Dicey on Writing the Law of the Constitution

Mark D. Walters*

Abstract—Albert Venn Dicey’s *Law of the Constitution* is one of the most influential books on public law in the common law tradition—but it is also one of the most misunderstood. Dicey is generally thought to have adopted an analytical or positivist method with a view to codifying the unwritten constitution as a set of rules, but this characterization of his work sits uneasily with the book’s comparative and historical references and its underlying ‘Whig’ politics. *Law of the Constitution* is therefore thought to be theoretically confused or even duplicitous and of little value to lawyers and legal scholars today. This essay challenges this view of Dicey and his famous book. It examines Dicey’s unpublished lecture notes and private correspondence as well as his personal characteristics as a legal scholar and writer in an effort to identify Dicey’s own ideas about the theoretical foundations of his work. The result is a ‘Dicey’ that might not be recognized today—one who embraced a legal theory that integrated analytical, historical, comparative and normative elements of legal interpretation together through discursive narratives about general principles. Read as an interpretation of legal principles rather than a textbook of legal rules, *Law of the Constitution* regains its theoretical coherence and it may offer valuable lessons for understanding constitutionalism today.

Keywords: constitutional theory, jurisprudence, legal history, rule of law, constitutional law, methodology

1. Introduction

It was 1906 and Albert Venn Dicey had been the Vinerian Professor of English Law at Oxford for almost 25 years. Even so, he felt uneasy about his position as a legal scholar. After reading Paul Vinogradoff’s introduction to a Russian
translation of his most famous book, *Law of the Constitution*, Dicey commented: ‘It was by a friend & extremely friendly & gave more or less... an account of my writings... [But w]hat struck me most was how little people might know of one’s real intellectual life.’

Dicey was right. There was a divide between perceptions of his published work and his own intellectual life. What he perhaps did not anticipate was just how expansive that divide would become. The constant use of *Law of the Constitution* over time produced, in Stefan Collini’s words, ‘a smooth-surfaced entity known as “Dicey” whose relation to the historical figure writing in the 1880s... dropped from view’. Dicey is now regarded as ‘the high priest of orthodox constitutional theory’. Orthodox or Diceyan constitutional theory is taken to embrace a legal method that is analytical, formalist, scientific, mechanical, descriptive and positivist. The conception of public law that emerges from this method focuses upon law’s authoritarian qualities. In particular, it is said that Dicey valued the authority of rules, and that he therefore understood the job of the academic legal writer—his job—to be the codification of law as systems of formal rules so that lawyers might approach their trade as if ‘mathematicians’. Dicey was thus an author of ‘dogmatic blackletter textbooks’ and *Law of the Constitution* was ‘an attempt to reduce Britain’s unwritten constitution to a partially written code’. Underlying this code was a formal not substantive conception of the rule of law. Of course, anyone reading *Law of the Constitution* for the first time might be confused by this description of Diceyan method. The book’s rhetorical form, its historical and comparative references, and its distinctively ‘Whig’ take on the constitution do not seem obviously analytical or positivist. We are therefore left with the impression that Dicey was theoretically naïve or incoherent, or even duplicious. *Law of the Constitution* is thus denounced as ‘brilliant obfuscation’.

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1 AV Dicey to WP Garrison, 11 April 1906, Garrison Papers, hMS Am 1169.1, no 33, Houghton Library, Harvard University. For Vinogradoff’s translation, see АВ ДАЙСИ, ГОСУДАРСТВЕННОГО ПРАВА ИН (МОКСА – 1905).
4 ibid 17, 18, 47, 140.
10 F Frankfurter, ‘Foreword’ (1938) 47 Yale LJ 515, 517.
agenda, it is ‘a book of profound historical influence which need no longer be read’.11

This, at least, is the smooth-surfaced entity known as Dicey. But what of the real Dicey? In this essay, I explore the possibility that Dicey did not regard the theoretical foundations for his work to be analytical or positivist in the way that is generally assumed, and that the normative, comparative and historical dimensions of his book were entirely consistent with the theoretical foundations he did have in mind. In pursuing this possibility, I will try to bridge the divide between Dicey’s published work and his ‘real intellectual life’. I will rely upon his unpublished lecture notes, an unfinished book manuscript, and private correspondence, and I will consider Dicey’s work in light of the sort of person Dicey was, as part of a re-evaluation of what Dicey’s Law of the Constitution means.

The idea that we should try to bridge the divide between a scholar’s published work and his or her ‘real intellectual life’ is not uncontroversial. With publication, scholarly work leaves a private domain full of doubt, ambition, insecurity, confidence and contingency, and it enters a public domain as a finished product with the expectation that it will be read and judged on its own terms. Inquiry into the ‘real intellectual life’ of the author may therefore be seen as an invasion of the private domain that distracts attention from the work itself. Nevertheless, scholarly interest in the private papers of authors whose books have obtained canonical status is often intense.12 Indeed, as time passes and intellectual contexts change, full appreciation of a work may require that its readers rediscover its original intellectual context.13 To this end, knowledge of the author’s ‘real intellectual life’ may prove very helpful, and reference to evidence found within the private domain of the scholar may assist in revealing dimensions of a work that have become obscured or neglected over time.

The intrusion into the author’s private domain for the purpose of reconsidering a canonical text must, however, proceed with caution. In my use of Dicey’s unpublished papers in this essay, I have made two assumptions that should be made explicit at the outset. First, I have assumed that any written text may develop a meaning separate from its author’s intentions, and that readers (including the author) are not bound by those intentions when interpreting the text.14 I will therefore refer to Dicey’s unpublished work not to discover an intention that will determine the true meaning of Law of the Constitution, but to build an historical context that will improve our own interpretive engagement with that text. Secondly, I have assumed that unpublished materials that provide context are texts in their own right and

must also be interpreted contextually. A private letter written in haste or the draft of a book that was never completed will give only fragmentary and possibly unreliable glimpses into an author’s intellectual life. We should hesitate before using these kinds of sources to reject the clear meaning of a published work. But where a canonical text is open to different interpretations, reference to materials in the author’s private domain may shed light on whether an interpretation that has become dominant should give way to alternative interpretations. To complicate received understandings about a canonical text in this way can only improve our sense of both the history of ideas and value of a famous book for readers today.

A full re-evaluation of Dicey in his intellectual context is beyond the scope of this essay. I will therefore focus upon one aspect of Dicey’s life as a scholar, namely, his approach to legal writing and legal literature. The examination will reveal that Dicey was not jurisprudentially confused or insincere; on the contrary, he regarded *Law of the Constitution* as a form of legal literature having a sound theoretical foundation that successfully integrated analytical, historical, comparative and normative aspects of legal interpretation through the discursive exposition of general principles. Understood in this way, *Law of the Constitution* may still be a book worth reading today.

2. The Real Dicey

*Law of the Constitution* was first published in 1885 and seven subsequent editions were published in Dicey’s lifetime, the last one in 1915. Its central ideas have become so thoroughly embedded within the common law tradition that it is now difficult to imagine that the book was once new and its outlook fresh and unfamiliar—that it was once seen as a work of ‘brilliance and originality’ written by ‘an iconoclast’ whose ideas might even have seemed to some readers as ‘heretical eccentricities’. What made the book novel then is what makes it orthodox today: Dicey sought to explain the English or British constitution from a distinctly *legal* perspective. To understand Dicey’s achievement, however, it will help to begin not with the book but with the person who wrote it, and to imagine him not as he now is, the embodiment of orthodoxy, but as he once was, as a legal scholar with an air of eccentricity about him.

Albert Venn Dicey lived from 1835 to 1922; he received a first in *Literæ Humaniores* at Oxford in 1858; he was a fellow of Trinity College, Oxford, from

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1860 until his marriage to Elinor Bonham Carter in 1872; he had a modest practice at the Bar before being elected Vinerian Professor of English Law and fellow of All Souls, Oxford, positions he held from 1882 until 1909; and in addition to publishing works in constitutional law and conflict of laws, he advocated a series of political positions that became increasingly unpopular during his lifetime, arguing against female suffrage, Irish home rule, trade unionism and the rise of the modern welfare state. Dicey could be politically dogmatic and uncompromising. Sir Frederick Pollock observed that Dicey and his friend James Bryce were ‘university Liberals together’, but Dicey’s ‘ideas remained fixed on all material points while Bryce’s mind was open to the last.’ Dicey himself conceded that he never ceased to be a ‘Mid-Victorian’.

