEldowney, 'Dicey in Historical Perspective — a Review Essay' in McAuslan and McEldowney (eds) *Law, Legitimacy and the Constitution* (London, 1985) 39, 42.
[4]Mark Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge University Press, 2021) 1–2; Dylan Lino, 'The Rule of Law and the Rule of Empire' (2018) 81.5 *Modern Law Review* 739, 745. Dicey specialists do not, of course, simplify their subject in this way.
[5] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, London, 1959) 39 ff.
[6] Ibid 183 ff.

constitution is undergirded by non-legal conventions.[7] These dicta are, in the telling, simple concepts (whose truth may or may not be challenged, depending on the proclivity of the teacher); their author is essentially anonymous — a 'smooth-surfaced entity known as Dicey'[8] without historical reality.

Dicey himself, one suspects, would have lamented this state of affairs: he was a man of strong opinions[9] who made frequent, Tantalean thrusts at public life[10] and wrote endlessly on public affairs, especially on Irish Home Rule. 'Smooth-surfaced' anonymity would not have pleased him. But it is no wonder that Dicey has been resolved into an abstraction: for anonymity, of a sort, was endemic to his method. His politico-legal discussions tended to dissolve into abstraction:[11] at his most polemically political — for instance when opposing Gladstone's Home Rule bill — he frequently claimed he was dealing in quasi-scientific legal truths.[12] Close to the heart of Dicey's practice was his approach to history. A better understanding of that approach is the focus of this essay.

Dicey's relationship to history has been under-theorised. I argue that a recurrent feature of his method was to divide history in two: there was 'legal history' and there was 'non-legal history'. With this division, Dicey became a conjurer of *pseudochrony* — 'fake-time', or false history with the imprimatur of truth. This device was productive: '*legal* history' was the energy of Dicey's arguments; and 'legal history' could be defined to exclude material inconvenient to his conclusions. Dicey's scholarship, in other words, stood on a peculiar form of genealogy:[13] a kind of selective breeding. This method, I argue, let Dicey advance sharply ideological arguments under the guise of apparently abstracted scholarship: this dynamic is clearest in Dicey's attack on Irish Home Rule.

In the second part of this essay, I argue a sounder understanding of Dicey's historical method is needed before we deal with his ideas. Parliamentary sovereignty and the rule of law

---

[7] Ibid 417 ff.

[8] Stefan Collini, *Public Moralists: Political Thought and Intellectual Life in Britain 1850–1930* (Clarendon Press, 1991) 288.

[9] Trowbridge H. Ford, 'The Law of the Constitution: Dicey's Polemic against Parnell' (1976) 65 *An Irish Quarterly Review* 210, 211–12.

[10] McEldowney (n 3) 46–7.

[11] Cosgrove (n 2) 23–24; McEldowney (n 3) 54.

[12] Horwitz, Morton J., 'Why Is Anglo-American Jurisprudence Unhistorical?' (1997) 17 *Oxford Journal of Legal Studies* 551, 570; Sugarman, David, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science', review of RA Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, by Richard A. Cosgrove (1983) 46 *Modern Law Review* 102, 110.

[13] Srinivasan, Amia, 'Genealogy, Epistemology and Worldmaking' (2019) 114.2 *Proceedings of the Aristotelian Society* 127, 128ff.

often appear value-neutral, born of a denatured 'legal history' and applicable to the abstracted 'legal realm'. They contain a genetic temptation towards over-simplified use. We fail to grasp *their own* storied past as socio-legal concepts; or we simply dismiss that past out of hand. I call for a *diachronous* reconsideration of Dicey: if we discard the *pseudochrony* at the root of his ideas, we can re-examine how those ideas have been deployed, across time, and what changing value-sets they have absorbed and discarded.

PSEUDOCHRONY

Dicey's historical method; The scholarship

Dicey had a complicated intellectual relationship with history. Like his fellow 'intellectual aristocrats', he was schooled in it: his mother reared him on classical history[14] and his time at Oxford was spent with Benjamin Jowett, Regius Professor of Greek.[15] But this essay is not a biography of Dicey, the private man. I am concerned, rather, with what Dicey *did with history* in his works. This question has been addressed in the scholarship, but, in my view, only partially. By the mid-20th century, there was a tendency to describe Dicey as a practitioner of 'analytical' jurisprudence.[16] Horwitz, famously, conceived of Dicey as a link in an analytical chain from Austin to Hart:[17] like the other links on that chain, Dicey (Horwitz tells us) separated the 'legal' from the 'political', eschewed empiricism for inductive analysis of institutions, and — crucially — 'marginalised' history.[18]

