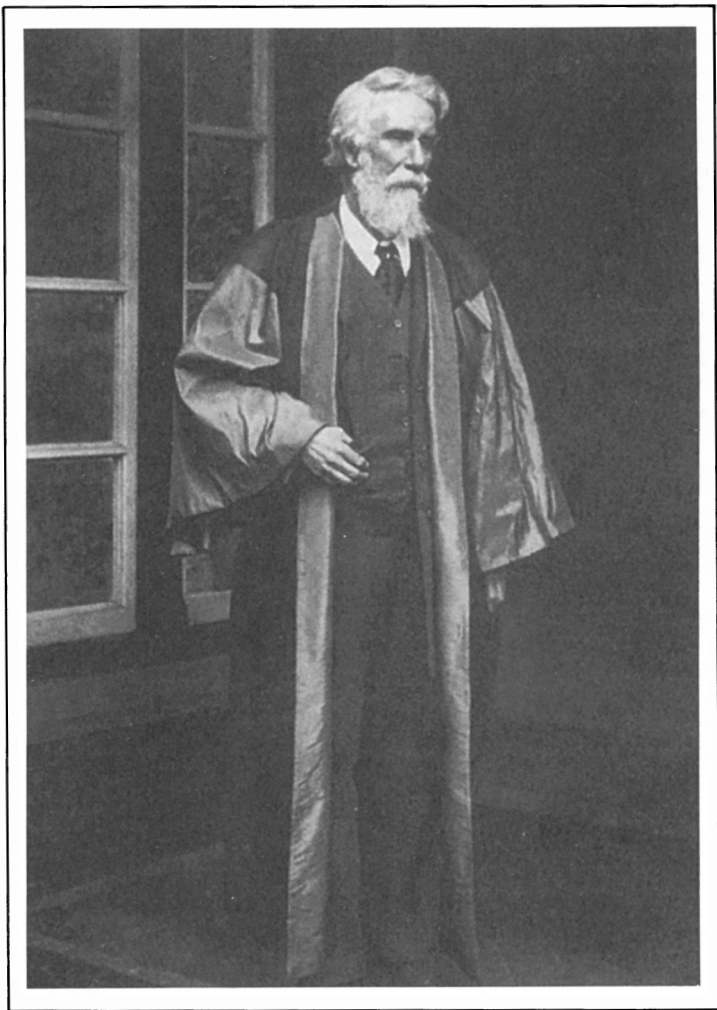
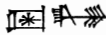

*INTRODUCTION
TO THE STUDY OF THE
LAW OF THE CONSTITUTION*



A. V. DICEY

INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION

A. V. Dicey



Liberty Fund
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The cuneiform inscription that serves as our logo and as the design motif for our endpapers is the earliest-known written appearance of the word "freedom" (*amagi*), or "liberty." It is taken from a clay document written about 2300 B.C. in the Sumerian city-state of Lagash.

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PUBLISHER'S NOTE

AV. Dicey's *Introduction to the Study of the Law of the Constitution* was first published in 1885 in London by Macmillan and Co. New editions were issued by the same publisher in 1886, 1889, 1893, 1897, 1902, and 1908. In each of these editions, Dicey attempted to reflect such constitutional changes as he believed had occurred since the previous edition.

When he prepared an eighth edition in 1914 (the eighth edition was published in 1915, but Dicey dated his preface in 1914, Dicey left the text as it had been in the seventh edition of 1908 but added a long introduction in which he discussed both actual changes in the British Constitution and various changes that were then under discussion.

In 1939, a ninth edition was prepared under the editorship of E. C. S. Wade. In this edition, a long introduction by Wade was substituted for Dicey's introduction to the eighth edition, and Dicey's appendix was omitted in favor of one by Wade. This edition was reprinted several times.

This Liberty Fund edition is based on the eighth edition, published in 1915, since this was the last edition that Dicey himself prepared.