But Dicey was much more complicated than this overview suggests. His family were liberal reformers connected to the Clapham sect and he grew up with the Reform Bill ‘in the air’. Dicey’s views were sometimes forward-looking for his time. On the question of race, it was Dicey, not Bryce, who was progressive—it was Dicey who wrote an elegant defence of equality in response to his friend’s arguments in favour of racial segregation. Dicey, the crusty individualist, served for over a decade as principal of a college founded by Christian socialists to educate the working class. He was also in the vanguard of reforms in university education. He lamented the ‘apathy’ of the aristocratic young who came to Oxford ostensibly to learn but who cared only ‘to play football...’ Would it not be, he wondered, a ‘sound principle to accept... democracy & even for a time be satisfied without an aristocracy even in learning, if it be possible to make the mass of the people appreciate knowledge’? Dicey had no patience for unprincipled elitism.

Dicey was certainly not the austere authoritarian suggested by some of his political writings. He was a somewhat quirky figure: tall, thin and physically un-coordinated (the result, perhaps, of an obstetrical error at birth), Dicey talked incessantly and he could be oblivious to social situations around him.
His wife, Elinor, worried that when he travelled to attend public functions he might arrive in a dishevelled state or depart without his belongings.28 Yet he inspired deep loyalty among those who knew him. Pollock, writing to Oliver Wendell Holmes, Jr, after Dicey's death, stated that although he respected Dicey for his work, 'I loved the man more, oddities and all (among others an invincible ignorance of the points of the compass).’29 Writing to Pollock, Holmes said of Dicey: ‘What a dear, naïve, ingenuous creature he was, and how modest as to his own powers.’30 Those close to Dicey seemed protective of him. After Dicey’s death, Elinor Dicey fretted about the revelations that a planned book about her husband might contain. One family friend thought that she had worried needlessly, for the resulting book31 was ‘successful in giving the right impression…bringing out the personality without any of the personalities which Mrs. Dicey deprecated’,32 while another observed upon reading the book that ‘[s]omeone with a greater sense of humour might have done more justice to some of A.V.D.’s qualities.’33 Dicey was, it seems, a funny sort of person.

Although he claimed to have been a ‘slow worker’ and that his physical state made ‘learning, *e.g.* reading’ tiring, Dicey received a thorough literary education at home under the tutelage of his mother, Anne Mary Stephen.34 Through his mother Dicey was part of an extended family famous for both its lawyers and its writers—Leslie Stephen, James Fitzjames Stephen and Virginia Woolf among them.35 ‘That Stephen blood is a powerful one’, Holmes once remarked, ‘It…accounts for Dicey.’36 Dicey developed a love of fiction that lasted throughout his life.37 In his book *Law and Public Opinion*, he used works by Dickens and Austen, among others, to contextualize the law, observing: ‘Novels, it has been well said, never lie; they always reflect the features of the time in which they were written.’38 Dicey’s own writing has been criticized for many reasons, but want of effective writing style is not usually one of them. However, Dicey’s statements—he said for example that ‘everybody knows, that I speak more easily than I write’39 and ‘I sometimes wish that writing had never

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28 E Bonham Carter to G Bonham Carter, 20 April 1898, Bonham Carter Papers, 94M72/F572, Hampshire Record Office, Winchester, United Kingdom.
29 Pollock to Holmes, 10 April 1922, Holmes–Pollock Letters (n 19) vol 2, 93.
30 Holmes to Pollock, 20 February 1925, Holmes–Pollock Letters (n 19) vol 2, 155–56.
31 The book was Rait (n 21).
32 E Toynbee to J Bonham Carter, 24 March 1923, Bonham Carter Papers (n 28) 94M72/F572.
33 HL Litchfield to J Bonham Carter, 29 April 1926, Bonham Carter Papers (n 28) 94M72/F572.
35 Dicey’s mother’s brother was Sir James Stephen (1789–1859), an influential lawyer in the Colonial Office whose children included Sir James Fitzjames Stephen (1829–94), author, lawyer, and judge, and Sir Leslie Stephen (1832–1904), author and literary critic, and father of author Virginia Woolf (1882–1941).
37 AV Dicey, ‘Novel Reading’ (1903) 8: 132 Working Men’s College J 201.
been invented & that we could rely on speech alone’\textsuperscript{40}—suggest that he found writing difficult. The problem was partly physical. His coordination problem meant that he had to dictate most of his work. As Dicey stated to Prime Minister William Gladstone: ‘The employment of an amanuensis is occasioned by a weakness of my fingers which renders my own handwriting almost illegible…’\textsuperscript{41} For Dicey, writing was, in effect, speaking. It is perhaps not surprising that Dicey’s most readable legal books, including \textit{Law of the Constitution}, were first delivered as lectures.

This brief account of Dicey helps us to understand something of his ‘real intellectual life’. Two general points are worth underscoring. The first concerns Dicey’s approach to writing and the creative intellectual process, which may have been affected, at least in part, by his physical disability. There is some reason to think that for Dicey the development of ideas, including legal ideas, emerged best \textit{through} oral discourse. Dicey observed to Bryce:

\begin{quote}
I really think that the contrast between speaking & thinking is like many received ideas delusive. I do not believe that I have ever got hold of a strictly original thought in my life – even in the form of a new error – but I am certain that conversation has very much improved my own thinking. Sometimes even in public speaking or lecturing, which is a very much less improving occupation than good talking, I have come across something like a new, or perhaps only a newly turned, idea.\textsuperscript{42}
\end{quote}

Secondly, Dicey was a slightly odd person—though in the endearing way of an absent-minded professor. Indeed, Dicey himself concluded that he had certain strengths and weaknesses intellectually:

\begin{quote}
Throughout life I have to an excessive extent, as I quite admit, followed the habit of expressing obvious thoughts on obvious matters, of which to my own knowledge I am by no means a complete master…. I frankly admit that I have pursued this course in part instinctively, but in part also from the knowledge that the same deficiency, whatever it is, that makes the learning of mathematics impossible to me, would prevent my carrying out any line of thought beyond a certain distance. However in each case we must bear in mind the very wise dictum of William James, when I was parting from him some 18 years or so ago, at Boston, U.S. ‘We must learn to be content with everything—even with ourselves.’\textsuperscript{43}
\end{quote}

Both of these points are relevant to how we should understand Dicey’s \textit{Law of the Constitution}. His comment about ideas and discourse may be considered alongside his observation that \textit{Law of the Constitution} exhibits ‘characteristics inseparable from oral exposition…’\textsuperscript{44} And his remarks about his intellectual

\textsuperscript{40} AV Dicey to E Freeman, 15 September 1887, Papers of Edward Augustus Freeman, GB 133 EAF, FA1/7/142, John Rylands Library, Special Collections, University of Manchester.
\textsuperscript{41} AV Dicey to WE Gladstone, 17 November 1886, Gladstone Papers, Add 44499, ff 173–74, British Library.
\textsuperscript{42} Dicey to Bryce, 17 May 1912, Bryce Papers (n 20) 3: 113–16.
\textsuperscript{43} AV Dicey to J Venn, 30 March 1916, Venn Papers, C25/24, Gonville and Caius College Archives, Cambridge.
\textsuperscript{44} AV Dicey, \textit{Introduction to the Study of the Law of the Constitution} (8th edn, Macmillan 1915) vi.
strengths and weaknesses may be considered alongside his own view of what he had accomplished in *Law of the Constitution*: ‘It contains some things (very few I own) which it were absurd to call original but wh I think have been hardly said expressly before.’ Law of the Constitution is, as Sir Ivor Jennings wrote, an ‘intensely personal’ book. Knowing about the sort of person Dicey was helps us to see why he saw his book the way he did, and why he gravitated towards an interpretive approach to law in which general principles already implicit within legal practice are brought to the surface and expressed through a discursive narrative—and why he might have been reluctant to explain this theoretical dimension to his work publicly.