Horwitz' view of Dicey's historical method is, at first glance, plausible. In his introduction to the first edition of *Law of the Constitution*, Dicey proclaims 'the essential difference between the historical and the legal way of regarding our institutions' and declares the 'weakness' of a historical method 'is that it may induce men to think so much of the way in which an institution has come to be what it is, that they cease to consider with sufficient care what it is that an institution has become'.[19] These programmatic statements, to an extent, reveal Dicey's intellectual *posture* towards history. But it is an error — one Horwitz seems to make — to synonymise *posture* with *actual method.* For even the least attentive reader of Dicey knows

[14] Cosgrove (n 2) 4–5; McEldowney (n 3) 45; Walters (n 4) 24.
[15] Cosgrove (n 2) 10–11; McEldowney (n 3) 45.
[16] Cosgrove (n 2) 23–24; McEldowney (n 3) 54; Walters (n 4) 137.
[17] Horwitz (n 9) 570–73.
[18] Ibid 571.
[19] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (1st ed, London, 1885) vii.

that history makes frequent appearances in his legal writing. As Allison shows, the famous fourth chapter of *Law of the Constitution*,[20] which expounds Dicey's rule of law theory, is only one-third 'analytical exposition': the remaining two thirds are 'historical and comparative' reference.[21]

Allison demonstrates the complexity of Dicey's methods.[22] For Allison, Dicey was no simple analytical opponent of historical thinking: instead, he was an exponent of Whig history — that stereotype of high Victorian liberal thinking, which 'elaborate[d] on the past as progress to the present'.[23] Allison demonstrates Dicey's reliance on Whig thinkers, like Samuel Gardiner and Henry Hallam. Following their lead, Dicey cites with approval those episodes of English history that seem to prefigure the liberal English constitution he describes: Coke's denial of the monarch's right to sit in judgment, for example, or the liberties enshrined in Magna Carta. Allison contends that,[24] strictly, Dicey's 'Whig history' is alien to his stated purpose of reducing 'some branch of the law to a consistent scheme of logically coherent rules'.[25] Instead, Allison believes, Dicey invoked Whig history, especially comparative history, to prove the 'liberal' nature of English institutions.[26]

Allison's 'Whig history' thesis has received recent support.[27] However, it has two deficiencies: first, it is wrong to assert that history is 'strictly extraneous' to Dicey's legal conclusions: historical examples frequently and directly support Dicey's claims about the nature of the constitution. Second, it understates the political strategy at play in Dicey's history — a strategy that let Dicey to go beyond general whiggish encomia of liberty and instead make specific interventions on the political issues of his day.

A novel suggestion: Creating legal history

A fuller account of Dicey's historical method is possible. In short, I argue Dicey maintained and deployed an apparently rigid, if in fact porous, distinction between 'legal history' and 'non-legal history'. There are parallels in other areas of Dicey's work, especially in his distinction

[20] Dicey, *Law of the Constitution* (n 5) 183ff.
[21] JWF Allison, 'History in the Law of the Constitution' (2007) 28 *Journal of Legal History* 263, 275.
[22] Allison (n 21) 269.
[23] Ibid 268.
[24] Ibid 270.
[25] Dicey, *Law of the Constitution* (n 5) 365
[26] Allison (n 21) 270.
[27] Lino (n 4) 745.

between 'law' and 'politics'.[28] Dicey, of course, deals with both law *and* politics in *Law of the Constitution*: he asserts a split between formal, legal sovereignty (which rests in parliament) and informal political sovereignty (the will of the nation).[29] The important methodological point is the *difference*: Dicey can make compelling legal claims, shorn of the complexity of politics, and based on a narrowly-defined body of legal evidence.

A similar dynamic is at play in Dicey's treatment of history: he discusses both legal *and* non-legal history, but he places legal history at the foundation of his central arguments. Of course, there is an unreality about the distinction: political, social and economic conditions affect legal realities, and vice versa. This does not deter Dicey: the divide is, as a matter of rhetoric and argumentation, a recurrent phenomenon. He grounds the distinction in a close focus on legal *institutions* and their procedural past: how courts, parliaments and governments acted and how they regulated themselves is, it seems, 'legal history'.

Let us consider some examples. In the fifth chapter of *Law of the Constitution*, Dicey argues that the 'right to personal freedom', secured through the ordinary laws of the land, is an incident of the English rule of law. The courts, Dicey says, use the writ to jealously safeguard the subject's liberty, whatever the wishes of the executive government. Dicey gives two historical cases in support. First, he quotes *The Case of the Canadian Prisoners*:[30] as Dicey tells it, Canadian 'rebels found guilty of treason in Canada and condemned to transportation' arrived in Liverpool *en route* to Van Diemen's Land. There, after being confined in a local gaol, they were brought before Exchequer on a writ *habeas corpus*; the court found their imprisonment lawful. But, Dicey says, 'had the court taken a different view, the Canadians would at once have been released from confinement'. From this account, Dicey omits any description of the charges against the rebels. For they (John Parker, Randall Wixon, James Brown and Leonard Watson)[31] were Upper Canadians radicals, who opposed the corrupt and self-serving colonial clique that administered their province.[32] They rose up between 1837 and 1838, making demands that, to a Diceyan, might sound reasonable: legal primacy for local assemblies, control over the executive, ministerial accountability to legislators, impeachment trials and authority over budgetary matters.[33]