FOREWORD

Very few jurists ever put forward doctrines of constitutional law which become not merely classic but which remain alive as standards. A year after the publication of Albert Venn Dicey's *Law of the Constitution* in 1885, Gladstone already was reading it aloud in Parliament, citing it as an authority. Half a century later these doctrines were still regarded so essential and fundamental that a special inquiry was necessary to determine whether more recent constitutional changes did not infringe on them. The Donoughmore Committee, whose *Report of the Committee on Ministers' Powers* appeared in 1932, endorsed those principles as a guide to further practice. Now, nearly a century later, Britain in large measure is still on the Dicey standard and so, too, is the United States. The doctrines, and even the names by which they are designated, remain part of the equipment of the student of public law. Dicey's analysis of legislative power and constitutional conventions must still be considered by anyone who desires to deal with the foundations of Anglo-American constitutional law simply because Dicey analyzed those foundations and enunciated principles, with a power and clarity never before or since attained that make those foundations intelligible.

I

Albert Venn Dicey was born 4 February 1835 at Claybrook Hall in Leicestershire, England, and he died in London 7 April 1922. He was

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the third son of Thomas Edward Dicey, a leading journalist of his time, by his wife Anne Mary, younger daughter of James Stephen, master in chancery. The Venn family name was given to him in honor of John Venn, the leader of the Clapham Evangelicals, whose daughter Jane married Sir James Stephen, Mrs. Dicey's brother and the elder Dicey's closest friend. The well-known Victorian scholars and publicists Sir Leslie Stephen and Sir James FitzJames Stephen were Albert Dicey's cousins. The Venns were linked by marriage to the Wedgwoods and the Darwins. Through the marriage of his parents Albert Dicey was born into what Lord Annan has called the Victorian intellectual aristocracy.

Even though Albert Dicey's parents had wed in 1814, just before the final defeat of Napoleon at Waterloo, there were no children born of the marriage until 1831. His parents, for reasons never publicly disclosed by them or their children, took the step, somewhat unusual for a middle class family, of educating their children at home; but Dicey in an "Autobiographical Fragment" surmised

that among Whigs and especially among Whigs who, as was the case with my parents, combined a firm belief in the political principles of the Whig party with an equally firm belief in the best and most tolerant Evangelicism in matters of religion, there had grown up a suspicion that the public school system of England was marked by some very strong defects which the salutary influence of education at home might easily correct.

The results of this tuition at home were in every way fortunate.

His father had graduated from Trinity College, Cambridge as a senior wrangler in mathematics in 1811, whereupon he assumed full editorial control of the *Northampton Mercury*, one of the oldest newspapers in the country and the basis of the family's publishing business. His mother was gifted in languages. Besides training him in English composition, she taught him Greek and Latin as well as French and German, which was unusual even at that time and in that circle of austere devotion to intellectual things. Dicey recounts a story about his mother that bears retelling: it reveals something of his mother's intellectual power and influence as well as conveying an insight into Dicey's extreme modesty.

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My mother had been reading with me [in 1848] the First Book of the *Iliad*. She dined on that evening at a house of good friends, among whom, naturally enough, an expression from that book, which we had noticed in the morning, was cited in Greek. My mother told me, when she came home, her amusement at hearing the words quoted, over which we had puzzled ourselves. But she added at once, "of course I did not let anyone perceive that I understood what the words meant."

An obstetrical error at the time of Dicey's premature birth left him with a muscular weakness that he bore all his life. The severity of the disorder is hard to judge, but at times it was so marked that he could not write at all; most of his life he could not write without taking frequent pauses. The affliction was severe enough to make him something of a physical oddity and to raise the question whether he would be strong enough to leave home before the age of seventeen, when he was sent to King's College School in London.

In 1854, after two years at King's College School, Dicey matriculated at Balliol College, Oxford, where he became a pupil of Benjamin Jowett. Under Jowett's personal supervision, which was kind but stringent, Dicey flourished and received a first class in classical moderations in 1856 and in *literae humaniores* in 1858. His own intellectual fervor and the reforming spirit of Jowett led Dicey, encouraged by this academic distinction, to join with other Balliol men, under the leadership of John Nichol, to form a literary society—the Old Mortality Society. This society, which has attracted considerable scholarly interest because of the later fame of many of its members, was a forum in which serious undergraduates could sharpen their intellects on questions that might lie outside their normal course of study by presenting papers which were followed by rigorous discussion. Membership and activity in the Old Mortality Society was especially important for Dicey because it gave him self-confidence in public speaking, at which, by all accounts, he became a master. In 1859 he was elected president of the Oxford Union. Although the presentations and discussions of the Old Mortality were academic, theoretical, and speculative, removed from the conditions of the real world, it bears mention that from time to time, particularly at the prodding of T.H. Green, the society did take up contemporary questions, politi-

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cal, social, and religious. According to Lord Bryce the discussions in this "quite remarkable" body were conducted openly and freely, devoid of dogmatism, because everyone "assumed individualism as obviously and absolutely right."

