

CHASING THE CHESHIRE CAT?
JOHN AUSTIN AND THE TRIAL OF FEDERALISM IN VICTORIAN ENGLAND

“[John Austin] has been in nothing more useful than in forming the minds by which he is, and will hereafter be, judged.” (Edinburgh Review, October 1863)

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I. INTRODUCTION

The United Kingdom's Human Rights Act (1998) gives domestic courts the weakest role of any European state in ensuring conformity with the European Convention on Human Rights. Though the Act provides that most "public authorities" may not violate Convention rights,¹ and that violations of Convention rights are actionable in domestic courts,² Acts of either House of Parliament are above censure.³ In the case of conflict, U.K. courts may make a "declaration of incompatibility", but must give force to domestic legislation.⁴

The United Kingdom's ginger implementation of Convention rights is based on the longstanding doctrine of parliamentary sovereignty. The emerging, quasi-federal European constitutional order challenges a long-standing British discomfort with the idea of a divided sovereignty. If we are to understand why U.K. legislators are so unwilling to share sovereignty with an external, independent authority, however, we must trace the doctrine of parliamentary sovereignty beyond its classic expositor, A.V. Dicey. Though Dicey's *The Law of the Constitution* enshrined the principle of parliamentary sovereignty in the soul of the uncodified constitution for generations of British barristers, the roots of modern British resistance to the division of sovereignty must be followed slightly further, to a sweeping constitutional debate which raged in England during the 1860s. This debate put federalism itself, as a constitutional proposition, on trial.

Conducted in newspapers, educated journals, published political commentaries, re-released histories with new prefaces, and the halls of Parliament, this debate had profound and enduring consequences, instilling in English minds a powerful suspicion of all things federal. Achieving a more sophisticated understanding of the unfortunate process by which England tried and condemned federalism will shed a great deal of light on the jurisprudential source of British discomfort with fuller implementation of the European Convention on Human Rights.

In this paper, I will examine how England first came to debate the nature of a Federal union. Despite the important lessons to be gleaned from this story, it has yet to be fully told. Historians have not directly addressed it. Nor have students of legal history. Nor have law review articles. Nor biographers of Austin.⁵ Accordingly, I will begin by sketching in full the outlines of the debate.

¹ 1998 Ch. 42 § 6(1).

² 1998 Ch. 42 § 7(1).

³ 1998 Ch. 42 §6(3) (Stating that "public authority" "does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament").

⁴ 1998 Ch. 42 §4 (4).

⁵ Historians have treated the reaction of English public opinion to the American Civil War in detail. See, e.g., DUNCAN ANDREW CAMPBELL, ENGLISH PUBLIC OPINION AND THE AMERICAN CIVIL WAR, (Boydell Press 2003); ALFRED GRANT, THE AMERICAN CIVIL

My primary focus will be on drawing together the narrative of the debate itself and the intellectual legacy it created. More directed conclusions I leave to others.

During the American Civil War, a remarkable confluence of historical forces, personalities, ideas, and politics provoked a searching debate over the location of sovereignty in a federal system. John Austin was dredged from obscurity, thrust to the forefront of English jurisprudence and invoked as the champion of indivisible sovereignty and the bane of federal structures.

This was no superficial debate: extensive, detailed commentary continued for years. Reviews in learned journals of both “conventional” and Confederate theories of federal sovereignty, comparative and historical studies of federal governments, treatises on political theory, and extensive moment-by-moment coverage of the “disruption” of the American federal union contributed to a lively and thorough debate in Victorian England, a debate which would ultimately “ossify” a condemnation of federalism no less comprehensive in scope than that with which Backer charges post-Civil War Americans.

I will then proceed to comment on the ramifications of this debate, exploring the manner in which the debate shaped English jurisprudence at a high-water moment in English constitutional politics. Political partisans, seeking further expansion of the English franchise, invoked Austin to shift blame from democracy to federalism as the root cause of the American Civil War. The result, while conducive to expansion of the franchise, was to reinforce a tangible fear of divided sovereignty in England, linked indelibly with Austin’s name. Later taken up with vigor by his champion-to-be Albert Venn Dicey, a longstanding verdict on the indivisibility of sovereignty and the particular inviolability of parliamentary sovereignty emerged.

