
No, Really, Dicey Was Not Diceyan

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I. Introduction

Several authors have pointed to AV Dicey's inconsistent positions on parliamentary supremacy.¹ However, Mark Walters, who calls McLean's account 'particularly extreme', maintains, 'Dicey never relented in his insistence that the *English or British* constitution embodied the two principles, parliamentary sovereignty and the rule of law, as he expounded them in the *first edition* of his book *Law of the Constitution*' (emphasis added).²

The following facts are, we think, not in dispute:

- (1) According to Dicey, 'parliamentary sovereignty' implies that:
 - no parliament may bind its successor;³ hence that
 - sections of statutes which purport to entrench the statute have no legal force;⁴ and hence that: 'Should the Dentists Act, 1878, unfortunately contradict the terms of the Act of Union [Union with Scotland Act 1707], the Act of Union would be *pro tanto* repealed.'⁵ This statement remained in all editions of *Law of the Constitution* published in Dicey's lifetime.
- (2) In 1884, Dicey deplored the House of Lords' obstruction of the Liberal government's franchise Bill: 'Their one plea for rejecting a measure passed by overwhelming majorities in the House of Commons is that the House does not represent the country. But the validity of this plea can be tested only by a General Election Are the English people prepared to introduce into

¹ RFV Heuston, *Essays in Constitutional Law* (London, Stevens, 1961) 1–3; R Weill, 'Dicey was not a Diceyan' (2003) 62 *Cambridge Law Review* 474; I McLean, *What's Wrong with the British Constitution?* 2nd edn (Oxford, Oxford University Press, 2012).

² MD Walters, *A.V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (Cambridge, Cambridge University Press, 2020) 389–90.

³ AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, 1st edn (1885) 51, reprinted in AV Dicey *The Law of the Constitution*, JWF Allison (ed) (Oxford, Oxford University Press, 2013).

⁴ *ibid* 78.

⁵ *ibid*.

the practice of the Constitution one of the most dubious devices of Swiss Democracy – namely the so-called “Referendum”[?].⁶

- (3) The House of Lords rejected the Budget of 1909 on the grounds that ‘this House is not justified in giving its assent to the Bill until it has been submitted to the judgment of the country’.⁷ That judgement took the form of the General Election of January 1910, forced by the Lords’ first rejection of supply since the English Civil War. It returned a Liberal government with Irish Party support.
- (4) Dicey changed his mind about referendums. In several tracts⁸ and in his introduction to the eighth edition of *Law and the Constitution*,⁹ he demanded a referendum, on the grounds that Home Rule for Ireland was an example of fundamental constitutional change that should be subject to a ‘people’s veto’. Indeed, he mused whether Parliament could adopt a Referendum Act protecting important statutes, which might be binding on future parliaments: a rejection of the doctrine of parliamentary supremacy.¹⁰ While still demanding an appeal to the people (as he had in 1884), he now rejected the idea that a general election settled the appeal. Evidently three Liberal General Election victories in a row (1906 and two in 1910) did not represent the judgement of the country. He expressed confidence that the people, if asked, would reject Home Rule in a referendum.
- (5) He recanted his earlier support for women’s suffrage, saying: ‘[but] history exemplifies the futility of giving to any class, whether of men or women, political rights in excess of genuine political power’.¹¹
- (6) Like many English public intellectuals of his day, he was hostile to Irish Catholics and nationalists, and supportive of Irish Protestants and Unionists. But he supported Italian nationalists.¹²
- (7) He almost always referred to the *English* Constitution. However, in his last book, he and his Scottish co-author stated that the drafters of the Scottish Act of Union intended to entrench some clauses, an effort which they called ‘not unmeaning’.¹³ The Scottish Act was endorsed unaltered by the English Parliament, creating the final Act of Union.

Facts such as these have led Weill, McLean and McMillan, and McLean to claim that Dicey was radically inconsistent and that he abandoned support for both

⁶ [AV Dicey], ‘Notes on the Crisis’ *Northampton Mercury*, 5 July 1884, 5A, ascribed to Dicey by AV Dicey and RS Rait, *Memorials of A. V. Dicey* (London, Macmillan, 1925) 122.

⁷ *Hansard*, HL Dec (series 5) vol 4, col 731, 22 November 1909 (Lord Lansdowne).

⁸ See eg AV Dicey, *A Leap in the Dark, or Our New Constitution* (London, J Murray, 1893) 198.

⁹ AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (1915) Introduction, xci–c, reprinted in JWF Allison, *Laws of the Constitution* 415, 474.

¹⁰ Walters, *Dicey and the Common Law Tradition* 383–85.

¹¹ AV Dicey, *Letters to a Friend on Votes for Women* (London, J Murray, 1909) 73.

¹² eg [AV Dicey] Untitled Article, *Northampton Mercury*, 19 May 1860, 2G–H (ascribed to Dicey by AV Dicey and RS Rait, *Memorials of A. V. Dicey* (London, Macmillan, 1925) 50).

¹³ AV Dicey and RS Rait, *Thoughts on the Scottish Union* (London, Macmillan, 1920) 253.

parliamentary sovereignty and the rule of law from 1885 to 1921, while engaged in his campaign against Home Rule.¹⁴ Walters avers that ‘Dicey remained steadfastly Diceyan to the end.’¹⁵ We find Walters’ arguments unconvincing.