3. Writing Law of the Constitution

On 5 December 1882, Dicey was elected the Vinerian Professor of English Law at Oxford. Dicey had (according to Elinor Dicey) ‘for years’ wanted the Vinerian chair, Blackstone’s chair, for unlike other chairs, including the Corpus chair in Jurisprudence, which he had also eyed for a time, it was in ‘his own particular subject’ and so was something of which he could ‘make a great deal’. Dicey would later reveal that as the ‘successor of Blackstone’ he felt considerable pressure, for having ‘no training as a Professor’ he found the effort of learning the law and preparing lectures ‘very great’. For his first set of lectures, he settled on a topic with which he felt a natural affinity—the constitution. Upon becoming ‘a Professor of English Law’, Dicey explained to Holmes, ‘I naturally took mainly to the constitutional side thereof as it was the part of our law in which from having been brought up in a very good Whig circle, I had been from my youth perpetually though unconsciously, educated.’ And so, over the course of 1883, the lectures that would become *Law of the Constitution* were written—or rather dictated.

Books like Walter Bagehot’s *English Constitution* and Edward Freeman’s *Growth of the English Constitution*, upon which Dicey relied, had examined the constitution from political and historical perspectives. But in his inaugural lecture in April, 1883, Dicey had forcefully promoted the idea of law as an independent academic discipline. He soon made known his intention to extend this idea to the constitution. In the summer of 1883, Dicey informed...
Edward Freeman, ‘I am going after Xmas to lecture on Constitutional law keeping as far as possible to the strictly legal aspect of the subject;’ 52 In March 1884, with his lectures underway, Dicey explained to Freeman that partly due to his ‘slender’ knowledge of history and ‘partly because I do not believe the historical aspect of law to be what the men here really need, I try as much as possible to learn myself & teach them what the law actually is rather than the process by which it has grown to be what it is.’ 53

The lectures were a success: the ‘new Vinerian professor’ had ‘amply justified his selection to that office’. 54 In June of 1884, Dicey proposed publishing the lectures as a book. 55 Over the course of the next 6 months, he revised his notes for publication. Dicey appreciated he was breaking new ground. ‘We have a great advantage as constitutionalists’, he informed his friend Sir William Anson, the Warden of All Souls, who was also writing a book on constitutional law at the time, ‘in the fact that no considerable lawyer has written about the subject for years’. 56 Dicey asked Anson, as well as Bryce, the then Regius Professor of Civil Law, to read early drafts of his book, and he consulted with Freeman, appointed Regius Professor of Modern History that year, about historical and comparative aspects of the work. Important parts of Dicey’s argument seemed to have developed during this time. ‘I am trudging on rather slowly with my book on the Law of the Constitn.’, Dicey wrote to Freeman at one point, adding that the work had ‘opened to me a line of thought which I think is really valuable’, namely, ‘the essential difference’ between continental and English approaches to the constitution: ‘In France they seem to me to start from the notion of the state & let the individual take care of himself. In England as I understand the matter we start from the rights of the individual & hardly recognise the state or Crown as having rights of its own.’ 57 Dicey said that he was ‘by degrees’ developing a ‘very vague understanding’ of French droit administratif. 58

Dicey’s ideas about parliamentary sovereignty and the rule of law also developed during this time. In December 1884, Dicey thanked Bryce for reviewing the manuscript of the book, adding:

I am much struck by an idea which has recently occurred to me, namely that what I call the supremacy of the law has tended to increase the exercise of Parliamentary sovereignty & that from the English sovereign body being primarily a legislative body has in turn increased the legal character of the constitution. 59

52 Dicey to Freeman, 2 August 1883, Freeman Papers (n 40) FA1/7/136.
53 Dicey to Freeman, 18 March 1884, Freeman Papers (n 40) FA1/7/137.
55 AV Dicey to Macmillan & Company, 9 June 1884, Macmillan Archive, 55084, 7–8, British Library.
57 Dicey to Freeman, part of letter, no date, Freeman Papers (n 40) FA1/7/154.
58 ibid.
59 Dicey to Bryce, 9 December 1884, Bryce Papers (n 20) 2: 55–60.
But Dicey was unsure about how to address this point in his book. Bryce apparently suggested that Dicey had not developed this point with sufficient detail in his draft. In January 1885, Dicey responded, stating that he agreed with what Bryce had said ‘about the sovereignty of Parliament & the rule of law’.60 Dicey went on:

I fancied I had sufficiently worked out the point you referred to in the concluding paragraphs of my chapter on the rule of law. Oddly enough I did write & re-write a complete separate lecture or chapter on the subject of the connection between the two. I bothered my mind with it for all of a fortnight. Then thought the topic too much of a digression & too long...& substituted for it the paragraph to wh I have already referred.

When *Law of the Constitution* was published, the topic of how parliamentary sovereignty and the rule of law are reconciled was still addressed, as it was in the draft Dicey sent to Bryce, in the concluding paragraphs to Lecture VII on the rule of law rather than in a separate lecture or chapter; but the discussion in the book consisted of ten paragraphs that spanned over eight pages, and in subsequent editions these paragraphs would be placed in a separate chapter.61 Had Dicey added more detail on this point in response to Bryce’s comments? We can only speculate on this point. However, one point that is clear is that Dicey invested considerable time and thought in the drafting of these ten paragraphs—the ten paragraphs that arguably form the theoretical heart of the book and of the Diceyan theory of constitutionalism.

*Law of the Constitution* was published in late 1885. Even this brief overview of its genesis affirms an obvious point—that it was the result of creative imagination rather than mechanical composition. We may now turn to consider the claim that its ambitions were to present law in a mechanical way. Where does the book fit within the traditions of legal writing that existed at the time? What were its jurisprudential foundations?

4. Legal Landscapes and Legal Codes

Jurisprudence in Victorian England was, as Dicey himself explained, dominated by the ‘analytical method’ associated with John Austin’s *Province of Jurisprudence Determined* and the ‘historical method’ associated with Sir Henry Maine’s *Ancient Law*.62 Austin’s book was first published in 1832 but only gained popularity after its republication in 1861, the year that Maine’s

60 Dicey to Bryce, 5 January 1885, Bryce Papers (n 20) 2: 64–68.
62 Dicey (n 38) 413, 414. See in general M Lobban, ‘Was there a Nineteenth Century “English School of Jurisprudence”?’ (1995) 16 J Legal Hist 34.
book was published. As a result, Dicey observed, Austin’s analytical method was ‘placed in curious juxtaposition’ with Maine’s historical method. The analytical method of jurisprudence purported to define law and legal ideas in abstract conceptual terms, focusing upon positive law or the command of the sovereign, with a view to separating questions about what law is from questions about what it ought to be; the historical method, in contrast, viewed law and legal ideas as embedded within social and historical contexts and therefore as evolving as societies evolved from less to more developed forms. The debate between analytical and historical schools was not a debate between legal positivism and a variant of natural law theory. It was a contest between conceptual and contextual styles of jurisprudence, and although both could be pursued with at least some sense of moral detachment, the contextual style purported to reveal a relationship between law and morality that the conceptual analysis denied. The textbook tradition in 19th-century English legal literature, within which authors re-stated legal doctrine as coherent codes of formal rules deduced from a limited set of general principles presented in isolation from broader considerations of political, social or moral factors, appeared to draw jurisprudential inspiration from the analytical school of jurisprudence. ‘The orthodox view of Dicey is that he was a legal positivist who embraced the analytical school of jurisprudence and contributed to the textbook tradition by writing digests or codes of law.

There is much to support this view in Dicey’s legal writing. Dicey’s early works on procedure and domicil were efforts to ‘digest the law . . . into a series of rules’ that were shown to be ‘the expression of a few simple principles’ with a view to establishing ‘a code’ for the relevant areas of law. Dicey’s mammoth Conflict of Laws, published in 1896, was designed to exhibit the law ‘in the form of systematically arranged Rules and Exceptions . . . ’ Dicey thus restated the common law ‘in language somewhat resembling that of an Act of Parliament’ producing a ‘dogmatic treatment’ of the law which inhibited

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64 Dicey (n 38) 413.
70 AV Dicey, A Digest of The Law of England with Reference to The Conflict of Laws (Stevens & Son; Sweet & Maxwell 1896) v.
71 Anonymous review of Conflict of Laws (30 January 1897) 15 Speaker 133.
‘full discussion’ of its contested aspects. But Dicey at his Austinian best.