I will close by suggesting ways in which an understanding of the role carved out for John Austin might nuance contemporary debates. The lingering presence of Austinian jurisprudence has, according to some commentators, crippled meaningful discussion. As England grapples with the jurisprudential

WAR AND THE BRITISH PRESS (McFarland, 2000). While useful in providing context to the debate, these studies do not examine the effect of the American Civil War on English constitutional thought. The most relevant historical studies are the work of John Kendle: *see* JOHN KENDLE, *FEDERAL BRITAIN: A HISTORY* (Routledge, 1997); JOHN KENDLE, *IRELAND AND THE FEDERAL SOLUTION: THE DEBATE OVER THE UNITED KINGDOM CONSTITUTION 1870-1921* (McGill-Queen’s University Press, 1989). Kendle, however, unjustifiably dismisses the depth and significance of the discussion. *See* KENDLE, *FEDERAL BRITAIN* at 35-6 (“the nineteenth century was pretty much a wasteland insofar as furthering insight into the options available in the formation of states Certainly, [Federalism’s] attainment was not heralded or advanced by the writings and musings of the constitutional experts”). The best treatment of this subject is located in a collection of essays on federalism by political scientists. John Pinder, *The Federal Idea and the British Liberal Tradition*, in *THE FEDERAL IDEA: THE HISTORY OF FEDERALISM FROM ENLIGHTENMENT TO 1945* (Andrea Bosco ed., 1991) (Highlighting the nuanced discussion of federalism in the Liberal press).

consequences of further European integration and the recent reforms in the House of Lords, frustration with the Austinian conception of sovereignty has increased.⁶ In a particularly vivid metaphor, Ian Ward likens the lingering presence of Austinian and Diceyan ideas in contemporary debates about sovereignty to the elusive smile of the Cheshire Cat: the famous “grin without cat”. This “maddening indefinable presence” has fettered both political discussion and case law: indeed, “[t]he future of Europe demands that we all stop worrying about the “location of sovereignty”.⁷

If one wishes to exorcise a ghostly presence, it seems reasonable to begin by asking how the apparition came to be. I suggest that we will best understand Austin’s specter by examining the debates on American federalism in England which gave enduring interpretative shape to his writings. Perhaps by better understanding the haphazard manner in which federalism was tried and convicted in nineteenth-century England, and the process by which Austin became appointed champion of indivisible state-sovereignty, we can more accurately evaluate Austin’s relevance in the “stalemated” European federal conversation.

II. PROSECUTING DEMOCRACY

Caprice, not design, turned the collective eye of educated England to examine federal constitutional theory. Though the 1860s would prove to be a uniquely fertile period of constitutional inquiry in England regarding federal theory, the English were originally concerned with a strictly domestic constitutional issue: the expansion of the franchise. Outbreak of civil war in America furnished opponents of further democratization with a potent rhetorical weapon, prompting a Liberal counterattack in the form of a detailed inquiry into the American federal system and the extent to which federalism was responsible for the conflict. This searching examination in the English press of the relation of American federal theories, both Southern and Northern, to the British constitutional order would bring the question of sovereignty to a broad and influential English audience. As a result, John Austin’s obscure writings achieved for the first time a general readership, and the uses to which they were put resulted in a profound mistrust of federal institutions, echoes of which pervade the debates over European integration and the English judiciary to the present day.

The road to these remarkable conclusions begins with Conservative opposition to further democratization of the English franchise. Lord Russell and

⁶ See Neil MacCormick, *Beyond the Sovereign State*, 56 Mod. L. Rev. 1 (1993). See also Ian Ward, *The End of Sovereignty and the New Humanism*, 55 Stanford Law Review 2091, 2101 (2003) (Arguing that “[a]rcane notions of member state sovereignty have no place” in modern Europe).