---

[28] Rivka Weill, 'Dicey was not Diceyan' (2003) 62.2 *Cambridge Law Journal* 474, 476–7.
[29] Dicey, *Law of the Constitution* (n 5) 76.
[30] (1839) 5 M & W 32 (151 ER 15).
[31] *The Case of the Canadian Prisoners* (1839) 5 M & W 32, 32 (151 ER 15, 15).
[32] Michel Durchame, 'Closing the Last Chapter of the Atlantic Revolution: The 1837–38 Rebellions in Upper and Lower Canada' (2006) 116.2 *Proceedings of the American Antiquarian Society* 413, 419.
[33] Ibid 419–20.

Nor does Dicey discuss the political machinery that brought the rebels to Liverpool: in 1837, the Upper Canadian legislature passed an 'Act to enable the government of this province to extend a conditional pardon in certain cases to persons who have been concerned in the late insurrection'.[34] The Act allowed the Lieutenant-Governor to grant a pardon. The conditions of the pardon, including the imposition of penal transportation, was wholly within the Lieutenant-Governor's discretion;[35] no court judged the rebels guilty or imposed a sentence. This concentration of unfettered executive power sits uncomfortably with Dicey's account of the rule of law, whose point, after all, is to prevent 'exercise by persons in authority of wide, arbitrary or discretionary powers'.[36] When the full history of the case is examined, our conclusion is inconvenient to Dicey's argument. Dicey avoids this conclusion by separating 'legal history' from non-legal history: only the legal technicalities of the case are given.

The next case Dicey cites, *Re Allen,*[37] shows the same method in operation. The facts, as Dicey gives them,[38] are these: an English officer serving in India is 'duly convicted' of manslaughter; he is sentenced to four years' gaol, to be served in England. The order compelling his transportation to England was 'irregular' and when the officer was brought before Queen's Bench on a writ of *habeas corpus*, he was freed.[39] From this anodyne legal history, Dicey omits three salient facts:[40] one, the officer was convicted not in an ordinary court of justice, but in a court martial;[41] two, the order for his transportation to England was invalid because it was not a warrant signed by a commanding officer, as required by the relevant Mutiny Act;[42] three, the officer was convicted of the manslaughter of an Indian man. In other words: Lieutenant Allen's conviction was *not* in the ordinary courts of the land; military administration, rather than the fundamentals of the common law, was the core issue; nor does Dicey inquire as to why Allen should have been freed, on a technicality, after serving less than a year of his sentence. One wonders whether an officer who killed an Englishman would have escaped punishment in the same way. Again, when the case's surrounding details are known, beyond the legal niceties, it raises problems for Dicey's conception of the rule of law.

---

[34] [Upper Canada] 1 Vic c 10.
[35] *The Case of the Canadian Prisoners* (1839) 5 M & W 32, 34 (151 ER 15, 15).
[36] Dicey, *Law of the Constitution* (n 5) 188.
[37] (1860) 30 LJ (QB) 38.
[38] Dicey, *Law of the Constitution* (n 5) 223.
[39] Ibid 223.
[40] See *Re Allen* (1860) 30 LJ (QB) 38, 38–40.
[41] Mutiny Act 1857, 20 Vic c 13.
[42] Ibid s 40.

Dicey takes the same approach to history in his discussion of *Wolfe Tone's Case*[43] in his chapter on martial law.[44] The passage is addressed by both Allison and Lino, who take it as evidence of Dicey's 'selective' treatment of historical facts.[45] 'Selective' is accurate. The decision was one of the Irish King's Bench, handed down during the rebellion of 1798. As Dicey tells it, Wolfe Tone was sentenced to death by a court martial for his role in the rising; since he was not an English officer, this sentence was illegal. 'The Court of King's Bench at once granted the writ [of *habeas corpus*]', Dicey tells us.[46] Dicey omits to mention that, by the time *habeas corpus* was granted, Tone's throat had been slit or shot through, possibly by his English torturers;[47] he died a week later in gaol.[48] King's Bench's 'splendid assertion of the supremacy of the law'[49] loses some of its lustre against the backdrop of extra-legal violence. It is no wonder, then, that Dicey keeps suppressed details extraneous to the 'legal' point: he speaks of writs and 'grounds taken' in argument. Non-legal facts, crucial though may might be to a 'full understanding' of what went on, are suppressed.