But Dicey valued other forms of legal writing too. He thought that academic lawyers might engage in overtly normative writing. In his 1886 *England’s Case Against Home Rule*, Dicey stated that he would assess the ‘merits’ of Gladstone’s Irish home rule proposal ‘with the calmness and fairness which a scientific constitutionalist should display…’ He also engaged, from an early point in his career as a legal writer, in sociological and historical analyses of law. His *Law and Public Opinion*, first published in 1905, is a sweeping account of 19th-century English legal history—‘a work of inference or reflection’ designed to show that ‘dry legal rules have a new interest and meaning when connected with the varying current of public opinion…’ Here we have Dicey ‘follow[ing] the historical method which characterised Maine’s *Ancient Law*’.76

In light of the different genres of legal writing in which Dicey engaged, the obvious question to emerge is: what sort of book is *Law of the Constitution*? It is neither overtly political or normative like *England’s Case Against Home Rule*, nor primarily sociological or historical like *Law and Public Opinion*. Its opening pages contain passages that could have been written by an Austinian textbook writer: ‘a professor whose duty it is to lecture on constitutional law must feel that he is called upon to perform the part neither of a critic nor of an apologist, nor of an eulogist, but simply of an expounder’; ‘[h]is proper function is to show what are the legal rules (i.e. rules recognised by the Courts)’; ‘[t]he duty, in short, of an English professor of law is to state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection.’ In his book, Dicey neatly divided constitutional law from constitutional morality or convention; he analysed constitutional law in terms of two principles: parliamentary sovereignty and the rule of law; he subdivided the rule of law into three parts: that rights may not be invaded except according to law, that everyone is equal before the law and that basic rights are implicit within the ordinary law; and then he examined the law relating to freedom, discussion, assembly, martial law, the army and public revenue. The result, it has been said, was a ‘textbook’ in which the author expounded the ‘axioms’ of the constitution in a manner that was ‘as trenchant as a biblical prophet or another Euclid engaged in demonstrating the truth.’ 

75 Dicey (n 44) 3–4, 29, 31.
77 Dicey (n 45) 3–4, 29, 31.
is often said to be unlike *Law and Public Opinion*, the latter book demonstrating the ‘sociological sterility’ and ‘myopia’ of the former book.\(^79\) the contrast between them proof that Dicey was not an ‘internally consistent’ thinker.\(^80\)

This, at least, is the orthodox view of Dicey’s *Law of the Constitution*. But not everyone read the book in this way. Harold Laski observed, after re-reading *Law of the Constitution* in the 1920s: ‘Dicey . . . captivated me . . . [with] a kind of mellow wisdom that was really masterly. I didn’t always agree and I sometimes doubted accuracy, but I never stopped admiring—a very big achievement.’\(^81\) It is hard to imagine a digest or code of law producing this kind of reaction. But, still, one might argue that if we peel away the book’s ‘masterly’ rhetoric, a code of formal rules or ‘axioms’ is revealed—and so, for example, Dicey’s three-part discussion of the rule of law may be read as the three *rules* of the rule of law. Under this approach Dicey’s work must be counted a failure, for his three points about the rule of are, as rules, easily ridiculed.\(^82\)

But to argue that *Law of the Constitution* was an effort to codify rules misunderstands Dicey’s aims and his achievements. *Law of the Constitution* is really a book about general principles, not rules, and these principles gain their meaning through Dicey’s narrative; any attempt to peel away literary form from legal substance is thus bound to fail. As Dicey informed his publisher when proposing the book, he had delivered ‘a series of lectures on the fundamental principles of constitutional law’ and although the book based on these lectures would deal with ‘the legal aspect of the constitution, [it] would not be a law book in the strict sense of the term’; rather, it would represent a ‘readable book’ on ‘principles of constitutional law’ that would be of ‘some interest for a wider class than mere lawyers’.\(^83\) In the preface to *Law of the Constitution*, Dicey insisted that the book ‘does not pretend to be even a summary, much less a complete account of constitutional law’; its modest goal was to deal ‘only with two or three guiding principles which pervade the modern constitution of England’ so that students might then study detailed treatises with profit.\(^84\) Although Dicey did engage in a lengthy discussion of substantive law, he began that discussion by stating that ‘the reader should remember’ that his object was not to provide ‘minute and full information’ on the law, but simply ‘illustrations’ of the rule of law.\(^85\) Readers wishing full statements of the law ‘should consult the ordinary legal text-books’.\(^86\) *Law of the Constitution*

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\(^79\) Frankfurter (n 10) 517.
\(^80\) Sugarman (n 7) 111.
\(^83\) Dicey to Macmillan, 9 June 1884, Macmillan Archive (n 55) 55084, 7–8.
\(^84\) Dicey (n 44) v.
\(^85\) ibid 200.
\(^86\) ibid 209.
was not an ordinary legal textbook; it was a book with ‘a special aim of its own...’

Dicey’s intentions in this respect are illuminated by his correspondence with Anson, who, as mentioned above, was writing his own book on constitutional law when Dicey was writing his. The two authors exchanged drafts of their work, and it became apparent to them that their books would be very different in character. ‘It is very odd to me’, Dicey stated, ‘to notice how perfectly consistent & yet how entirely different may be two different modes of treating the same subject’; indeed, he continued, ‘[c]ould we have foreseen exactly the shape our writings wd take, we might perhaps have published a joint work using my chapters as introductory to our subject’. In the first edition to his book, which came out before Anson’s book was published, Dicey stated that the ‘true law of the constitution’ was a subject that had ‘not yet been fully mapped out’. In the editions published after Anson’s book came out, he added a footnote: ‘since these words were written, Sir William Anson’s admirable Law and Custom of the Constitution has gone far to provide a complete scheme of English constitutional law’. In the preface to his book, Anson described Dicey’s Law of the Constitution as ‘the work of an artist’ while his own work was, picking up on Dicey’s mapping metaphor, that of ‘a surveyor’. Although Dicey would later insist that this assessment was a ‘friendly over-estimate’ of his own contribution, he agreed that Anson’s effort to map or state ‘what the mechanism of the constitution is’ was very different from the effort ‘to trace out with more or less truth certain leading ideas or principles’ implicit within the law, a ‘pursuit always more or less visionary’ in character.

We may say, then, that Dicey had painted a picture of the constitutional landscape in broad and colourful strokes, while Anson had created a technical map or chart. To read Dicey’s Law of the Constitution as if it were a code or map of formal legal rules would be like trying to find your way through Suffolk using a Constable landscape as your guide. Read as an artistic impression of principles, however, the book reveals a ‘spirit of legality’—to use Dicey’s own expression—that a code or map could not. Dicey saw principles as very different from rules. General principles of law, Dicey wrote in the introduction to Conflict of Laws, ‘possess a distinct character and value of their own’ different from the specific ‘rules’ they animate. Principles are ‘essentially generalisations’ suggested by judicial decisions and academic writings; they lack ‘such

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87 ibid vi.
88 Dicey to Anson, 26 February 1886, Anson Papers (n 56) 22–6.
89 Dicey (n 15) 34.
90 Dicey (n 44) 34.
93 Dicey (n 44) 409.
94 Dicey (n 70) 61.
accuracy and precision’ as to be applicable ‘with confidence’ to the solution of ‘novel questions’ of law, but they ‘indicate the direction’ in which specific rules of law ‘tend’ and they give ‘rational meaning’ to rules that by themselves appear ‘arbitrary or conventional’. These ‘generalizations’ are, he wrote, ‘far less the premises from which our judges start . . . than the principles towards the establishment of which the decisions of our Courts gradually tend’. ‘A Court, when called upon to decide cases which present some legal difficulty’, Dicey observed in Law and Public Opinion, ‘is often engaged—unconsciously it may be—in the search for principles’ with a view to developing rules that maintain ‘the logic or the symmetry of the law’. Dicey’s three propositions on the rule of law are, as strict rules, descriptively false and normatively problematic, but as general principles they may be, even today, both factually true and morally compelling.