II. Dicey and Diceyanism

AV Dicey (1835–1922) was born at Claybrooke Hall, near the border between Leicestershire and Northamptonshire, where his family owned the *Northampton Mercury*. He attended Balliol College, Oxford. After two unsuccessful tries, he became a fellow of Trinity College, Oxford, where he taught law until he forfeited his fellowship by marrying in 1872. He lived in London from 1861, where he practised law and wrote articles and legal treatises. He returned to Oxford in 1882, when he became Vinerian Professor of Law, a position he held for 27 years.¹⁶

Dicey had a disability, from ‘an obstetrical error’, which made him unable to control physical movements or to write legibly.¹⁷ He dictated everything he wrote, including nearly all his correspondence. He was unable to tie his tie before his Oxford examinations; the Master of Balliol tied it for him.¹⁸ He also had difficulty attending to what was happening around him.¹⁹ He seems to have coped with these constraints by adopting a forceful style of exposition. ‘For Dicey, real *writing* was, in effect *speaking*.’²⁰

Diceyanism comprises two central principles and a set of facts about governance. The principles are the sovereignty (or supremacy) of Parliament and the rule of law. Parliament comprises the monarch, the House of Commons, and the House of Lords. Parliamentary sovereignty means that:

Parliament thus defined has, under the *English* constitution, the right to make or unmake any law whatever; and ... no person or body is recognised by the law of *England* as having a right to override or set aside the legislation of Parliament.²¹ (emphasis added)

The rule of law means, first, that no one can be punished except for a breach of law proven in court; second, that everyone is subject to the law and to the courts’ jurisdiction; and third, that general principles of the Constitution come from judicial decisions about the people’s rights in particular cases.²² Alongside these

¹⁴ Weill, ‘Dicey’; I McLean and A McMillan, ‘Professor Dicey’s Contradictions’ (2007) *Public Law* 435; McLean, *What’s Wrong*.

¹⁵ Walters, *Dicey and the Common Law Tradition* 404.

¹⁶ RA Cosgrove, *Rule of Law: Albert Venn Dicey, Victorian Jurist* (Chapel Hill, University of North Carolina Press, 1980).

¹⁷ *ibid* 4; Walters, *Dicey and the Common Law Tradition* 30–31.

¹⁸ Cosgrove, *Rule of Law* 10–11.

¹⁹ Dicey and Rait, *Memorials* 289.

²⁰ Walters, *Dicey and the Common Law Tradition* 31.

²¹ Dicey, *Lectures Introductory* 27.

²² *ibid* 97, 100, 115.

two legal principles sit the facts now known as constitutional conventions, which are not enforced by courts, but also constrain law and politics.²³ However, Dicey did not consistently believe in the sovereignty of parliament. His position on parliamentary supremacy changed twice.

In December 1885 Liberal leader WE Gladstone announced his support for Home Rule in Ireland. The large majority of Irish MPs already supported Home Rule, but neither party in Great Britain previously had. From then until 1921, Home Rule became the defining cleavage in United Kingdom politics. Gladstone's conversion split his party. Those Liberals who could not accept Home Rule became known as Liberal Unionists, and they campaigned with the Conservatives against Home Rule, agreeing on a single Unionist candidate in (almost) every seat from 1892, and formally merging in 1912. The Labour Party emerged as a separate party supporting Home Rule (for Scotland as well as for Ireland). The Irish Party already controlled every seat in Ireland outside the majority-Protestant areas in the north-east. It split more than once in the period, especially in 1890 when most followers of its dictatorial leader CS Parnell rejected him. Contested elections in Catholic Ireland were fought (often bitterly) between supporters and opponents of Parnell, and later of other politicians who split from the main Irish Party. But every MP elected from Catholic Ireland (about 85 of the 105 Irish seats) supported Home Rule. Many seats were uncontested.

Dicey's changing views on referendums tracked successive Liberal Home Rule Bills. In 1890, '[T]here is much more to be said for, no less than against, the popular veto than English thinkers are generally ready to admit.'²⁴ By 1893, following the Unionists' electoral defeat in 1892, this had become, 'a direct appeal to the electors in the nature of a Referendum' might be necessary, following the Lords' certain rejection of the second Home Rule Bill. The Lords should demand that the Bill should receive assent in a referendum before becoming law:

This course, it may be said, is unconstitutional. This word has no terrors for me; it means no more than unusual, and the institution of a Referendum would simply mean the formal acknowledgement of the doctrine which lies at the basis of English democracy – that a law depends at bottom for its enactment on the assent of the nation as represented by the electors.²⁵

The Lords rejected the Bill outright in September 1893 by 419 votes to 41 without inserting a referendum provision.

By 1910, following the Unionists' electoral loss after the Lords had rejected the 1909 Budget, Dicey advocated a Referendum Act, mandating protection for 'statutes of the highest importance'.²⁶ He had come a long way from 1884.

²³ *ibid* 186–88.

²⁴ AV Dicey, 'Ought the Referendum be Introduced into England?' (1890) 57 *The Contemporary Review* 489, 511.

²⁵ Dicey, *A Leap in the Dark* 198.

²⁶ AV Dicey, 'The Referendum and Its Critics' (1910) 212 *The Quarterly Review* 538, 554.

III. Who Would Have Won a Referendum on Home Rule?

The electoral qualification in the United Kingdom, and the number and distribution of seats in the House of Commons, remained unchanged for the whole of the period covered by our analysis, from 1886–1918. Adult male householders had the vote, as did some men who were not householders. The latter found it easier to register if they were rich.²⁷ Therefore, in the poorest part of the United Kingdom, Ireland, the enfranchised proportion of the population was probably lower than in Great Britain. On the other hand, the 1885 redistribution of seats led Ireland to be over-represented, and as Ireland's relative population continued to decline, its overrepresentation increased, from about 20 per cent in 1891 to over 50 per cent in 1911 (see Appendix 2, Table 1).

Even given these distortions of representation, support for Home Rule was far stronger than Dicey made it out to be. Table 2 shows the seat and vote shares for the pro- and anti-Home Rule coalitions in the seven general elections in the period (see Appendix 3, Table 2).

Because of the United Kingdom's single-member district electoral system, the seat shares in Table 2 swing around violently. The Unionists had a majority in the Commons from 1886 to 1892 and from 1895 to 1905. They resigned from government, hopelessly split, in December 1905, and in the ensuing 1906 general election their seat share plummeted from 60 per cent to less than a quarter. This volatility is shown in the standard deviation of the seat shares for the two factions (of nearly 14 per cent). But a referendum would have counted votes, not seats. Therefore, the popular vote, not membership of the House of Commons, best predicts the outcome of a hypothetical referendum on Home Rule.

Table 2 shows that the vote share for the two factions was much more stable than the seat share. The Unionist (anti-Home Rule) vote share was never more than 51.42 per cent (in 1886) and never less than 43.05 per cent (in 1906). Disregarding a tiny number of unclassifiable candidates, the pro-Home Rule coalition's vote share was just the converse. As is to be expected in a polarised polity where Home Rule was the dominant issue, these vote shares were stable, as shown in the low standard deviations in Table 2.