Dicey's treatment of *Wolfe Tone's Case* has already brought us to Ireland, where we shall stay for a time. I aim to show that, in his attacks on proposals for Irish Home Rule, Dicey used the construct of 'legal history' to set his jurisprudential ideas to work.

Refashioning history; Unfashioning Home Rule

Dicey was obsessed with Irish 'Home Rule', the name of several plans to grant Ireland a domestic legislature while still under ultimate British control.[50] The idea was most closely associated with Charles Stewart Parnell, Irish nationalist and leader of the Irish Parliamentary Party.[51] Initially, Dicey was supportive of Home Rule.[52] But with the growing extremism of

[43] (1798) 27 St Tr 614.
[44] Dicey, *Law of the Constitution* (n 5) 284ff; 293–4 for *Wolfe Tone's Case*.
[45] Lino (n 5) 753–4; JWF Allison *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge, 2007) 160–1.
[46] Dicey, *Law of the Constitution* (n 5) 294.
[47] P O'Donnell 'Wolfe Tone's death: Suicide or assassination?' (1997) 166.1 *Irish Journal of Medical Science* 57, 58–9.
[48] Lino (n 4) 753; Allison (n 45) 160.
[49] Dicey, *Law of the Constitution* (n 5) 294.
[50] Thomas Mohr, 'Irish Home Rule and Constitutional Reform in the British Empire, 1885–1914' (2019) 24.2 *French Journal of British Studies* 1–2.
[51]Christopher Harvie, 'Ideology and Home Rule: James Bryce, A.V. Dicey and Ireland, 1880–1887' (1976) 91 *The English Historical Review* 298, 303.
[52] Ford (n 9) 215–18.

the Irish nationalist movement, he seems to have become disillusioned.[53] In Ford's account, the *Law of the Constitution* itself, published at the zenith of Parnell's powers in 1885, was a repudiation of Home Rule: with the doctrine of parliamentary sovereignty, Ford suggests, Dicey invited individual members of the House of Commons to ignore Parnell and Gladstone's Irish plans and pass an 'unauthorised programme'.[54] The rule of law, similarly, gave weight to the assertion of 'individual rights', especially in the courts, against the spectre of Parnellian radicalism, like the cancellation of rents.[55] In the context of the *Law of the Constitution*, a work which does not once mention Irish Home Rule, Ford's assertions are tendentious. But his arguments are usefully provocative: they demonstrate that Dicey's constitutional ideas have the potential, at least, for political application.

We need not look far for a clear example of that application. In 1886, the same year that Gladstone brought on his first, ultimately unsuccessful Home Rule bill, Dicey published *England's Case Against Home Rule*.[56] Tulloch argued that *England's Case* is a riposte to Home Rulers who advocated a kind of 'federation' for Britain, with Ireland a subnational state alongside England, Wales and Scotland.[57] Indeed, Dicey spends an entire chapter of *England's Case* arguing against a federal solution.[58] The main grounds on which he does so are telling. In a federal system, no longer will there be a sovereign parliament.[59] And without a sovereign parliament, there would no longer exist the strong central command necessary to maintain empire[60] and to preserve 'equality of rights' and give 'legal protection' to 'loyal British subjects'.[61] In other words, a federal solution (or, for that matter, adoption of Gladstone's Government of Ireland Bill,[62] or a return to Henry Grattan's Constitution of 1782[63]) would imperil two of Dicey's constitutional principles: parliamentary sovereignty and liberty secured through the rule of law. These principles, as Lino has shown, were fundamental to Dicey's conception of empire.[64]

---

[53] Ibid 219.
[54] Ford (n 9) 220.
[55] Ibid.
[56] Albert Venn Dicey, *England's Case Against Home Rule* (London, 1886)
[57] Hugh Tulloch, 'A.V. Dicey and the Irish Question: 1870–1922' (1980) 15.1 *Irish Jurist* 137, 142–3.
[58] Dicey, *England's Case* (n 56) 160ff.
[59] Ibid 168–71.
[60] Ibid 173–75; 281. Cf. Lino, Dylan, 'Albert Venn Dicey and the Constitutional Theory of Empire' (2016) 36.4 *Oxford Journal of Legal Studies* 751, 769–70.
[61] Dicey, *England's Case* (n 56) 283.
[62] Ibid 223ff.
[63] Ibid 218–223.
[64] Cf. Lino (n 4) 753–4

It is clear enough, then, that *England's Case* applies Dicey's 'legal ideas' to political ends. I mean to show that this application is undergirded by Dicey's now-familiar distinction between 'legal' and 'non-legal' history. This approach is programmatic to *England's Case*. In the opening chapter, Dicey claims his argument will rest on the 'probable effects of Home Rule', rather than on the 'poisonous venom of historical recrimination'.[65] We must, Dicey tells us, put aside those incidents of history that would 'colour' our researches with regret, generosity or a drive for recrimination. So, he tells us, the cruelties of Cromwell and the violated treaty of Limerick — the litany of English abuses in Ireland — are to be dismissed. [66]