Dicey went down from Oxford in 1861 to read law in London. He left with an excellent degree, a fellowship at Trinity College, which he relinquished upon his marriage in 1872, a circle of friends, who remained close until death, and his first book, *The Privy Council*, winner of the Arnold Prize Essay in 1860, ready for publication. He returned to Oxford in 1883, when he began his intellectually productive period. The intervening years were spent in legal practice, having been called to the bar in 1863 as a member of the Inner Temple. His accomplishments led in 1876 to his appointment as junior counsel to the Commissioners of the Inland Revenue. Although he did handle some important briefs, the political career for which he hoped did not materialize. It also became clear before long that because of his physical weakness he could not realistically expect elevation to the bench. During this time Dicey married, began his scholarly writing, and travelled, with some frequency outside of England.

It was from these travels that he gained the knowledge to lay the foundation for the pioneering character of the *Law of the Constitution* in the field of comparative constitutional law. Dicey's extraordinarily accurate knowledge of continental constitutions was initiated in the course of his travels to Belgium, France, Switzerland, and Germany; the regimes of these countries excited him as examples of constitutional governments different from but similar to Britain. Indeed, Dicey's genius as a constitutional lawyer came from his ability to draw sharp distinctions between very similar but fundamentally different constitutional arrangements. Much of his understanding for these subtle but profound differences came from first-hand observations.

In 1870 he made a voyage to America with Bryce who used the opportunity to gather much of the material for *The American Commonwealth*, which he published in 1888. These travellers seemed bent on learning everything possible about the United States, and through their Oxford friends and family contacts met an impressive number of

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prominent Americans. Dicey made a full record of these experiences in his diary.

Above all, the travellers wanted to understand the American constitution; Dicey's diary abounds in jottings regarding the legal profession, the administration of justice, politics, and constitutional arrangements in the United States. Dicey attended the Democratic Convention at Rochester in 1870 and was able to see at close range the machine politics of which he was not an unqualified admirer. He wrote: "America is in theory the purest of Democracies, yet there are perhaps very few countries where there is less scope for independent political action, at least by individuals." Systematic party discipline, he thought, "violates the essential principles of Democracy, for it very much limits the control over their Government exercised by the people, and it sacrifices the public service to purely individual interests. The evil is very apparent in England and will become more so." Many of the observations about American politics and institutions in his diary showed his strong capacity for comparative analysis. In the opinion of his friend and former pupil, Robert Rait, the American tour very decidedly marked Dicey's later work in comparative and constitutional law. It gave him a basis for comparison, and it influenced his subsequent attitude to American constitutional problems. On at least two occasions Dicey wrote to Bryce that the *Law of the Constitution* would not have been written but for this journey.

Dicey admired the United States greatly. It proved popular government possible; it drew on a tradition of voluntary action, and it seemed to confirm his liberal principles. The United States and France were the examples he drew most frequently on to contrast by illustration with the principles of the British constitution. America expanded his imagination about the structure and formation of comparable but different legal institutions.

The academic study of modern society through the study of politics and history was one of the achievements of the movement to reform university education. Dicey admired this reform when he was still an undergraduate; when he became Vinerian professor in 1882 he brought the spirit of those reformers to bear on the field of his responsibilities.

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The Vinerian Professorship had been established in Oxford in 1758 on a bequest of Charles Viner. Its first incumbent was Sir William Blackstone, author of the *Commentaries on the Laws of England*. While law, principally canon law, had most certainly been studied for a long time at Oxford—the Regius Professorship had been established by Henry VIII—the Vinerian Professorship was the first academic post created specifically for the study of English law. After the auspicious beginning in Blackstone's lectures, the subsequent Vinerian professors were uniformly undistinguished. They paid little attention to teaching; some had written unremarkable commentaries; most seemed uninterested in the post.