Table 2 shows that the anti-Home Rule coalition won the popular vote just twice, in 1886 and 1900. But most seats in Ireland were uncontested, thus suppressing turnout there. Irish nationalists, and indeed Irish Unionists, cast few election votes. But they would have voted in Dicey's referendum. How do the numbers in Table 2 change if we allow for this? We extrapolated from contested seats (where there were any), and imputed by other means where there were none,

²⁷ N Blewett, *The Peers, the Parties and the People: The General Elections of 1910* (London, Macmillan, 1972) 362.

to get hypothetical vote totals for the pro- and anti-Home Rule coalitions, in both nationalist and unionist Ireland. Details of our imputation method are in Appendix 1. The result is shown in Table 3 (see Table 3, Appendix 4).

The rightmost columns of Table 3 show two things. One is that the standard deviation of vote share is still lower than before the imputation process, confirming that opinions were both polarised and stable. The other is that the pro-Home Rule parties would have received a majority of votes in all seven elections.

There were also uncontested seats in Great Britain (ie the United Kingdom minus Ireland). These often roughly cancelled out, but in 1886 and 1900 Unionist uncontested seats considerably outnumbered Liberal ones because of collapses in Liberal organisation – in 1886 because of the split, and in 1900 because of vast popular enthusiasm for the Boer War, which at the time was going well for Britain. In a later paper we will extend our modelling to allow for this factor. But at a minimum, for the five other parliaments in our series, Home Rule would *prima facie* have won any referendum. Why then were Dicey and other Unionists so confident of the opposite outcome? We suggest several overlapping explanations.

A. Seat-Vote Illusion

Unionists may have failed to look beyond their control of the Commons from 1886–92 and 1895–1905 (and of the Lords and the monarchy for the entire period).²⁸ They were therefore more shocked than they should have been when the electoral majority for Home Rule parties translated into a Commons majority.

B. England, Great Britain, and the United Kingdom

Any referendum would have been held in the same territory that elected the House of Commons – including, for the avoidance of doubt, Ireland. Did Unionists manage to forget that Ireland was part of the United Kingdom when totting up votes, while at the same time insisting that it must forever remain part of the United Kingdom when resisting Home Rule?

In a pamphlet entitled *A Fool's Paradise* Dicey observed that there are 40 million people in Great Britain and 4 million in Ireland, of whom a million are Unionists.²⁹ (These numbers are very roughly right, according to the 1911 census). As an 'old ... Benthamite', Dicey declared that he preferred the welfare of the 40 million to that of the 3 million.³⁰ So: his referendum was not to take place in Ireland, or at

²⁸ McLean, *What's Wrong*.

²⁹ AV Dicey, *A Fool's Paradise: Being a Constitutionalist's Criticism on the Home Rule Bill of 1912* (London, J Murray, 1913) viii–ix.

³⁰ *ibid.*

least if the United Kingdom majority in such a referendum was in favour of Home Rule while the Great Britain majority was against, the latter should prevail.

C. Racism and Othering

Racist and/or religious disparagement of the Catholic Irish population of the United Kingdom was prevalent in this period.³¹ It was a frequent component of Unionist appeals to working-class voters.³² Dicey was a case in point:

There have been ... cases in which every one of *us* would hold that rebels risking their own lives for the freedom of *their country* were performing a high duty If in a moment of disgrace and weakness England should place *Ulster* in subjection to a Parliament in Dublin, it would be easier to adduce than to confute the reasons which in the eyes of many Englishmen and Scotchmen would justify Ulster in resisting a power to whom Ulstermen owed no moral allegiance.³³ (emphasis added)

Us: who were we? Apparently, everyone who supported ‘rebels risking their own lives for the freedom of *their country*’. Were those the Irish nationalists? Certainly not; they were the people of *Ulster* who were resisting Home Rule. But who were the people of Dicey’s *Ulster*? *Ulster* is one of the four historic provinces of Ireland. In terms of seats, *Ulster* had been a dead heat in the most recent elections (1885: 16 U, 17 N; 1886: 17 U, 16 N). ‘*Ulster*’ here does not mean ‘the people of *Ulster*’. It means ‘the Protestant people of *Ulster*’. The passage, typical of Unionist writing of its time, displays clear ‘othering’ of the Catholics/nationalists (the terms had become essentially interchangeable) who comprised the large majority of the population of Ireland, and almost half the population of *Ulster*.

Dicey was far from alone. For instance, in his poem ‘*Ulster*’ (1912) Rudyard Kipling similarly mistook Protestant *Ulster* for *Ulster* and expressed visceral hatred of Catholicism:

We know the war prepared
On every peaceful home,
We know the hells declared
For such as serve not Rome –
The terror, threats, and dread
In market, hearth, and field –
We know, when all is said,
We perish if we yield.³⁴

³¹ M Pugh, *The Tories and the People 1880–1935* (Oxford, Blackwell, 1985) 84–85; RF Foster, *Paddy and Mr Punch: Connections in Irish and English History* (Harmondsworth, Penguin, 1993).

³² RT McKenzie and A Silver, *Angels in Marble: Working-Class Conservatives in Urban England* (London, Heinemann, 1968) 54–61.

³³ AV Dicey, *The Verdict: A Tract on the Political Significance of the Report of the Parnell Commission* (London, Cassell, 1890) 119.

³⁴ R Kipling, *Poems, 1886–1929*, vol 3 (London, Macmillan, 1929) 22, 23.

However, Dicey had supported Giuseppe Garibaldi's campaign for Italian unification: 'The contest will doubtless aid in establishing the personal freedom of every Italian, but it is not primarily a struggle to obtain political liberty so much as to gain national independence.'³⁵ What is the difference?