But history that does *not*, in Dicey's view, poison our analysis of Home Rule's 'probable effects' is in a wholly different category. Of that kind of history, Dicey approves; in fact, he relies on it to advance his argument. We might take, for example, his account of the liberalising Constitution of 1782, a series of reforms made in the dying days of the old Irish parliament when led by Henry Grattan.[67] Dicey rejects calls for a return to Grattan's parliamentary model:[68] he does so with an appeal to strict legal history. For Grattan's constitution did not, we are told, respect the sovereignty of the British parliament. Rather, it 'rested on the absolute denial of British Parliamentary sovereignty'.[69] A denial of sovereignty was to be abhorred.

Dicey, admittedly, mounts another argument against Grattan's model: the political conditions in Ireland have so changed since 1782 that its revival would be impossible. The Protestant element in Ireland, which dominated Grattan's parliament, has been overtaken by nationalist, often Catholic forces. [70] The historical basis for this argument is not strictly legal: but this argument is of secondary importance. Dicey's first criterion for any workable model of Home Rule was consistency 'with the ultimate supremacy of the British Parliament'.[71] The thrust of Dicey's objection to Grattan's constitution is that it did not meet that test: his chief argument, therefore, and the deployment of his jurisprudential ideas, is done through appeal to *legal history*. Elements of non-legal history offer at best subsidiary lines of attack.

Against Grattan's Constitution, we may compare Dicey's treatment of another 'model' for Home Rule: Gladstone's Government of Ireland Bill of 1886. The Bill, which is reproduced in

[65] Dicey, *England's Case* (n 56) 9.
[66] Ibid 10–11.
[67] J Lee, 'Grattan's Parliament' in B. Farrell (ed), *The Irish Parliamentary Tradition* (Dublin, 1973) 149, 151–52.
[68] Dicey, *England's Case* (n 56) 221.
[69] Ibid. Indeed, the British parliament formally renounced sovereignty over Ireland in 1782, with the repeal of the Declaratory Act: Harvie (n 51) 312; Dicey, *England's Case* (n 56) 244.
[70] Dicey, *England's Case* (n 56) 221.
[71] Ibid 158.

an appendix to *England's Case*,[72] would have granted to Ireland a parliament of limited competence (like the legislature of a Canadian province). The Bill would also have ended Irish representation in the Parliament of the United Kingdom,[73] creating what Dicey calls a 'British Parliament'. However, the old, UK Parliament could be revived for the express purpose of amending or repealing the Bill itself: in that case, and in that case alone, Irish members and Lords were to return.[74] Dicey singled out this unusual procedure for criticism. Really, he said, the Bill was an *abdication* of sovereignty by the UK Parliament: the new British Parliament, stripped of its Irish members, would no longer have total legal authority, since it could not alter the Government of Ireland Bill. Full sovereignty was now in the extraordinary body to be convened with Irish members for the purpose of changing the Bill. The likely problems were legion: would an Act of the British Parliament that was inconsistent with the Government of Ireland Bill be valid? Would courts be required to 'strike down' laws emanating from Westminster?[75] The threat to strong and central imperial government was, for Dicey, impermissible.

Where does 'legal history' enter this argument? To prove that the UK Parliament could, by resolving itself into a British Parliament, abdicate sovereignty, Dicey considers the 1707 Acts of Union between England and Scotland.[76] He claims that the union was not, 'as Englishmen often, I suspect, fancy, the absorption of the Parliament of Scotland in the Parliament of England'. Rather, two pre-existing 'sovereign bodies' negotiated the creation of a new state; they both agreed to 'surrender their separate sovereignty in favour of a new sovereign, namely, the sovereign Parliament of Great Britain.[77] As a matter of simple legal history, Dicey is correct. But his account suppresses the fuller picture of English and Scottish union: Scotland's economy was struggling[78] and was perceived, by both the Scottish and the English, as weak;[79] its Panamanian colonial venture, the Darien scheme, had comprehensively failed;[80] Scottish politicians were bribed into union by the English.[81] The Scottish descent into

[72] Ibid 291ff.
[73] Government of Ireland Bill
[74] Government of Ireland Bill s 39(b).
[75] Dicey, *England's Case* (n 56) 246–47.
[76] The English Act: 6 Ann c 11. The Scottish Act: 1707 c 7.
[77] Ibid 244.
[78]Laura AM Stewart and Janay Nugent, *Union and Revolution: Scotland and Beyond, 1625–1745* (Edinburgh, 2020) 82–3.
[79] Ibid 85.
[80] Christopher Whatley, *Bought and sold for English Gold? Explaining the Union of 1707* (East Linton, 2nd ed, 2001) 48.
[81] Ibid.