⁷ Ward, *supra* note 6.

the Whigs had proposed to expand the English franchise far beyond the moderate democratization already achieved by the Whigs in 1832, which provoked immediate and vigorous opposition from Conservative MPs and peers on pragmatic grounds. Expansion of the franchise, it was felt, would pollute the august business of politics with frenzied participants from the lower orders and lead to the ruin of the English political system. The opening notes of the American Civil War added fuel to this fire, and with the American “disruption”, England began to invoke the American crisis in the debates concerning her own constitutional dilemma.

Opening dramatically with the foreboding sentence “Democratic institutions are now on their trial in America”, *The Times* observed on November 29th, 1860 that American progress had confirmed “the expansive energies of a Democracy, but its capability of cohesion still remains open to question.”⁸ This was not a standard foreign affairs piece – *The Times*’ correspondent was acutely aware of the domestic English ramifications of the impending American crisis and did not hesitate to invoke the political storm brewing in England over further expansion of the franchise. “The enemies of Democracy have always asserted that it . . . carries in itself the germ of its own decay”, observed the correspondent: indeed, Conservatives would soon point to the bloodshed in America as a warning of the consequences of rash democratization. Before shots were fired on Fort Sumter, England anticipated the relevance of the American crisis to her own constitutional dilemma, and serious thinkers on both sides of the English debate undertook public examinations of the constitutional background to the American conflict in hopes of claiming the lesson held by the American “disruption” as supportive of their political agendas.

The piece in *The Times* was necessarily provisional. South Carolina had not yet seceded and the resignation of Southern delegates had not yet been accepted in Washington, so *The Times* dealt rather perfunctorily with the “disruption”. Dismissing the threat of secession (“the standard resource of a mob”) as unworkable, *The Times*’ correspondent expressed a diplomatic confidence in the ability of President Buchanan and President-elect Lincoln to resolve the issue.

As the American crisis deepened, however, English commentary became more direct and extensive, supported by the thorough research of English partisans. In December, South Carolina formally seceded from the Union, to be joined in February 1861 by six other states. By April, the Whigs were prepared to offer a somewhat pre-emptive diagnosis of the American crisis in Henry

⁸ Correspondent’s Report, THE TIMES (London), November 29, 1860, at 8.

Reeves' learned quarterly, the liberal *Edinburgh Review*.⁹ As was typical of serious intellectual quarterlies in Victorian England, essays in the *Edinburgh Review* were based on reviews of authoritative texts, mixing summary and criticism while advancing substantive argument, and 'The Election of President Lincoln and its Consequences' was no exception. Attributing secession to Southern skittishness concerning Lincoln's accession to the Presidency, the reviewer drew on published correspondences from the slave states, statistical data regarding slave populations, and the twin authorities of Alexis de Tocqueville and *The Federalist* to present a general political history of early 19th century America.¹⁰

Appearing in this extensive and thoroughly researched piece was the first serious consideration in England of John Calhoun's constitutional jurisprudence. From Professor Backer's grim description of the Calhoun purge, one might expect a somewhat dismissive treatment of Calhoun's constitutional philosophy. This was not the case: the perspective of the Southern Confederacy was set forth as a viable, and perhaps preferable, alternative to that of the Washington Cabinet. Quoting at length from Calhoun's *A Discourse on Government and a Discourse on the Constitution and Government of the United States*, the *Edinburgh Review* presented both aspects of Calhoun's constitutional philosophy relevant in Backer's estimation to the present European federal debates.¹¹ Far from being vilified by its association with slavery, Calhoun's analysis was presented entirely independently, and given quite high praise. "No writer on American constitutional law, with whom we are acquainted, has expressed the Federal theory with so much logic and precision as Mr. Calhoun, in this remarkable treatise", glossed the reviewer after a long inset quotation from the Southern gentleman. Located in a thirty-two page review quoting from several essays in *The Federalist*, Tocqueville, and a speech from the House of Representatives, appearing in an issue containing a detailed review of Tocqueville's life and letters, this commendation is not to be taken lightly.

Despite the early stage of the debate, the *Edinburgh Review* did not shy from offering intimations of the liberal position later to be more fully articulated. Reading the writing on the wall from the November 29th piece in *The Times*, the *Edinburgh Review* sought to shift the focus of the impending debate from

⁹ *The Election of President Lincoln, and its Consequences*, THE EDINBURGH REVIEW, April 1861, at 555.