D. Belief that Voters for Pro-Home Rule Parties Did Not Support Home Rule

Party manifestoes are multidimensional. It is perfectly possible that people in Great Britain who voted for pro-Home Rule parties did not support their party's policy on Home Rule but supported it for other reasons. For Dicey and other fervent Unionists, this was an article of faith. There is no opinion polling in this period. Evidence from election results does not show any notable effect. The Unionists had been insisting since 1885 that 'Home Rule is Rome Rule.' No one could be in any doubt about their position, or that of the Irish Party. The Liberal and Labour parties were less forthright, but such evidence as we have suggests that Home Rule was not a salient issue for many of their voters. In 1913, the Prime Minister, Herbert Asquith (admittedly an interested party) responded to the King, who had been pressing Dicey's and others' Unionist arguments, arguing that opposition to Home Rule was weak:

All the most trustworthy observers agree that, even when the bye-elections have gone against the Government, the attempt (wherever made) to arouse interest and resentment by pushing to the forefront the case against Home Rule and the supposed wrongs of Ulster, has met with no success.³⁶

Passionate opposition to Home Rule was already baked into Unionist vote totals. By, at latest, 1910, it was obvious that voting Liberal, Irish Party, or Labour was voting for Home Rule. As more than half of the vote went to the Home Rule parties three times in a row, there is no evidence for the fervent Unionist belief that the people did not support Home Rule.

IV. From a Contradiction Anything Follows

In 1885 Dicey argued for what HLA Hart labels 'continuing omnipotence':³⁷ the Dentists Act 1878 could impliedly repeal the Treaty and Acts of Union between Scotland and England.³⁸ We label this position 'Dicey 1'. In his polemics against

³⁵ [Dicey], Untitled Article.

³⁶ HH Asquith to George V, [19] September 1913, quoted in McLean, *What's Wrong* 277.

³⁷ HLA Hart, *The Concept of Law*, 3rd edn (Oxford, Oxford University Press, 2012) 149.

³⁸ Dicey, *Lectures Introductory* 78.

Home Rule, Dicey abandoned parliamentary sovereignty for any straw in the wind, including a referendum that he thought the Unionists would win. We label this 'Dicey 2'. Finally in 1920 he and his Scottish co-author adopted something akin to Hart's 'self-embracing omnipotence': viz, that Parliament could, at least once, bind itself by 'exercising an even larger sphere of legislative competence than [continuing omnipotence] allows to it'.³⁹ We label this 'Dicey 3'. Dicey 3 contradicts Dicey 1, and Dicey 2 contradicts both.

Introducing his Home Rule Bill in 1886, Gladstone argued that *Law of the Constitution* showed 'the absolute supremacy of Parliament' in its most 'distinct and emphatic manner' and Parliament's illimitable power to pass Home Rule for Ireland.⁴⁰ That Bill failed in the Commons and never reached the Lords. The Second (1893) and Third (1912) Home Rule Bills were carried in the Commons but defeated in the Lords. Under the provisions of the Parliament Act 1911, the 1912 Bill became the Government of Ireland Act 1914 without Lords' consent after passing three times in the Commons. Dicey argued that the increased strength of party discipline devalued parliamentary sovereignty. Party discipline had, according to Dicey, permitted the alliance of a true party (ie the Liberals) with a mere 'faction' (Irish Nationalists) to make passage of Irish Home Rule possible.⁴¹ However, he did not define party or faction. The iron discipline of Parnell over his party was already obvious when *Law of the Constitution* was first published in 1885, and Dicey's appeal to a golden age was to Palmerston's governments of 1855 and 1859.⁴²

Dicey 2 wrote that there might be 'acts of oppression on the part of a democracy, no less than of a king, which justify resistance to the law, or, in other words, rebellion',⁴³ and that the 1912 Bill lacked 'constitutional authority' because it had not been confirmed in a general election. However, the governing Liberals had won three successive general elections. Dicey's claim that the government lacked constitutional authority for the Government of Ireland Act 1914 makes no Diceyan 1 sense. He argued in 1910, 'The People's Budget [of 1909] has been rejected by the people' because 'every [MP] from Ireland, whether a Unionist or a Nationalist, detested the Budget'.⁴⁴ But the people elected a government that enacted the People's Budget in April 1910. He claimed in 1911 that the 'hereditary House of Lords, and not the newly elected House of Commons, truly represented the will of the nation'⁴⁵ when it rejected Irish Home Rule in 1893. By then Dicey was demanding a referendum or a dissolution to prove that the will of the nation

³⁹ Hart, *Concept of Law* 149; cf Dicey and Rait, *Thoughts* 252–54.

⁴⁰ Hansard, HC Deb (series 3) vol 304, col 1048, 8 April 1886.

⁴¹ AV Dicey, 'The Parliament Act 1911 and the Destruction of All Constitutional Safeguards' in WR Anson (ed), *Rights of Citizenship: A Survey of Safeguards for the People* (London, Warne, 1912) 102.

⁴² *ibid* 101.

⁴³ Dicey, *A Fool's Paradise* 114.

⁴⁴ Dicey, *The Referendum and its Critics* 548.

⁴⁵ Dicey, *A Leap in the Dark*, 2nd edn (London, J Murray, 1911) xvii.

was what he said it was, and hoped that King George V would veto the Home Rule Bill. He claimed the Third Home Rule Bill was illegitimate:

A combination of discordant parties is attempting to drive through Parliament, without an appeal to the electors, a policy which has been twice deliberately rejected by the electorate of the United Kingdom Every loyal citizen of the United Kingdom ought in general, and as a paramount duty, to obey the law of the land, or, *in other words, the clearly and indubitably expressed will of the nation. But ... such obedience can be due only when a law is the clear and undoubted expression of the will of the nation.*⁴⁶ (emphasis added)

When Dicey said that Home Rule had been ‘twice deliberately rejected by the electorate of the United Kingdom’, he seemed to refer to the general elections of 1886 and 1895.⁴⁷ But only 1886 was fought on Home Rule. In 1895 the overt issues of the election were elsewhere, including the government’s alleged failure to equip the Army. The overwhelming issue in 1900 was the Boer War. Even then, the Unionists won a bare majority of votes cast (Table 2). But if every seat had been contested, the Home Rule coalition would probably have won a majority of votes in 1895.