Union was not the 'punctilious' and level-headed abdication of legal sovereignty, as Dicey portrays it: politically, English sovereignty was imposed on Scotland. The make-up of the new Parliament of Great Britain proves this: the first post-Union parliament had 558 MPs; only 45 were from Scotland.[82]

Dicey's historical method is again clear: 'legal history' forms the nub of his argument; inconvenient historical details are treated as 'non-legal'; they are ignored, or are mentioned to be dismissed (as, for example, the history of English abuses in Ireland); or, at best, they are attached to an argument of secondary importance (as, for example, his charge that Grattan's constitution would now be impossible). The distinction between 'legal' and 'non-legal' history is, as we have seen, an illusion: but the illusion is central to Dicey's method. He purports to deal in near-abstractions, and in the ascertainable practice of institutions, rather than the messy complexities of a fuller history. He constructs his world of constitutional absolutes — absolutes tending, as Lino has shown, towards the maintenance of empire — on a *pseudochronous* foundation.

DIACHRONY

Diceyan abstractions; Australian foundations

Since *Law of the Constitution*'s publication, Diceyan thinking has embedded itself in the politico-legal complex. Yet few who handle Dicey's ideas, at any time in the last sesquicentenary, are alive to his *pseudochronous* treatment of history. That, I suggest, is because Diceyan methods are self-effacing: his ideas are genetically divorced from the organic complexities of their socio-political context; their bases, as we have seen, are in anodyne legal history and the palatable pasts of institutions. It is easy, then, for those who read, teach and apply Dicey's work to strip his ideas of their contingent colour: they become something like scientific theories — plausible explanations of a value-free dataset. Sometimes, we question the accuracy of the theories. But it is rare to ask whether the theories have a particularly ideology — or (even rarer) whether the dataset was assembled in an ideological way.

The abstracted handling of Dicey's constitutionalism itself has a long history. It played a formative role in Australia's own constitutional drama. During the constitutional convention

[82] William Cobbett *Parliamentary History of Great Britain*, vol 6 (London, 1810) 579.

debates of the 1890s, delegates referred to Dicey on seven occasions,[83] frequently as an authority on the meaning of 'federalism'. Andrew Thynne, for example, cites[84] *Law of the Constitution* for the proposition that a federation must have either a 'legally immutable' constitution or one 'capable of being changed only by some authority above and beyond the ordinary legislative bodies'.[85] Similarly, Andrew Cockburn invokes Dicey for the view that, in a federation, the constitution necessarily becomes 'the object of a somewhat superstitious reverence on the part of the people'.[86] Both delegates treat Dicey as an unquestioned authority: they do not situate the author's views on federalism in his ideological context; they do not note that, in *England's Case*, he opposed the introduction of federalism as a solution for Home Rule; nor do they mention that, in *Law of the Constitution* itself, the author declared that '[f]ederal government means weak government'.[87] His ideas rather, stripped of contentious contemporary and historical detail, stand as useful abstractions.

Even more telling, perhaps, is Isaac Isaacs' reference[88] to Dicey on the possibility of the Congress 'packing' the United States Supreme Court with its preferred judges.[89] Dicey, Isaacs says, 'does not reprove' the idea; indeed, he treats it 'with a certain amount of approbation'. Isaacs concedes the practice is within the Congress's right — and would be within the right of the new Australian parliament as well. At the least, if court-packing was referred to 'in such terms by so eminent and impartial a writer as Mr Dicey', then it is a topic that cannot be ignored. Two points emerge from this Diceyan reference. One, Isaacs is untroubled by Dicey's omission, in the passage on court packing, of the complex political history of the practice: Dicey mentions neither the Democrats' pre-Civil War dominance on that body;[90] nor Lincoln's transformation of the Court into a 'partisan', anti-slavery and pro-union body during the war.[91] Only the strict legal and institutional facts are given: Congress has the power to stack the Court,

---

[83] *Official Record of the Debates of the Australasian Federal Convention,* Sydney, 6 March 1891, 106 (Andrew Thynne); Sydney, 10 March 1891, 198 (Andrew Cockburn); Adelaide, 30 March 1897, 307 (Matthew Clarke); Adelaide, 19 April 1897, 911 (Edmund Barton); Adelaide, 20 April 1897, 952 (Edmund Barton); Sydney, 12 September 1897, 312 (Isaac Isaacs); Melbourne, 2 March 1898, 1727–8 (Isaac Isaacs).

[84] *Official Record of the Debates of the Australasian Federal Convention* Sydney, 6 March 1891, 106 (Andrew Thynne).

[85] Dicey, *Law of the Constitution* (n 5), 147.

[86] *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 10 March 1891, 198 (Andrew Cockburn).

[87] Dicey, *Law of the Constitution* (n 5), 171.