Not only did Dicey's considerable practice at the bar and his position as counsel to the Commissioners of the Inland Revenue help his election to the Vinerian Professorship, but also his writings, *The Privy Council* (1861), his *Treatise on the Rules for the Selection of the Parties to an Action* (1870), and *The Law of Domicil as a Branch of the Law of England* (1879) had given him a considerable reputation as a legal writer. In 1896, he published his *Digest of the Law of England with Reference to the Conflict of Laws*, which was an expansion of *The Law of Domicil* and is the most celebrated of his strictly legal works. *The Conflict of Laws*, which has been periodically brought up to date, remains today a standard work. In the words of his Vinerian successor, William Geldart, this work "not only reduced to order one of the most intricate and technical branches of law . . . but exerted a potent influence on its development."

Dicey held the Vinerian Professorship for twenty-seven years. His term of service is often referred to as the second founding. By the time of his resignation in 1909 Dicey had transformed the Vinerian chair into one of the most important posts in the world for the teaching of law. In a tribute, Sir William Holdsworth, the ninth Vinerian Professor and the author of *The History of English Law* in sixteen volumes, wrote:

Dicey will hold in the history of the legal literature of the nineteenth century a place not unlike that which Blackstone holds in the history of the legal literature of the eighteenth century. Both have written books which have been accepted by their contemporaries as books of authority; and . . . Dicey's

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work has contributed largely to the fulfilment of Blackstone's prophecy of the effects of a scientific study of English law at a university both upon the law, and upon the teaching of law. . . . In his works on the *Law of the Constitution* and *Law and Opinion in England* he has done for English public law and for the legal history of the nineteenth century all, and in some respects more than all, that Blackstone did for the public law and the legal history of the eighteenth century.

The first of the books to which Holdsworth referred, the *Introduction to the Study of the Law of the Constitution*, was originally published in 1885, two years after Dicey moved back to Oxford. It was a revision of his first Oxford lectures and based on many years of study and reflection. In it, he conceived of the legal and political elements of constitutional law in a way that, after the better part of a century, as Holdsworth said, still remains our starting point.

II

The contemporary American reader of the *Law of the Constitution* initially must understand three points. First, Great Britain, unlike the United States, does not possess a written document specifying the constitution of political power. In a narrow sense knowledge of constitutional law in the United States may be had through familiarity with the text of the Constitution and through the current state of interpretation of the written Constitution as revealed through Supreme Court decisions. This approach to knowledge of English constitutional law, due to the absence of a single written document, is impossible.

The second point proceeds from this observation. That is, how does one know, actually and conceptually, the English constitution and English constitutional law? In the *Law of the Constitution* Dicey answers these questions by stipulating three descriptive principles of law around which he organizes the book: the legislative sovereignty of Parliament; the rule of law; and the dependence in the last resort of the conventions of the constitution on the law of the constitution. He states these principles with such force and clarity that they remain today the starting point for any contemporary discussion of constitutional rules and of limitations of governmental powers. While Dicey

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is writing of Great Britain directly, because of their extraordinary similarity, he says much that is true of constitutional principles of the United States as well. In short, Dicey develops a conceptual structure that defines the political and legal constitution of democratic government as we know it.

Finally, the book should be read with reference to conditions when he wrote. Dicey published the *Law of the Constitution* in 1885. As he carefully explains, the text of the book was essentially fixed with the seventh edition, which appeared in 1908. That edition contained revisions up to 1908 in accord with Dicey's understanding of the changes that had taken place in the English constitution. The eighth edition, which is reprinted here, appeared in 1915 when Dicey was eighty years old. This reprints the text of 1908, but it contains an introduction of nearly one hundred pages in which Dicey recorded his thoughts on constitutional changes since 1908. The organization of this introduction, however, follows the organization of the book and may not be readily understood if the propositions and the arguments of the main text are not *first* read and absorbed. A further suggestion for the present-day reader before embarking on the introduction, but after reading the main body of the work, would be to read the Parliament Act of 1911, listed as Note XIII. Dicey seeks to show the actual, the true state and condition of English constitutional law, within the boundaries of his definition, in the period between 1885 and 1908. Were he writing in the 1980s, the book would be very different. This is the principal value of his 1915 introduction, for it shows Dicey's understanding not only of actual changes in the law but of how those changes embody changes in fundamental constitutional principles.