Dicey celebrated ‘the old Whig doctrine that oppression, and especially resistance to the will of the nation, might justify what was technically conspiracy or rebellion.’⁴⁸ This echoed his party leader, Bonar Law, who said, ‘I can imagine no length of resistance to which Ulster can go in which I should not be prepared to support them.’⁴⁹ In 1914 Dicey wrote,

Unionists must applaud every word of one of the noblest utterances of Sir Edward Carson: ‘... The first time the Government tries by means of the Army to enforce the Bill, that moment will the manhood of England rise and declare “You shall not do this terrible thing”’.⁵⁰

All of these positions contravene parliamentary supremacy, but also the rule of law.

English and other common law public lawyers are still strangely protective of Dicey. They often do not regard his polemics as ‘really’ part of Dicey’s writings. But he wrote them; he called his opponents delusional in the title of one of them and fools in another.⁵¹ Why is it inappropriate to read them together, and thence to argue that his oeuvre is contradictory? The most recent attempt to defend

⁴⁶ Dicey, *A Fool’s Paradise* 112–14.

⁴⁷ *ibid* 112; see also Dicey, *The Parliament Act 1911* 86.

⁴⁸ Dicey, *A Fool’s Paradise* 125.

⁴⁹ A Bonar Law, speech delivered 27 July 1912, reprinted in R Blake, *The Unknown Prime Minister: The Life and Times of Andrew Bonar Law, 1858–1923* (London, Eyre & Spottiswoode, 1955) 130. See also ‘Mr. Law on Ulster’s Resistance’ *The Times*, 29 July 1912, 7F.

⁵⁰ AV Dicey, ‘The Enigma Still Unsolved? (II) Facts and Thoughts for Unionists’ (1914) 75 *The Nineteenth Century* 717, 718.

⁵¹ AV Dicey, *Letters on Unionist Delusions* (London, Macmillan, 1887); Dicey, *A Fool’s Paradise*.

Dicey does review several of the polemics (not all of them),⁵² but has considerable difficulty with his racism, misogyny, and abandonment of sovereignty.

V. Scotland, Nationalism and Constitutional Statutes

Dicey's attitude towards Scotland was initially dismissive. In 1882, in an article entitled 'Why do people hate Mr Gladstone?' Dicey offered four explanations, one being that 'Mr Gladstone is by descent a Scotchman', and that 'educated Englishmen' were both put off by the 'vehemence, the warmth, the hortatory morality of the pulpit' but also found them 'dull'.⁵³ Nearly all references to Scotland in *Law of the Constitution* are examples of continuing parliamentary supremacy, denying any Scottish institutional autonomy. In addition to implied repeal and the Dentists Act, Dicey argued that efforts to entrench the Treaty and Acts of Union 1706–7 failed because Parliament abolished the requirement that professors at Scottish universities subscribe to the Westminster Confession of Faith.⁵⁴ The theory behind Dicey 1 incorporates a single, central source of political power, to the exclusion of any real delegation of governmental authority. Scottish national identity presented a threat to that position. It still does, as does the status of Northern Ireland under the Good Friday (Belfast) Agreement of 1998.

In 1886 Dicey claimed, in anti-Catholic mode, that 'from the commencement of their ill-starred connection' Ireland and England had 'been countries standing on different levels or at different stages of civilization' and that the 'passion of Irish peasants for the possession of land' was somehow evidence for this,⁵⁵ whereas the passion of dukes for the possession of land was apparently not. He deplored the:

monstrosity of imposing Anglican Protestantism upon a people who had not reached the stage of development which is essential for even the understanding of Protestant dogma, and who if left to themselves would have adhered to Catholicism.⁵⁶

Dicey had supported Italian unification, but he rejected Irish Home Rule on the basis that the Irish had not yet reached a level of development suited to a self-governing people. His approach to Scottish (but not Irish) nationalism became more sympathetic in old age. Scotland was a Protestant-majority country. Dicey started visiting Scotland every year, and befriended Robert Rait, the Historiographer Royal for Scotland.⁵⁷ In 1920 they published *Thoughts on the*

⁵² Walters, *Dicey and the Common Law Tradition* 378–404.

⁵³ AV Dicey, 'Why Do People Hate Mr Gladstone?' (1883) XXXV *The Nation* 218.

⁵⁴ Dicey, *Lectures Introductory* 40.

⁵⁵ AV Dicey, *England's Case against Home Rule* (London, J Murray, 1886) 79–80.

⁵⁶ *ibid* 89.

⁵⁷ Dicey and Rait, *Memorials* 197; Cosgrove, *Rule of Law* 289.

Union between England & Scotland. There they emphasised the importance of the statutory protection of the Church of Scotland in the union of 1707. They described that settlement as ‘a real treaty or contract between England and Scotland, [having] the leading characteristic of a contract between individual persons’.⁵⁸ The special virtue of such a contract was that it provided benefits to both parties. This is a historically accurate view of the negotiations of 1706–7. They admitted that ‘The extension to Scotland of the supreme authority of Parliament is not recorded by a single word in the Act of Union. It may well be doubted whether, either in England or in Scotland, it was clearly realised or perceived’.⁵⁹ On Dicey’s contractual theory of the union, parliamentary supremacy could hardly be binding on Scotland.

Although Dicey and Rait continued to refer incorrectly to a single ‘Act of Union’, they contradicted Dicey’s earlier dismissal of the second, English, Act of Union as an ordinary statute. The Scots Parliament, moving first, put entrenchment of safeguards for the Church of Scotland into its Act, and made it a condition of Union that the English Parliament should carry over the Scottish entrenchment, while being free to add an entrenchment of its own church. The [English] Union with Scotland Act 1706, recited and incorporated at Article 25 the following from the prior Act of the Scottish Parliament:

[T]he ... true Protestant religion and the worship, discipline and government of this church [shall] continue without any alteration to the people of this land in all succeeding generations.⁶⁰

Dicey and Rait called the Patronage Act 1711, which undermined the 1707 settlement, ‘the chief and almost the only example’ of a law ‘passed in violation of the Act of Union’,⁶¹ which was ‘the work of Tories meditating the restoration of the [Catholic] Stewarts’.⁶² They explained:

Englishmen ... have ... an intellectual difficulty derived really from their being accustomed to the sovereignty of Parliament, in admitting the possibility of any division of sovereignty between Church and State.⁶³

Well, one Englishman did, apparently, until enlightened by his Scottish co-author.