Dicey was perhaps partly to blame for the fact that people read Law of the Constitution as a book about rules; his ‘clarity of exposition and his profound sincerity’ may have led readers to ‘disregard his warning’ about his aims for the book. This clarity made the book attractive to students in search of rule-like certainty. ‘The fact [is] . . .’, Dicey wrote to his publisher, ‘Law of the Constitution has become a sort of school-book.’ The essay about principles thus took on the life of a textbook about rules. But not for Dicey. Over time, Dicey’s enthusiasm for academic legal codes or digests declined, and his changing views about legal writing only reinforced his opinion about the sort of book Law of the Constitution was. He found the task of writing Conflict of Laws a thoroughly unpleasant one; it was, he confided to Bryce, ‘a rather wearisome performance’. Dicey insisted that the challenges associated with writing ‘a good law-book’ were ‘immense & unexplainable to those who have never attempted the feat’; he lamented the fact that he had no memory for cases—‘no one has read so many & remembers so few’—and that he had ‘never caught the knack of ordinary legal composition . . .’. Indeed the brief look at Dicey’s personal characteristics above suggests that Dicey may not have been intellectually cut out for the work of legal codifier. Bryce encouraged Dicey to keep up with codifying common law rules, but in a letter dated 15 November 1894, Dicey expressed doubt about whether he was capable of this task:

. . . I don’t think that what you may call unauthorised codification is really the right line of labour for me. Whatever I produce in future – if I produce anything – wd be much more in the style of the Law of the Constitution. It was I consider unfortunate,

95 ibid 61, 62.
96 ibid 61.
97 Dicey (n 38) 364, 365.
98 J Finkelman, Review of Law of the Constitution (9th edn) (1940) 3 U Toronto LJ 484, 484.
99 Dicey to Macmillan, 14 November 1914, Macmillan Archive (n 55) 55085, 104.
100 Dicey to Bryce, 24 July 1896, Rait (n 21) 139–40.
101 Dicey to Bryce, 28 September 1895, Bryce Papers (n 20) 2: 218–20.
though the misfortune is now irreparable, that I ever set eyes on the Conflict of Laws. However life is a series of mistakes & I have no reason to complain, though it is provoking as one looks back to think how much good work one cd have achieved if one had only been endowed with a certain kind of intellectual foresight.\(^\text{102}\)

In this remarkable passage, Dicey confirmed that \textit{Law of the Constitution} was not an attempt at academic codification of law, and that his intention for the future was to produce books in its style. The next legal book that Dicey published was \textit{Law and Public Opinion}. As Dicey observed to Bryce, ‘The book is rather an impostor. It looks so like the \textit{Law of the Constitution} and has so little of its go.’\(^\text{103}\) For those who accept the standard view of Diceyan method and read \textit{Law of the Constitution} as if it were like \textit{Conflict of Laws} and unlike \textit{Law and Public Opinion}, none of this makes sense. But it is clear how Dicey saw his own work: \textit{Law of the Constitution} was not a work of codification but rather a work of reflection about general principles that might serve as a prelude to the task of codifying constitutional law.

Dicey was, by 1896, thoroughly disenchanted with legal codes or digests. ‘My faith in digests has declined’, he informed Bryce.\(^\text{104}\) Upon completing \textit{Conflict of Laws}, Dicey confided to Holmes:

I have grown sceptical as to the merit of ‘digests’ of the modern kind as a method of reproducing statements of law. They involve immense waste of space & I think a good deal of repetition & lead to an affectation of precision in the use of terms, wh. in the present condition of English legal terminology is & must be an affectation rather than a reality.\(^\text{105}\)

Dicey’s concern about the ‘affectation of precision’ seems to suggest that he saw codes not in the continental sense, as instruments with considerable interpretive flexibility, but as statute-like statements of concrete rules. With codes in this latter sense, Dicey became sceptical (though, it should be noted, this scepticism did not prevent him from completing two subsequent editions of \textit{Conflict of Laws}).

\textbf{5. The Real Diceyan Method}

Once we accept that Dicey’s \textit{Law of the Constitution} is not a book about legal rules, but rather is, as Dicey himself thought, an essay on legal principles, the claim that it is the work of a strict legal positivist becomes problematic. Jurisprudential debate since the mid-20th century has been, to a large extent,

\(^{102}\) Dicey to Bryce, 15 November 1894, Bryce Papers (n 20) 2: 185–88.

\(^{103}\) Dicey to Bryce, 6 June 1905, Rait (n 21) 189.

\(^{104}\) Dicey to Bryce, 4 June 1900, Rait (n 21) 186.

\(^{105}\) Dicey to Holmes, 19 April 1896, Holmes Papers (n 49).
pre-occupied with the question of whether legal positivism can accommodate a conception of law that embraces both rules and principles. Instead of looking at Diceyan method through today’s lens, however, we shall focus on how Dicey positioned himself in response to the jurisprudential debates of his day. The orthodox reading of Dicey is that his decision in *Law of the Constitution* to adopt a distinctively legal perspective on the constitution instead of the perspective of either the historian or the political theorist meant, in effect, siding with Austin and against Maine in the contest then raging between the analytical and historical schools of jurisprudence. Dicey was ‘devot[ed] to...Austinian methodology’, 106 or at least his ‘conceptualization of law was very much influenced by Austin’. 107

Dicey was certainly influenced by Austin. In *Conflict of Laws*, Dicey stated that laws ‘in the proper sense of the term...are commands proceeding from the sovereign of a given state’, 108 adding in a footnote in the third edition of the book, ‘i.e., from the point of view of Austinian jurisprudence, which, of course, is not accepted generally outside England.’ 109 At least when he sought to make distinctions between sovereign legal systems clear, as he did in his work in private international law, Dicey was content to follow Austin. Pollock, after reading the book, was prompted to exclaim to Holmes that Dicey ‘is not clear of the damnable heresies of Austin’. 110 Indeed, Dicey himself had written to Holmes years before, in 1880, stating:

A work on law may, it seems to me, be concerned with any or all of three questions. First What is the law? (practical lawyer) secondly What ought to be the law? (Jurist or legislator) thirdly What is the history of the law? (legal historian). 111

What could be more Austinian than this separation of descriptive, normative and historical perspectives on law? And yet in this letter we also see some evidence of a very un-Austinian Dicey. Although Dicey insisted that ‘it greatly conduces to clearness’ to keep the three approaches to law ‘distinct’, he also accepted that they ‘have a connection with each other’. 112 Furthermore, his tripartite division was defined in terms of disciplinary or professional roles rather than jurisprudential methods, and a brief comment at the end of his letter suggests that Dicey thought that to select the disciplinary role of the lawyer still left open a range of schools of jurisprudence. ‘I am’, Dicey wrote, ‘very tolerant of different legal schools...’. 113

106 Cosgrove (n 18) 23.
108 Dicey (n 70) 14.
111 Dicey to Holmes, 19 January 1880, Holmes Papers (n 49).
112 ibid.
113 ibid.
Dicey had occasion to affirm his jurisprudential tolerance a few years later, albeit anonymously, in a review of Holmes' book *The Common Law*. In the opening passages of his book, Holmes announced that '[t]he life of the law has not been logic: it has been experience' and '[i]n order to know what it is, we must know what it has been, and what it tends to become.' This mixing of descriptive, historical and normative analyses might have troubled the Austinian positivist, but it did not trouble Dicey. Dicey praised Holmes for his 'attempt to unite the historical with the analytical method'. In Dicey's opinion, 'any candid critic' had to accept that 'jurisprudence has suffered much' by the separation of analytical and historical schools. Neither method was sufficient on its own. Dicey thus argued that Maine 'forgets...that to trace the growth of a notion is not the same thing as explaining its meaning', and Austin 'commits the mistake of dealing with terms such as justice, law, duty, and the like, as if they were words which must, from the nature of things, have at all times possessed one rigid signification, viz, the meaning assigned to them by Austin himself'. Though he thought Holmes had on occasion read his own ideas about reason or policy into old cases, Dicey praised the normative dimensions of the book—the way Holmes sought 'to explain, and to justify, the principles which govern the different departments of the Common Law', and how he showed the growth of the common law not just 'as a matter of fact' but also as the 'result of the genius of the English race'.

Within a few months of writing this review, Dicey was appointed to the Vinerian chair and was preparing the lectures that would become *Law of the Constitution*. As seen, Dicey stated clearly in the opening pages of the book that he had adopted the lawyer's and not the historian's or political theorist's approach to the constitution. But was he referring to disciplinary roles or jurisprudential methods? Dicey certainly rejected the historian's approach taken by his friend Freeman, and a quick glance at Freeman's book, *Growth of the English Constitution*, suggests why. Freeman claimed that constitutional history had been 'perverted at the hands of lawyers' who failed to appreciate that true knowledge of the English constitution was to be found 'among the dales and mountain-sides of Switzerland' and in the 'German forests' where evidence of the 'oldest institutions of our race' live on 'in their primæval freshness...'.