[88] *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 2 March 1898, 1727–8 (Isaac Isaacs).

[89] Dicey, *Law of the Constitution* (n 5), 179.

[90] Brian McGinty, *Lincoln and the Court* (Harvard University Press, 2008) 15–16.

[91] Ibid 237ff.

as a matter of constitutional law. Two, Dicey's is treated as an authority because of his 'eminen[ce] and impartial[ity]': in large part, I suggest, the impression of impartiality emerges from Dicey's even-handed treatment of history — an even-handedness that is made possible by his selective approach *to history*.

Isaacs' deference to Dicey, and that of his fellow delegates, is understandable, given the scholar's high reputation in the late Victorian period. I suspect a group of ardent federalists may have been less deferential, had they known Dicey's unitarian ideology and the pseudochronous construction of his arguments. That is not to say the delegates had nothing to learn from Dicey; clearly, the fledgling Australian federation need a sound guide to constitutional principles, especially parliamentary sovereignty and federalism itself. But a productive relationship with Dicey does not require deference: his interlocutors need not blanch the ideological and contextual colour out of the scholar's ideas.

Diceyan hypo-exegesis; Amended conversations

While Dicey remains a staple of classrooms, serious scholars of jurisprudence and legal history are alive to the deficiencies in his method, especially his half-hidden ideological motivations.[92] The response to these newfound shortcomings has often been to dismiss Dicey. We might consider the scholarship on Dicey's rule of law, which Shklar famously described as 'an unfortunate outburst of Anglo-Saxon parochialism'.[93] Krygier, similarly, attempts to divorce the 'rule of law' from Dicey and his context.[94] He prefers not to follow Dicey in describing what the rule of law 'is'; instead, he argues we should consider what it 'ought to achieve'.[95]

What the rule of law 'ought' to achieve, Krygier says, is the restraint of arbitrary power.[96] That, as Krygier rightly acknowledges, was exactly what Dicey himself thought the rule of law ought to do.[97] But Krygier insists that Dicey does not have an intellectual monopoly on the rule of law: other legal theorists conceptualised it both before and after him.[98] In one deft stroke,

---

[92] Cf. Martin Loughlin, 'The Apotheosis of the Rule of Law' (2018) 89.4 *Political Quarterly* 659, 659–61.
[93] Judith Shklar, 'Political Theory and the Rule of Law' in J Shklar (ed), *Political Thought & Political Thinkers* (Chicago, 1998) 21, 26.
[94] Martin Krygier, 'The Rule of Law and State Legitimacy' in W Sadurski and K Walton, *Legitimacy: The State and Beyond* (Oxford, 2019) 106, 121.
[95] Martin Krygier, 'Rule of Law' in Michael Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 233, 242.
[96] Ibid 241.
[97] Martin Krygier, 'The Rule of Law: Pasts, Presents and Two Possible Futures' (2016) 12 *Annual Revue of Law and Social Sciences* 199, 205. Cf. n 36 above.
[98] Ibid 203.

Krygier sets aside Dicey's extensive contributions to constitutional scholarship: he loses a valuable opportunity to consider the lineage of the rule of law and its ideological genetics. He also demonstrates a lack of scholarly self-awareness: Dicey is dismissed as partisan, parochial and contextually contingent. It seems unlikely that modern legal writers, who live in the world of politics just as Dicey did, are any less shaped by their circumstances.

The scholarly dismissal of Dicey is, I suggest, to be regretted. It is no more productive than uncritically imbibing Diceyan thought. What is need is a *diachronous* reading of Dicey — one that explores more fully the contours of his conversation with jurisprudence and the law over the past century. For modern common law constitutionalism cannot be understood without Dicey; yet his ideas should not be applied, as though received wisdom, without an understanding of his imperial ideology. An understanding of Dicey's pseudochronous historical methods can assist in achieving this revised reading: such knowledge can arm us against the temptation to treat Dicey as a collection of palatable, scientific truths. Instead, we can train ourselves to detect what is omitted from Dicey's arguments — on what often fictive bases his curated genealogies rest.

At the same time, as Lino has suggested,[99] a greater knowledge of Dicey's context and methods lets us turn a mirror onto our own use of his ideas. If we accept that Dicey's legal conclusions are not as simply analytical as they appear, it becomes easier to consider them critically: no longer quasi-scientific truths, resting on uncontroversial legal histories, but contestable and ideological claims, which should be rightly situated in often-complex non-legal contexts.

[99] Lino (n 5) 746.