Later judicial remarks also challenged Dicey 1. In 1953, Lord-President Cooper (the senior judge in the highest domestic Scottish court), citing Dicey and Rait, said:

The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law [T]he Treaty and

⁵⁸ Dicey and Rait, *Thoughts* 182.

⁵⁹ *ibid* 242–43.

⁶⁰ Union with Scotland Act 1706 (6 Ann c 11).

⁶¹ Dicey and Rait, *Thoughts* 280.

⁶² *ibid* 283.

⁶³ *ibid* 244.

the associated legislation, by which the Parliament of Great Britain was brought into being as the successor of the separate Parliaments of Scotland and England, contains some clauses ... which emphatically exclude subsequent alteration I have never been able to understand how it is possible to reconcile with canons of construction the adoption by the English constitutional theorists of the same attitude to these markedly different types of provisions.⁶⁴

In *Thoburn v Sunderland City Council*,⁶⁵ the lawyers for Thoburn, who had displayed weights in pounds and ounces on his market stall, argued, consistently with Dicey 1, that the Weights and Measures Act 1985 (which permitted imperial measurements) *pro tanto* implicitly repealed the European Communities Act 1972. Lord Justice Laws ruled against them (and Dicey 1) by distinguishing between ‘ordinary’ and ‘constitutional’ statutes, just as Dicey 3 did. He included in the latter class, which he said were immune from implied repeal by later, non-constitutional statutes, nearly all those that Dicey 3 wanted to protect with a referendum requirement: the Act of Settlement, the Acts of Union with Scotland, and the various Reform Acts, but not the Union with Ireland Act 1800.⁶⁶

The tension between Dicey 1 and Dicey 3 has been evident in judgments about the United Kingdom’s departure from the European Union. Dicey 1’s parliamentary sovereignty appears in the judgment of the Supreme Court in the first *Miller* case, that the process giving rise to the United Kingdom’s withdrawal could not be initiated by ministerial fiat.⁶⁷ Instead, parliamentary authority was necessary to give notice under Article 50 of the Treaty on European Union, that the United Kingdom was leaving the EU. Getting there, however, required consideration of ‘seminal events’, including the enactment of constitutional statutes that gave the government its current structure, including the Acts of Union of 1706 and 1707.⁶⁸ At the same time, the court rejected the argument of devolved administrations that their consent to withdrawal was required, including a claim that section 28(8) of the Scotland Act 1998 required legislative consent to trigger Article 50.⁶⁹ The court did so while still allowing, in an echo of Dicey 3, that ‘the purpose of the legislative recognition’ of the convention in the Scotland Act 2016, was ‘to entrench it as a convention.’⁷⁰

⁶⁴ *MacCormick v Lord Advocate* [1953] SC 396 at 411.

⁶⁵ *Thoburn v Sunderland City Council* [2003] QB 151.

⁶⁶ *ibid* 186; cf Dicey, *The Referendum and Its Critics* 554.

⁶⁷ *Miller v Secretary of State for Exiting the European Union (Miller 1)* [2017] UKSC 5, [2018] AC 61, [121].

⁶⁸ *Miller 1* at [41].

⁶⁹ *Miller 1* at [148]–[150].

⁷⁰ *Miller 1* at [149]; see also M Elliott, ‘The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle’ (2017) 76 *Cambridge Law Journal* 257; JEK Murkens, ‘Mixed Messages in Bottles: The European Union, Devolution, and the Future of the Constitution’ (2017) 80 *Modern Law Review* 685.

VI. Conclusion

Conor Gearty has argued that Lord Reed, a Scottish judge who serves as the current President of the United Kingdom Supreme Court, has:

a very un-Scottish veneration of parliamentary sovereignty Many judges over the years have realised that parliamentary sovereignty is an empty shell, that Parliament is a creature of the executive, and never has this been truer than after the Brexit landslide election of December 2019.⁷¹

He fears that the Supreme Court under its current President may retreat into formalism, factual particularism, and history. Dicey 1 absolutism seems currently in the ascendant in both the United Kingdom courts and the United Kingdom government, where it has been labelled as 'muscular unionism'.⁷²

Dicey refused to see any analogy between the preservation of Scottish identity in 1706/7 and the demand for Irish Home Rule. Dicey 1 assumed a unitary United Kingdom, which he called 'England'. Dicey 2 attempted to prioritise the 'will of the nation,' as expressed in the hereditary House of Lords or even by his circle of friends there, and demonstrated the poverty of absolutism to solve real-world problems, which involve politics. But by the 1920s Dicey 3 and his co-author bemoaned the absence of English legal imagination and its inability to conceive of constitutional protections that might be stronger than any particular parliament.

Ivor Jennings dismissed Dicey's *Introduction to the Law of the Constitution* as 'a book of profound historical significance which need no longer be read'.⁷³ He is still being read, and so he should be read, warts and all. This is currently important because some politicians and lawyers take a strongly Diceyan (Dicey 1) line on Dicey's favourite subject – the Union of the United Kingdom. In the Northern Ireland case *Allister v Secretary of State for Northern Ireland*, the Unionist appellants made a Dicey 3 argument that the Acts of Union 1800 were constitutional statutes not subject to implied repeal.⁷⁴ The Supreme Court, however, held,

The debate as to whether Article VI created fundamental rights ... whether the Acts of Union are statutes of constitutional character ... is academic. ... The most fundamental rule of UK constitutional law is that ... the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme.⁷⁵

⁷¹ C Gearty, 'In the Shallow End' *London Review of Books*, 27 January 2022, <https://www.lrb.co.uk/the-paper/v44/n02/conor-gearty/in-the-shallow-end>.

⁷² A Henderson and R Wyn Jones, *The Ambivalent Union: Findings from the State of the Union Survey* (London, Institute for Public Policy Research, 2023) 30, <https://www.ippr.org/articles/the-ambivalent-union-findings-from-the-state-of-the-union-survey>.