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116 Touster (n 114) 712–13.
117 ibid 712.
118 ibid.
120 Freeman (n 50) x, 1–2, 21.
In private, Dicey rightly wondered about Freeman’s abilities as a legal historian, observing that ‘he never seemed to me to see that the law of a country, & especially of a country like England, was part of its history’.121 But Dicey’s selection of the legal disciplinary perspective did not mean ignoring other disciplinary perspectives. Dicey maintained the lawyer’s perspective ‘without flinching’, a reviewer wrote in 1885, but the result was a book that ‘for the first time connects and elucidates’ the ‘different points of view...of the comparative jurist, the historian, the politician, and the practical lawyer’.122 Furthermore, in selecting the legal rather than the historical disciplinary perspective, Dicey did not wish to be misunderstood. ‘Let no one suppose’, he wrote in Law of the Constitution, that to deny the value of the historian’s approach for lawyers ‘is to deny the relation between history and law’.123 Dicey insisted that it would be ‘far better, as things now stand, to be charged with heresy, than to fall under the suspicion of...questioning the universal validity of the historical method’.124 Dicey did not wish to be seen as siding with Austin’s analytical method over Maine’s historical method; selecting the lawyer’s disciplinary perspective over the historian’s was not selecting the analytical over the historical school of jurisprudence. To opt for the lawyer’s approach to the constitution was to open rather than close options for jurisprudential analysis.

In fact, Dicey relied heavily upon historical and comparative references in Law of the Constitution.125 He also conveyed ‘a breadth of view’ that contrasted favourably with the ‘dry and pedantic legalism of...Austin’.126 But, aside from these points, he also rejected the central tenets of Austinian jurisprudence.127 Austin famously said that law is the command of the sovereign, who is that person or persons to whom obedience is habitually given, and he located sovereignty in Britain in the Crown-in-Parliament together with the electorate. In Law of the Constitution, Dicey called Austin’s brand of sovereignty ‘political’ and focused instead upon defining ‘legal’ sovereignty for Britain, which he located in the Crown-in-Parliament alone.128 Under Dicey’s approach, ‘law’ had to precede ‘sovereignty’ to provide a way of distinguishing between the ‘legal’ and ‘political’ sovereigns. His solution was, at first glance, very simple. ‘A law,’ Dicey wrote, ‘may, for our present purposes, be defined as “any rule

121 Dicey to Bryce, 22 June 1892, Bryce Papers (n 20) 2: 137–40.
122 FH (n 54) 503.
123 Dicey (n 44) 14.
124 ibid.
127 Sugarman (n 6) 106.
128 Dicey (n 44) 73.
which will be enforced by the Courts.”129 Austin said laws are commands of
the sovereign and judgments of courts are law because tacitly commanded by
the sovereign; Dicey, in contrast, said that law is what courts enforce and the
(legal) sovereign is that person or persons whose acts are so enforced. For
Austin, law flowed from sovereignty; for Dicey, sovereignty flowed from law.
Finally, Austin defined the source of law as a matter of fact—law is the will of
the person or persons habitually obeyed—in an effort to explain a point of
general jurisprudence. Dicey, however, said that he had ‘at this moment, no
concern’ with abstract questions of jurisprudence; rather his ‘whole business’
was to consider the ‘English constitution’.130 His definition of law was, in other
words, a normative proposition of law not an empirical statement of fact, and it
flowed directly from a larger theory of normative constitutionalism in which
principles of parliamentary sovereignty and the rule of law are reconciled:
Parliament may be sovereign and may legislate as it wishes, but the rule of law
prevails in Britain, Dicey argued, because courts independent from the
sovereign have the final say on what law means.131 In countries where courts
merely voice the will of the sovereign, as he thought they did in France, the
rule of law fails. Dicey’s explanation of how parliamentary sovereignty and the
rule of law are reconciled sketches complex ideas about normative constitu-
tionalism that might have been developed in richer detail; indeed, we have seen
how Dicey struggled with the ten paragraphs that address this topic and that he
had originally written a much longer analysis of it. It might be argued that his
private comments in this respect should inform how we interpret this part of
his book. For now, however, we can simply observe that the ten paragraphs
that Dicey gives us on the reconciliation of parliamentary sovereignty and the
rule of law make little sense if we assume Dicey accepted and applied Austinian
jurisprudence.

There is nothing incoherent or duplicitous about the normative quality to
Dicey’s definition of law. As we have seen, a few years before writing Law of the
Constitution, Dicey had advocated, albeit anonymously, an integrated form of
jurisprudence that combined descriptive, historical and normative elements
together. Law of the Constitution is best read as a manifestation of this
integrated jurisprudence. But if Dicey had developed a distinctive jurispru-
dential position, why did he not explain that position publicly? For a time, at
least, Dicey intended to do so. During the 1890s, Dicey wrote and lectured on
comparative constitutional law with a view to publishing a book on the subject,

129 ibid 38.
130 ibid 59.
131 ibid 409.
and although this book was never completed, his draft chapters included the most detailed explanation of his theoretical approach to public law that he would ever compose. Dicey included this explanation in a lecture he delivered in Liverpool on 16 November 1894.

In this lecture, Dicey explained that there are at least three ‘modes or methods’ for studying constitutions: ‘the analytical or expository method’, the ‘historical method’ and the ‘comparative method’. The analytical method, he said, is the right method for writers of legal commentaries on constitutional law. The aim of the ‘commentator’ is, Dicey argued, to explain the ‘existing scheme’ of government, and so he takes institutions and rights ‘as they are’. A full account of the constitution would, he continued, express the constitution ‘in a set of definite propositions placed in a logical order, accompanied by such commentary as sufficed to explain the full import & the precise meaning of what I may term the Articles of the Constiu’. The objective, in other words, ‘is to produce a Constitutional Code accompanied by illustrative comment’. Dicey conceded that ‘[n]either the law nor the practice of the English Constitu lends itself easily to codification’, but, still, he thought that ‘the task of exposition has been achieved with more or less success & completeness by more than one eminent writer...’ We may quickly dismiss the notion that Dicey was referring to himself here; the letter to Bryce examined in the preceding section in which he questioned his own ability to engage in academic codification, denied that Law of the Constitution served that purpose, and proclaimed his intention to avoid attempts at codifying law in future, was, as it turns out, written the day before he delivered this lecture in Liverpool. One writer he probably did have in mind when making this comment was the surveyor or mapper of the constitution, Anson.

So far, Dicey’s lecture fits squarely within the orthodox view of Diceyan method. But Dicey did not stop here. English institutions being what they are, he said, ‘an author who strictly confined himself to the use of the analytical method could not produce a satisfactory exposition of the English Constitutn’, for ‘[t]he analytical method requires for its completeness the aid, though only the subordinate aid, of a different mode of investigation’, namely, the ‘historical method’.

134 ibid.
135 ibid.
136 ibid.
137 ibid.
138 ibid.
139 ibid.
itself historical’, as the past is only consulted to give ‘additional understanding of the present’.140 So, once again, we find that although Dicey rejected the historian’s disciplinary perspective for legal exposition, he did not reject the relevance of the historical method of jurisprudence for legal exposition.

One of the features of Law of the Constitution about which Dicey said he was most ‘proud’ was his use of comparative analysis, and in particular his use of French droit administratif.141 By 1894, Dicey had reflected upon the value of comparative and historical jurisprudence and he had come to appreciate that the latter was just an aspect of the former. ‘History is comparison, though comparison need not be history’, Dicey said in his Liverpool lecture, and so ‘[t]he historical method is at its best an illustration of the comparative method’.142 Dicey then developed a strikingly broad sense of what that method involves. Aside from the value of comparing existing laws with those in other lands or other times, one may, he argued, ‘learn much from the ideal or imagined polities, constructed by the fancy of philosophers or poets’, citing here Rousseau and Montesquieu, as well as comparing ‘conceptions or ideas’ that underlie ‘institutions or laws’, the ‘spirit’ that provides ‘a key’ to understanding the government of countries ‘which cannot be supplied by any study however diligent of the letter or form of their constitutions’.143

If Dicey thought analytical method must be supplemented by a comparative method that included philosophical accounts of ‘ideal’ constitutionalism as well as the ‘spirit’ animating the ‘letter or form’ of particular constitutional laws, then, needless to say, he was a long way from mechanical, analytical or positivist formalism. To the objection that the ‘spirit’ that ‘controls’ institutions, that is, ‘the very things which make up the essence of English public life’, are matters generally known and not in need of explanation, Dicey stated:

No mere exposition of the rules of which English Constitutional law consists will ever free us from this error. An enquiry into the growth of our system of government will do something to free us from the delusion that things must be as they are...144

He insisted to his audience in Liverpool, ‘not as a politician (for with politics we have tonight no concern) but as a student of constitutional theory’, that even parliamentary sovereignty, viewed from this perspective, might be seen as an ‘anomaly’ resulting from ‘the peculiarities of English history’ rather than the ‘final result of democratic progress or development’.145 Dicey finished his discussion by addressing the relationship between the ‘good constitution’ and the ‘great and free nation’, arguing that ‘the student of constitutions’ will soon come to appreciate that even if a ‘good constitution cannot create a free or

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140 ibid.
141 Dicey to Freeman, 8 October 1885, Freeman Papers (n 40) FA1/7/141.
142 Dicey (n 133).
143 ibid.
144 ibid.
145 ibid.
prosperous people' it is possible that ‘bad institutions may mar both the freedom and prosperity of the State’. 146

For Dicey, the ‘satisfactory exposition’ of the ‘letter’, ‘form’, ‘rules’ or ‘law’ of the constitution required an analytical method aided by historical, comparative and normative methods. But why should his development of this argument in an unpublished and incomplete book manuscript delivered in a now-forgotten lecture in Liverpool in 1894 inform our understanding of Law of the Constitution, where, as we have seen, he stated that the duty of the professor of constitutional law is ‘to perform the part neither of a critic nor of an apologist, nor of an eulogist, but simply of an expounder’? The answer, simply put, is that the unpublished lecture seems to elaborate upon what Dicey meant by exposition in Law of the Constitution, for in expounding the general principles of the constitution in that book Dicey did more or less what he later said in his lecture the commentator of constitutional law should do, namely, incorporate analytical, historical, comparative and normative styles of legal exposition together. The lecture is only inconsistent with the book if we accept the orthodox view of the book as theoretically incoherent.

In fact, Dicey’s unpublished lecture was consistent with a point that Dicey had recognized in his published work all along—that legal exposition often has some normative aspect to it. To ‘expound the law’, Dicey observed in Law of the Constitution, one must rely upon ‘judicial decisions’ and thus ‘in many cases on mere inferences drawn from judicial doctrines’. 147 Although Dicey insisted that expounders of law cannot be critics, apologists or eulogists, he accepted that, in the course of inferring principles from cases and developing lines of legal thought based on those principles, they could not be purely neutral or descriptive either. Indeed, in his inaugural lecture as Vinerian professor, Dicey insisted that the academic exposition of law was often transformative, influencing ‘far more than is generally believed not the form only but the substance of the law’. 148 In the introduction to Conflict of Laws, Dicey praised the ‘positive method’ adopted by English academic writers on private international law, who seek ‘to discover not what ought to be, but what is the law’, but he acknowledged that English writers will also find ‘opportunities for the legitimate application of the theoretical method’, ie, the more normative style of analysis adopted by continental jurists, for when ‘as often happens’ legal problems have no obvious answers one must look ‘to arguments drawn from general principles’. 149 In Law and Public Opinion, Dicey observed that ‘the

146 ibid.
147 Dicey (n 44) 31.
148 Dicey (n 51) 23–4.
149 Dicey (n 70) 16, 19, 20, 21.
explanation of a rule may...so easily glide into the extension or the laying down of the rule, or in effect into legislation, that the line which divides the one from the other can often not be distinctly drawn.150 This is true whether the expounder is a judge or an academic writer: 'it may with equal verbal correctness be affirmed in one sense, and denied in another', wrote Dicey (quoting Pollock), 'that interpretation (whether performed by judges or by text-writers) makes new law'.151 In hard cases, we might now say, the descriptive and normative aspects of legal interpretation are inseparable. Dicey may not have developed this theme in Law of the Constitution explicitly, but there is no reason to think that he intended to put forward inconsistent positions on this point; indeed, in the editions of Law of the Constitution published after the publication of Law and Public Opinion he directed readers to the latter book.152

It is appropriate, then, to refer to Dicey’s unpublished book manuscript when interpreting Law of the Constitution because it is broadly consistent with an approach to legal exposition that Dicey developed throughout his published writings. The manuscript was, however, different from the other accounts in certain respects. Dicey seemed all along to have appreciated that the academic writer and the judge both engaged in legal exposition and so both engaged in an exercise that was partly descriptive and partly normative in character. But in the manuscript, Dicey focused more squarely upon the special nature of academic writing, and thus advanced a style of reasoning that was more openly theoretical, comparative and reflective (hence the reference to poets and philosophers) than one would expect from judges—a style reminiscent (to borrow Anson’s labels) of Dicey the ‘artist’ in Law of the Constitution rather than Dicey the ‘surveyor’ in Conflict of Laws.

It is true that in both his published and unpublished accounts, Dicey did emphasize the analytical or positive method. Writing to Anson in 1897, Dicey stated: ‘I do hold that it is in some way absolutely necessary to make clear what we mean by law as it exists in a thoroughly developed modern state...’153 Dicey acknowledged that Austin’s definition of law had its ‘limitations’ and much of what his critics said in ‘pulverising’ his work was ‘true & ingenious'; but, for Dicey, ‘the weak point of the Anti-Austinians is that they do not tell us what they do mean by a law...’.154 In the end, however, Dicey cannot be cast in the role of Austinian disciple. As he informed Anson: ‘It is I think a great advantage that the subject [of jurisprudence] shd be looked at from all points of view.’155 But Dicey kept his jurisprudential cards close to his chest.

150 Dicey (n 38) 491.
151 Dicey (n 38) 362 n 2 (quoting Sir Frederick Pollock, First Book of Jurisprudence (2nd edn) 236); also 361–95, 483-93.
152 Dicey (n 44) 58 n 2.
153 Dicey to Anson, 5 March 1897, Anson Papers (n 56) 95–98.
154 ibid.
155 ibid.
He praised the Austinian work of TE Holland and the anti-Austinian work of Pollock. But his best efforts at reconciling competing approaches are found, as we have seen, in an anonymous review of Holmes’ work and unpublished lecture notes. Dicey’s insistence upon integrating schools of jurisprudence, and his reluctance to explain explicitly his reasons for doing so, is reflected in a letter he wrote to Anson in 1896:

Surely the time is come when reasonable men may insist upon a truce between Austiniens and Anti-Austiniens. Austin insisted upon an important distinction which in his day was overlooked & no doubt like all teachers overrated the importance of his own doctrine. The historical school in their turn have called attention to the fact that law in Austin’s sense of the word is preceded & is always accompanied by rules which have great force though they cannot be brought within Austin’s definition. I cannot myself see, with the highest respect both for Pollock & Holland, why one may not accept the teaching both of Austin & his opponents. But not wishing to be stoned by both sides, I shall not avow my position.

Dicey disliked theoretical extremes. But Dicey did not regard himself as a philosopher of law and he never published a sustained account of his own approach to jurisprudence. In his opinion (though it is one with which we might disagree), he was not intellectually equipped to carry ‘line[s] of thought beyond a certain distance’. It does not follow, however, that Dicey’s work in public law was theoretically incoherent. It combined analytical, normative, comparative and historical aspects of legal interpretation together through the discursive exposition of general principles. The fact that no recognized school of jurisprudence in England at this time—a time described as ‘the lost years of English jurisprudence’—explained this approach to law does not mean that it was without a sound theoretical foundation, or that Dicey was not aware of that theoretical foundation.

6. The Union of Law and Letters

Dicey’s theory of law could not be expressed fully by the existing vocabulary of English jurisprudence. However, we may find expressions of Dicey’s theory through his use of other vocabularies. In particular, his reflections about the nature of legal literature may be seen as reflections about the nature of law and legal interpretation.