Some of Dicey's detractors have called this introduction the work of a tired, cranky old man, disappointed by life. There is, however, much to be learned from the introduction. For instance, in 1915 Dicey appears cool to women's suffrage, which was then one of the pressing issues of the day. But it must be understood that his chilliness represented a change. In the 1860s he was a great champion of the women's movement, and he supported John Stuart Mill's call for women's suffrage. In the well-known *Essays on Reform* in 1867, Dicey contributed a piece entitled "The Balance of Classes" in which he

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spoke against the arguments of the Conservatives and defended individual choice. Following his trip to the United States in 1870, he wrote:

One of the reasons why there is less clamour for Women's Rights [in the United States] is the existence of a far smaller number of women's wrongs than with us, *e.g.*, they have in many states the right to hold property when married, as their own, and have got the full legal protection for their earnings. . . . It is impossible not to conclude that the average education of women is, compared with that of men, higher than in Europe—hence a freer opening of careers. . . . In the United States women are as a matter of fact obtaining political privileges . . . generally reserved for men.

Dicey was demonstrably a vigorous proponent of women's suffrage. In any case, the political issue of women's suffrage is moot. But it is not beside the point to read a distinguished constitutional lawyer's reflections on the effects of social and political movements on constitutional principles and on individual rights under the constitution. Dicey says that "constitutional law, as the term is used in England, appears to include all rules which directly or indirectly affect the distribution or the exercise of the sovereign power of the state." These "rules" fall into two broad categories. The first category of rules are laws, strictly understood. These laws are written and unwritten, statutory and customary, which are usually called the Common Law. These laws are known and recognized to be laws, because—this is the important determining factor—they are enforced by the courts. The other broad category of rules are what Dicey calls "conventions of the constitution." The rules of this second category are not in strictness laws, they are not enforced or enforceable by the courts; but they are the usual and customary practice of politicians and civil servants, and represent what Dicey calls "political" or "constitutional morality." The law of the constitution, then, is of two pieces: the relatively unambiguous laws, derived from judicial decisions and Parliamentary enactments, precisely expressed and recognized by the courts and the relatively ambiguous, largely implicit, conventions, which are part of political practice and morality and enter into public opinion. Dicey aims to examine the relationship between statutory law and public morality, and thereby to elucidate the relations be-

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tween continuity and change in law and politics. The sovereign power of the state consists of a "legal sovereign" and of a "political sovereign."

In the *Law of the Constitution* Dicey shows how, from a strictly legal point of view, public morality must yield to law. In a later work *Lectures on Law and Public Opinion in England during the Nineteenth Century*, which was published in 1905, Dicey shows how, from other than a strictly legal point of view, public morality acts as a final sanction on law. No other modern writer has shown so penetratingly, as Dicey does in these two books, the relationships between law and the *mores maiorum*—the prevailing beliefs—in democratic regimes.

Dicey also tells us something of the importance of political morality. By deprecating the growing estrangement between law and morality through the constant addition to the statute books and the criminal law of acts which the government considers anti-social but the governed do not consider immoral Dicey offers us his most important lesson: the persistence of this state of affairs can only mean "a decline of reverence for the rule of law."

This phrase, "the rule of law," Dicey formulated into a principle of the British constitution. He did not create this phrase, but he brought it into currency, and he was responsible for elaborating the principle. By the rule of law he means: 1) the absence of arbitrary or discretionary power on the part of government; 2) every man is subject to the ordinary law of the land administered by ordinary and usual tribunals; 3) the general principles of law, the common law rules of the constitution, in contradistinction to the civil law countries of Europe, are the consequences of rights of the subject, not their source. To illuminate this difference Dicey contrasts the rule of law with the French idea of *droit administratif*, which he translates as administrative law.

Dicey makes the point that in Great Britain in 1885 there was no distinction between private and public law. One set of laws regulated and one system of courts adjudicated public and private interests alike. In subsequent decades this point ceased to be valid.