⁷³ I Jennings, 'Review of Dicey, *Introduction to the Law of the Constitution* (9th ed)' (1940) 3 *Modern Law Review* 321, 322.

⁷⁴ *Re Allister's Application for Judicial Review* [2023] UKSC 5, [2023] 2 WLR 457, [58].

⁷⁵ *ibid* [66].

To the appellants' 'Dicey 3', the court retorted 'Dicey 1'. Exactly like Dicey in 1914, the *Allister* appellants wished to retain the historic constitutional status of Northern Ireland. Dicey 3 can help them; Dicey 1 cannot.

In Scotland, the current Conservative United Kingdom government supports Dicey 1, and Scottish legal nationalists support Dicey 3. Legal nationalism is not the same as political nationalism. The pre-eminent Scottish legal nationalists were professor Neil MacCormick (1941–2009), son of the petitioner in *MacCormick v Lord Advocate*, and the Scots judge Lord Rodger of Earlsferry (1944–2011). The Scots negotiators of the Treaty of Union, as Dicey and Rait as well as Lord Cooper acknowledged, meant their protections of the Scottish church and Scots law to be perpetual. This is recognised in the text of the Accession Oath that King Charles III has recently sworn.⁷⁶ Furthermore, the church disruption controversies of the 1830s and 1840s, and some unhelpful legal judgments in the 1900s⁷⁷ were put to rest by the Church of Scotland Act 1921.⁷⁸ This Act flies in the face of Dicey 1. It enacts that the doctrine of the Church of Scotland is as determined by its General Assembly and may not be altered by Parliament (except by explicit repeal). Scottish legal nationalists therefore welcome *Thoburn's* distinction between constitutional and other statutes and the suggestion that a constitutional statute may only be modified explicitly and by a later constitutional statute.

However, Dicey 1 hovers over the current constitutional settlement in Scotland. The Scotland Act 1998 states in section 28(7) that the creation of the Scottish Parliament 'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'.⁷⁹ In 2016 a more Dicey 3-ish subsection (8) was added: 'But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'. But that section has been drawn into question by withdrawal from the European Union and the enactment of the United Kingdom Internal Market Act 2020 without the consent of the Scottish Parliament. As noted above, *Miller 1* rejected the Scottish government's claim that it should have been consulted, holding that the word 'normally' is to be interpreted by politicians, not courts.

Dicey 1's absolutism aspired to solve constitutional problems of the mid-1880s. However, he became involved in politics, endorsing Garibaldi's unification of Italy, supporting, then opposing, votes for women, as well as with his bugbear, Irish Home Rule. That forced him into political realism. Reconciling all the Diceys we have discussed here provides an interesting problem for intellectual

⁷⁶ 'His Majesty The King's Oath Relating to the Security of the Church of Scotland' (Royal Website, 10 September 2022), <https://www.royal.uk/his-majesty-kings-oath-relating-security-church-scotland>.

⁷⁷ *General Assembly of Free Church of Scotland v Overtoun* [1904] AC 515 (HL).

⁷⁸ A Rodger, *The Courts, the Church and the Constitution: Aspects of the Disruption of 1843* (Edinburgh, Edinburgh University Press, 2008).

⁷⁹ Scotland Act 1998, s 28(7).

historians. However, ‘Dicey’ as a unitary actor offers little to those concerned with the pressing problems of the twenty-first century, nor does it to constitutional lawyers. He need no longer be read.

Appendix 1: Irish Election Results 1885–1910 and Imputation for Missing Values

The pattern of contests is that minority politicians often stood once or twice, got derisory vote shares, and did not contest later elections. In nationalist Ireland, numerous seats were also contested in 1892 between pro- and anti-Parnell nationalists, even though Parnell had died in 1891. Their joint vote total gives what may be a lower bound on the imputed nationalist vote in other, uncontested, elections. (A lower bound because it is reasonable to suppose that some nationalist voters sat out the internecine feud.)

We therefore estimate what the vote shares would have been if all seats in Ireland had been contested. Almost the only contests were intra-communal, among varieties of unionist in Unionist seats, and varieties of nationalist in Nationalist seats. After 1886, inter-communal contests occurred only in the few seats where Unionists (\approx Protestants) and Nationalists (\approx Catholics) voted in comparable numbers. In just three seats (Dublin St Stephen’s Green, Tyrone N, and Tyrone S) no imputation is required as every election was contested by at least one Unionist and one Nationalist.

Candidates labelled ‘Liberal’ in the data source are deemed to be Unionist in 1885–86 and Nationalist thereafter.⁸⁰ The justification for this is that the formal split of the Liberal Party took place in 1887, after which Liberal Unionists are labelled LU in the data source. As some Liberal candidates in 1885 and 1886 were probably Gladstonians, this slightly depresses the N imputation and increases the U imputation.

Our complete spreadsheet is available on request.

A. The Imputation Method

- (1) Seat with no contests at all (Donegal West). U vote share imputed at 2.5 per cent in line with U share in comparable seats in 1885. Turnout imputed at 75 per cent in line with comparable seats.

⁸⁰ FWS Craig, *British Electoral Facts 1832–1987* (Dartmouth, Parliamentary Research Services, 1989); BM Walker, *Parliamentary Election Results in Ireland, 1801–1922* (Dublin, Royal Irish Academy, 1978).