¹⁰ Tocqueville's authority on the issue was monolithic: nearly every substantial essay on the American disruption managed to cite him. This particular issue of the *Edinburgh Review* also ran a detailed review of Tocqueville's life and letters. See *Remains of Alexis de Tocqueville*, THE EDINBURGH REVIEW, April 1861, at 427.

¹¹ The reviewer was particularly concerned with Calhoun's theory of nullification, and alluded to his 'concurrent majority' principle. See *The Election of President Lincoln, and its Consequences*, *supra* note 12, at 575-7.

democracy to federalism. Dissolution, under this analysis, was the ‘manifest destiny’ of a people bound only by the ‘slender tie of a Federal Government’. By turn, the article on Tocqueville’s correspondence assumed an appropriately cheery stance on democracy, the viability of which was treated as a foregone conclusion. Gently, the *Edinburgh Review* sought to frame the events in America as an institutional crisis of federalism, rather than democracy.

By April 1861, a serious and public enquiry into American constitutional affairs had begun. Introducing the key authorities into the debate, the *Edinburgh Review* broadly invoked Tocqueville and Calhoun, and flagged for its readers a new edition of John Austin’s jurisprudence which contained, in the reviewer’s estimation, a highly relevant discussion of the location of sovereignty in a federal system.¹² These authorities would retain their prominence throughout the course of the debate, and as Conservative periodicals joined the fray, the challenge for essayists would be to spin these authorities in a way reflecting favorably on their domestic political convictions.

As the conflict in America intensified, any remaining illusions of journalistic impartiality were dropped. *The Quarterly Review*, founded by a group of Tories for the purpose of rebutting the liberal *Edinburgh Review*, ran an article in July 1861 entitled “Democracy on its Trial”, reviving *The Times’* metaphor which so aptly captures the use to which the English would put the American Civil War.¹³

This piece was to be the flagship articulation of the Tory position. Penned anonymously by Lord Robert Cecil, a conservative peer, the essay was an excoriating denunciation of proposals to “reform” the English franchise, charging Lord Russell and his fellow Whigs with mass delusion under “the light of America”. Delighted with American prosperity and forgetting the disastrous French Revolution, Lord Cecil pressed, the Whigs and Liberals were proposing to abandon the calm, settled English tradition and stampede even further than the 1832 expansion of the franchise.¹⁴

Though sympathetic to American suffering, Lord Cecil was quite clear in expressing his intent to commandeer the American experience for the benefit of English politics. “We are allowed to study, in the experience of another land, the termination of the path of democratic progress upon which we ourselves have

¹² See *id.* at 576 (“The distinction between a supreme Federal State and a system of Confederate States has been discussed, with his usual acuteness, by the late Professor Austin in his ‘Province of Jurisprudence Determined,’ of which most valuable work a second edition has just appeared. Mr. Austin’s view of the American Constitution was that the sovereignty resided in the States’ Governments *as forming one aggregate body*, and not merely in the individual States as forming a *collective whole.*”)

¹³ *Democracy on its Trial*, THE QUARTERLY REVIEW, July 1861, at 247.

¹⁴ *Id.* at 253.

entered. Such lessons are not to be thrown away.”¹⁵ In a startling feat of intellectual gymnastics, Lord Cecil managed to shrug off both slavery and the legal issues raised by secession in a federal union raised two months before in the *Edinburgh Review*, attributing the entirety of the American disruption to the pernicious effect of a Tocquevillian tyranny of the majority. Pointing out that England had passed through a number of serious rebellions largely unscathed, Lord Cecil identified “two separate counts under which democracy may be charged with having caused the American civil war”.¹⁶ Citing Tocqueville to effect, Cecil first bemoaned the tendency of a democracy to produce frenetic, mediocre statesmen, and then lamented the institutional inability of a democracy to check its pernicious inclinations.¹⁷ Closing with a screed against Gladstone and Reform, Lord Cecil was incredulous that “with the warnings before their eyes which each mail from America brings home, there should still be men eager to travel along the same fatal path and court the same fearful destiny”.¹⁸