As Dicey became disenchanted with legal digests he began to rethink the relationship between law and literature. He came to see that understanding law involved its expression through literature—that law books had to be ‘part of

157 Dicey to Anson, 30 June 1896, Anson Papers (n 56) 270–73.
158 Dicey to Venn (n 43).
159 Duxbury (n 107) 3.
English literature’ and that ‘there ought to be no divorce between law and letters’.\textsuperscript{160} To illustrate this point, Dicey invoked the ‘literary beauty’ of Blackstone’s \textit{Commentaries}.\textsuperscript{161} The \textit{Commentaries}, he wrote, ‘live by their style’, and Blackstone was a ‘literary genius’.\textsuperscript{162} Within the idea of ‘style’ Dicey enveloped aspects of legal and literary form and substance. It included clarity about the relationship between author and reader. Once the writer’s audience is understood all else follows, and readers of legal literature, in Dicey’s view, as in Blackstone’s, were ‘educated gentlemen’, a group that represented neither ‘practitioners who want to learn the details of their business’ nor men who had not already acquired ‘the elements of a liberal education’.\textsuperscript{163} Legal literature was neither ‘practical’ nor ‘popular’.\textsuperscript{164} Style for Dicey also embraced ‘literary judgment or tact’.\textsuperscript{165} Want of literary tact in legal writing produces the ‘exaggerated desire for completeness’ found in technical books for ‘experts’.\textsuperscript{166} Here Blackstone showed his ‘special genius’, for by his ‘tact’ he succeeded ‘as has no English writer before or since his time, in blending the history with the exposition of law’ avoiding both ‘the dry dogmatism which infects the whole school of systematizers and codifiers’ as well as ‘the antiquarianism’ of authors devoted solely to the historical method.\textsuperscript{167} Literary style, judgment, and tact are, once we look carefully at what Dicey had to say, really the germs of an interpretive theory of law, one that was explicit in its denunciation of logical formulae, dogmatism, formalism and codification. Given his ‘Stephen blood’\textsuperscript{168} (as Holmes put it), it is perhaps not surprising that Dicey would turn to the literary expression of law in this way.

Dicey returned to Blackstone’s \textit{Commentaries} in his final lecture as Vinerian professor, alluding to the close relationship between the symmetry of law—its normative coherence—and its literary expression.\textsuperscript{169} Indeed, Dicey would make the same allusion in relation to his own work. Upon completing the seventh edition of \textit{Law of the Constitution}, he informed his publisher that he would not make any more revisions to the book, observing: ‘I have known many law books much spoilt by constant re-editing’.\textsuperscript{170} Dicey regarded legal literature as having an \textit{aesthetic} quality. Changing \textit{Law of the Constitution} so that it captured the state of the law as time went by ‘threatened to spoil the symmetry of the book itself’.\textsuperscript{171} In the introduction to the eighth edition, he explained that amendment of a law book may take away ‘such literary merits as it may

\begin{itemize}
\item[160] Dicey, ‘Introduction to Jurisprudence’ (n 156) 235.
\item[161] AV Dicey, ‘Blackstone’ (7 and 14 October 1897) 65 Nation 274 (pt I) and 295 (pt II), 274.
\item[162] ibid 295.
\item[163] ibid.
\item[164] ibid.
\item[165] ibid.
\item[166] ibid.
\item[167] ibid.
\item[168] Holmes to Laski (n 36).
\item[169] AV Dicey, ‘Blackstone’s Commentaries’ (1909) 65 Natl Rev 653, reprinted (1932) 4 CLJ 286.
\item[170] Dicey to Macmillan, 9 July 1908, Macmillan Archive (n 55) 55084, 218–19.
\item[171] Dicey to Macmillan, 1 July 1912, Macmillan Archive (n 55) 55085, 25–30.
\end{itemize}
originally have possessed...destroy[ing] the original tone and spirit of any treatise which has the least claim to belong to the literature of England’. 172

Preserving the aesthetic and literary status of *Law of the Constitution* was, in the end, more important to Dicey than ensuring its technical legal accuracy—a reflection not just of the fact that the book was a creative work of legal interpretation addressing general and relatively constant constitutional principles, but also of the fact that the principles expounded gained their normative meaning through the distinctive literary form of their expression. For Dicey, legal literature was highly dependent on individual judgment and creativity; he would have accepted Jennings’ assessment that *Law of the Constitution* was an ‘intensely personal’ book. 173 Dicey closed his career as Vinerian professor by emphasizing just this point. He insisted that ‘the union between law and letters’ was a complex achievement arising from the ‘individuality’ of academic law-writers. 174 A committee of the best lawyers might produce an encyclopaedia of law, but not, in Dicey’s opinion, legal literature. 175 Only someone who had rejected a strictly mechanistic or formalistic approach to legal theory and method in favour of an interpretive conception of legality could have asserted such a thing.

### 7. Conclusion

The orthodox view of Diceyan constitutional theory as analytical, formalist, scientific, descriptive and positivist is inaccurate, not because Dicey rejected these approaches to legal method, but because he consciously integrated them within an overarching legal theory that also embraced comparative, historical and normative approaches. With this conclusion in hand, we are in a better position to assess the significance of Dicey’s writings on the law of the constitution: we are better able to appreciate how Dicey’s analytical objective of making explicit the implicit legal structure of the constitution in a scientific or rational manner was not inconsistent with the rhetorical or literary form through which he developed a narrative about the normative principles of constitutional law. But this re-reading of Dicey’s work in light of his ‘real intellectual life’ leaves some unanswered questions. Dicey may not have been a strict positivist in the Austinian sense, but perhaps he was positivist in other ways. With his concern for analytical structure and his emphasis on judicial legislation, for example, Dicey might be welcomed within one or more of the many positivist camps that have been established since Austin’s day. 176

172 *Dicey* (n 44) xvii.
173 *Jennings* (n 11) 321.
174 *Dicey* (n 169) 302.
175 ibid.
Addressing this point fully is beyond the scope of this essay. However, some tentative observations can be made in response to the idea of re-casting Dicey in a different positivist role. One potential difficulty is that, as John Gardner has observed, legal positivism today is often presented as a ‘philosophical’ thesis that has little to do with the ‘themes’ commonly associated with the ‘broad intellectual tradition’ of legal positivism that evolved historically, and as such it may not be well-suited to the analysis of the ‘history of ideas’. Yet, to avoid anachronism, Dicey’s ideas must be considered against the history of ideas, and so broad intellectual traditions do matter. From this perspective, the analysis of Dicey’s ‘real intellectual life’, or at least his views about legal writing and legal literature, does, in my view, suggest a legal scholar who, on balance, favoured an interpretive approach to law that does not fit easily into the broad intellectual tradition associated with legal positivism. Of course, a full defence of this view would involve a fuller account of what the positivist ‘tradition’ really is. Furthermore, my claim must meet the charge that it is as detached from broad intellectual traditions as the claim that Dicey is a legal positivist. It may be argued, for example, that I have presented not the real Dicey but a new Dicey who happens to have a particularly modern ‘Dworkinian’ look to him. This claim too requires more analysis than can be given here. But, for now, it is possible to suggest the following response, namely, that scholars like Ronald Dworkin provide examples of jurisprudential vocabulary for understanding the broad intellectual tradition associated with the common law that began long before Dicey began writing the law of the constitution, and that Dicey was part of that common law tradition. By approaching Dicey’s place in the history of ideas in this way, we are, I think, well placed to judge the value of his work for our own approach to the challenges of legality and constitutionalism today.

As an old man, Dicey was fond of reminiscing with his friend Bryce about a trip they took to the United States in 1870—what we might now call a coming-of-age roadtrip (though in fact they were already practising barristers in their early 30s). It was a suitably academic roadtrip. It was not just that they made important contacts, including Holmes, and gained important insights from their exposure to another political and legal system; it was that, as Dicey later wrote, their ideas were shaped through ‘conversation’ about what they experienced. ‘[W]e accomplished a good deal of thinking in our 8 weeks’, he observed, something that was ‘jolly to think of’ years later. Indeed, the impact on Dicey’s academic writing seems to have been profound and lasting.

178 Eg R Dworkin, Law’s Empire (Harvard University Press 1986).
181 Dicey to Bryce, 17 May 1912, Bryce Papers (n 20) 3: 113–16.
182 ibid.
‘It is curious to think’, he wrote to Bryce, ‘how much in one way or another our journey in 1870 affected both of our lives & I should say on the whole affected them happily’, for, Dicey continued, ‘[o]ne may pretty well assume that the American Commonwealth [written by Bryce] & probably neither the Law of the Constitution nor certainly Law & Opinion would have been produced but for this journey.’

Dicey’s great constitutional law book was, it seems, at least partly a product of comparative legal observation and the amiable and informal academic discourse that accompanied it. For Dicey, writing the law of the constitution meant engaging in a discourse on general principles—and the lasting lessons of Law of the Constitution are to be found by reading his book accordingly.

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183 Dicey to Bryce, 18 February 1907, Bryce Papers (n 20) 3: 52–3.