- (2) Unionist seats with only intra-communal contests (Antrim Mid, Antrim East, Belfast East). U vote extrapolated from contested intra-U elections. N vote imputed at 2.5 per cent of U vote.
- (3) Nationalist seats with only intra-communal contests (Cork N, Cork NE, Galway Connemara, Galway N, Galway S, Kerry N, Kildare S, Kilkenny City, Limerick W, Limerick E, Louth N, Louth S, Mayo N, Mayo E, Meath N, Meath S). N vote extrapolated from contested intra-N elections. U vote imputed at 2.5 per cent of N vote.
- (4) Unionist seats where Nationalist candidates contested three or fewer elections (Antrim N, Antrim S, Armagh N, Armagh Mid, Belfast S, Down N, Down E, Down W). N and U votes extrapolated from mean in contested elections.
- (5) Nationalist seats where Unionist candidates contested three or fewer elections (Carlow, Cavan W, Cavan E, Clare W, Clare E, Cork City, Cork Mid, Cork E, Cork W, Cork S, Cork SE, Donegal N, Dublin College Green, Dublin Harbour, Dublin St Patrick's, Dublin Co. N, Kerry W, Kerry S, Kerry E, Kildare N, Kilkenny N, Kilkenny S, King's County (Birr), King's County (Tullamore), Leitrim N, Leitrim S, Limerick City, Longford N, Longford S, Mayo W, Mayo S, Queen's County (Ossory), Queen's County (Leix), Roscommon N, Roscommon S, Sligo N, Sligo S, Tipperary N, Tipperary Mid, Tipperary S, Tipperary E, Waterford City, Waterford W, Waterford E, Westmeath N, Westmeath S, Wexford N, Wexford S, Wicklow W). N and U votes extrapolated from mean in contested elections.
- (6) Competitive seats (all other seats). Missing U and N votes in uncontested elections supplied by interpolation.

B. Results

Uncontested seats lead to an undercount of both Unionist and Nationalist support in Ireland. But because Ireland was predominantly Nationalist, the undercount of Nationalist support is greater in every election except that of 1892, when most Nationalist seats were contested because of the Parnell split (even though Parnell was dead). The full matrix of imputations is available for those who wish to check our maths and assumptions. We estimate that the underlying Nationalist vote in Ireland was between 300,000 and 400,000, and the underlying Unionist vote was between 80,000 and 100,000. Splits between Nationalist factions tended to depress the Nationalist vote.

What happens when we plug these 'missing' votes back into the actual election results is shown in Table 3, viz, that if every seat in Ireland had been contested, the Home Rule coalition would have won all seven elections in the series.

Appendix 2

Table 1 Nominal Vote Shares and Seat Shares, General Elections 1886–1910

Election	Con (and LU)		Lib		Lab		Irish nationalist		Other		Pro Home Rule		Anti Home Rule			
	Vote share	Seat share	Vote share	Seat share	Vote share	Seat share	Vote share	Seat share	Vote share	Seat share	Vote share	Seat share	Vote share	Seat share		
1886	51.42	58.66	45.18	28.66			3.41	12.69			48.59	41.35	51.42	58.66		
1892	46.99	46.72	46.72	40.75	0.51	0.45	6.75	12.09	0.38	0.00	53.98	53.29	46.99	46.72		
1895	49.25	61.34	45.58	26.42	0.96	0.00	3.93	12.24	0.28	0.00	50.47	38.66	49.25	61.34		
1900	50.22	60	45.07	27.31	1.29	0.3	1.77	11.34	1.66	1.04	48.13	39.99	50.22	60.00		
1906	43.05	23.43	48.98	59.70	5.86	4.48	0.62	12.39			55.46	76.57	43.05	23.43		
1910J	46.75	40.75	43.03	41.04	7.58	5.97	1.90	12.24			52.51	59.25	46.75	40.75		
1910D	46.26	40.60	43.82	40.60	7.10	6.27	2.52	12.54			53.44	59.41	46.26	40.60		
	Mean												51.80	52.65	47.71	47.36
	Standard Deviation												2.80	13.82	2.82	13.82

Source: FWS Craig, British Electoral Facts 1832–1987 (Dartmouth, Parliamentary Research Services, 1989).

Appendix 3

Table 2 Vote Shares for Elections, 1886–1910

Election	Unionist	Liberal	Labour	Irish	Other	Unionist	Home Rule
1886	51.42	45.18		3.41		51.42	48.59
1892	46.99	46.72	0.51	6.75	0.38	46.99	53.98
1895	49.25	45.58	0.96	3.93	0.28	49.25	50.47
1900	50.22	45.07	1.29	1.77	1.66	50.22	48.13
1906	43.05	48.98	5.86	0.62		43.05	55.46
1910J	46.75	43.03	7.58	1.90		46.75	52.51
1910D	46.26	43.82	7.10	2.52		46.26	53.44

Appendix 4

Table 3 Imputed Vote Shares and Seat Shares, General Elections 1886–1910

Election	Con (and LU)			Lib			Lab			Irish nationalist			Other			Pro Home Rule			Anti Home Rule						
	Votes	Vote share	Seat share	Votes	Vote share	Seat share	Votes	Vote share	Seat share	Votes	Vote share	Seat share	Votes	Vote share	Seat share	Votes	Vote share	Seat share	Votes	Vote share	Seat share				
1886	1462863	47.37	58.66	1245930	40.35	28.66	0			379165	12.28	12.69	0			52.63	41.35	47.37	58.66						
1892	2103145	47.40	46.72	1962170	44.22	40.75	27036	0.61	0.45	344472	7.76	12.09	137	0.00	0.00	52.60	53.29	47.40	46.72						
1895	1855055	47.92	61.34	1632138	42.16	26.42	40511	1.05	0.00	343188	8.87	12.24	52	0.00	0.00	52.08	38.66	47.92	61.34						
1900	1748822	48.61	60.00	1475923	41.03	27.31	45440	1.26	0.3	322345	8.96	11.34	4800	0.13	0.00	51.39	38.95	48.61	60.00						
1906	2393991	42.58	23.43	2567225	45.66	59.70	311252	5.54	4.48	336706	5.99	12.39	12780	0.23	0.00	57.32	76.57	42.58	23.43						
1910J	3009349	46.15	40.75	2717748	41.68	41.04	459185	7.04	5.97	321944	4.94	12.24	12309	0.19	0.00	53.79	59.25	46.15	40.75						
1910D	2357610	45.66	40.60	2159202	41.82	40.60	315696	6.11	6.27	330212	6.39	12.54	970	0.02	0.00	54.46	59.41	45.66	40.60						
Mean																									
Standard Deviation																									
															51.80	52.65	47.71	47.36							
															2.80	13.82	2.82	13.82							

Sources: FWS Craig, *British Electoral Facts 1832–1987* (Dartmouth, Parliamentary Research Services, 1989); BM Walker, *Parliamentary Election Results in Ireland, 1801–1922* (Dublin, Royal Irish Academy, 1978).