BIBLIOGRAPHY

Allison, JWF, 'History in the Law of the Constitution' (2007) 28 *Journal of Legal History* 263

——————— *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge, 2007)

Annan, Noel, 'The Intellectual Aristocracy' in JH Plumb (ed), *Studies in Social History: A Tribute to G.M. Trevelyan* (London, 1955) 243

Cobbett, William, *Parliamentary History of Great Britain*, vol 6 (London, 1810)

Collini, Stefan, *Public Moralists: Political Thought and Intellectual Life in Britain 1850–1930* (Clarendon Press, 1991)

Cosgrove, Richard A., *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (London, 1980)

Dicey, Albert Venn, *England's Case Against Home Rule* (London, 1886)

——————— *Introduction to the Study of the Law of the Constitution* (1st ed, London, 1885)

——————— *Introduction to the Study of the Law of the Constitution* (8th ed, London, 1915)

——————— *Introduction to the Study of the Law of the Constitution* (10th ed, London, 1959)

Durchame, Michel, 'Closing the Last Chapter of the Atlantic Revolution: The 1837–38 Rebellions in Upper and Lower Canada' (2006) 116.2 *Proceedings of the American Antiquarian Society* 413, 419.

Ford, Trowbridge H., 'The Law of the Constitution: Dicey's Polemic against Parnell' (1976) 65 *An Irish Quarterly Review* 210

Harvie, Christopher, 'Ideology and Home Rule: James Bryce, A.V. Dicey and Ireland, 1880–1887' (1976) 91 *The English Historical Review* 298

Horwitz, Morton J., 'Why Is Anglo-American Jurisprudence Unhistorical?' (1997) 17 *Oxford Journal of Legal Studies* 551

Jennings, Sir William Ivor, Review of *Law of the Constitution* (9th ed) (1940) 3 *Modern Law Review* 321

Krygier, Martin, 'Rule of Law' in Michael Rosenfeld and András Sajó (eds), *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 233

———— ‘The Rule of Law: Pasts, Presents and Two Possible Futures’ (2016) 12 *Annual Revue of Law and Social Sciences* 199

———— ‘The Rule of Law and State Legitimacy’ in W Sadurski and K Walton, *Legitimacy: The State and Beyond* (Oxford, 2019) 106

Lee, J, ‘Grattan's Parliament' in B. Farrell (ed), *The Irish Parliamentary Tradition* (Dublin, 1973) 149

Lino, Dylan, ‘Albert Venn Dicey and the Constitutional Theory of Empire’ (2016) 36.4 *Oxford Journal of Legal Studies* 751

Lino, Dylan, ‘The Rule of Law and the Rule of Empire’ (2018) 81.5 *Modern Law Review* 739

Loughlin, Martin, ‘The Apotheosis of the Rule of Law’ (2018) 89.4 *Political Quarterly* 659

Maine, Sir Henry Sumner, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (10th ed, 1885, London)

Mantena, Karuna, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press, 2010)

McAuslan, Patrick and John McEldowney (eds), *Law, Legitimacy and the Constitution: Essays marking the Centenary of Dicey’s* Law of the Constitution (London, 1985)

McEldowney, John, ‘Dicey in Historical Perspective — a Review Essay’ in McAuslan and McEldowney (eds) *Law, Legitimacy and the Constitution* (London, 1985) 39

McGinty, Brian, *Lincoln and the Court* (Harvard University Press, 2008)

Mohr, Thomas, ‘Irish Home Rule and Constitutional Reform in the British Empire, 1885–1914’ (2019) 24.2 *French Journal of British Studies* 1

O’Donnell, P, ‘Wolfe Tone’s death: Suicide or assassination?’ (1997) 166.1 *Irish Journal of Medical Science* 57

Neal, David, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (Cambridge University Press, 1991)

Judith Shklar, 'Political Theory and the Rule of Law' in J Shklar (ed), *Political Thought & Political Thinkers* (Chicago, 1998) 21

Srinivasan, Amia, ‘Genealogy, Epistemology and Worldmaking’ (2019) 114.2 *Proceedings of the Aristotelian Society* 127

Stewart, Laura AM and Janay Nugent, *Union and Revolution: Scotland and Beyond, 1625–1745* (Edinburgh, 2020).

Sugarman, David, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science', review of RA Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, by Richard A. Cosgrove (1983) 46 *Modern Law Review* 102

Tulloch, Hugh, 'A.V. Dicey and the Irish Question: 1870–1922' (1980) 15.1 *Irish Jurist* 137

Walters, Mark, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge University Press, 2021)

Weill, Rivka, 'Dicey was not Diceyan' (2003) 62.2 *Cambridge Law Journal* 474

Whatley, Christopher, 'Economic Causes and Consequences of the Union of 1707: A Survey' (1989) 68 *Scottish Historical Review* 186

———— *Bought and sold for English Gold? Explaining the Union of 1707* (East Linton, 2nd ed, 2001)

Williams, Bernard, *Essays and Reviews: 1959–2002* (Princeton University Press, 2014)

———— 'Why Philosophy Needs History' in Bernard, *Essays and Reviews* (Princeton University Press, 2014) 405