That same month, the other principal (and less restrained) Tory publication ran a piece reflecting on the lesson to be gleaned from events in America, essentially amounting to a smug “I told you so” to England’s former colony. Responding to indignation in Washington over England’s neutrality, *Blackwood’s Magazine* took a hard stance:

“It is precisely because we do not share the admiration of America for her own institutions and political tendencies that we do not now see in the impending change an event altogether to be deplored. In those institutions and tendencies we saw what our own might be if the most dangerous elements of our Constitution should become dominant. We saw democracy rampant, with no restriction on its caprices...”¹⁹

America had swiftly become a political pawn in the debate over constitutional Reform, and the Conservative position was clear. As Lord Cecil put it, “the future of England, rather than the future of America, is the point to which our thoughts are naturally turned by the contemplation of these calamities. . . . May it not be,

¹⁵ *Id.* at 260.

¹⁶ *Id.* at 261.

¹⁷ *Id.* at 266. Interestingly, especially in light of the recent disestablishment of the Law Lords and the introduction in the United Kingdom of an independent judiciary, Lord Cecil was particularly concerned with the erosion of the independence of the state judiciaries. A brief history of this phenomenon was indulged, surveying Jefferson’s suggestion of term limits, reiterated by President Jackson, achieving traction in the vast majority of states by the time of the Civil War. Lord Cecil followed Tocqueville in finding it a potentially effective check on the caprice of democracy. *Id.* at 263.

¹⁸ *Id.* at 285.

¹⁹ *The Disruption of the Union*, BLACKWOOD’S EDINBURGH MAGAZINE, July 1861.

that we have been sucked into the same current, and are gliding insensibly towards the same fatal shore?”²⁰

III. THE RESURRECTION OF JOHN AUSTIN

From the moment *The Times* framed the struggle in America as the trial of democratic institutions, it was clear that Liberals were going to have to find a way to distinguish the expansion of the English franchise from its democratic counterpart across the Atlantic.

The detailed April 1861 piece in the *Edinburgh Review* certainly illuminated the issue, exhuming the historical background of American slavery and the division in American constitutional theory as to the location of sovereignty in a federal state. Once Lord Cecil launched his single-minded assault on the American “great experiment” in democratic government, however, a different culprit had to be found.

By a fortuitous coincidence, John Austin’s widow had recently republished *The Province of Jurisprudence, Determined*, earlier that year. A lengthy, obtuse tract, *Province* was an edited collection of six lectures Austin had delivered as the University of London’s inaugural professor of jurisprudence between 1829 and 1832. Austin’s chief concern was sovereignty, and his overall project was to clarify the notion of positive law. The first five lectures were largely taken up with definitional elements and the application of Bentham’s principles of utility (Austin was a devoted disciple), but the sixth lecture, by far the longest of the lot, contained the full explication of Austin’s analytical jurisprudence. Roughly summarized, Austin defined a sovereign as one who enjoys the habitual allegiance of the bulk of an independent political society, and bears no habits of obedience to another. Under this model, a sovereign is “incapable of legal limitation”:²¹ Austin distinguished so-called “constitutional law” from positive law as merely positive morality, for under his definitions, a sovereign properly so called was legally illimitable. Under this model, according to Austin’s exhaustive and precise definitions, divided sovereignty, in the sense of two sovereigns sharing power, would be an impossibility.

This last observation bears special attention for the purposes of this study, for though Austin would come to be presented as hostile to federal arrangements on the basis of his rejection of divided sovereignty, he was not necessarily hostile to federal arrangements. Indeed, in a section dedicated to the examination of “supreme federal governments”, Austin explained that in these federal arrangements, sovereignty was not divided, properly speaking. Rather, it was

²⁰ *Democracy on its Trial*, *supra* note 6, at 283.

²¹ JOHN AUSTIN, LECTURES ON JURISPRUDENCE 150 (ed. Robert Campbell, vol. 1).

shared: held in common by the member states composing the union.²² Thus, “if in making a law or issuing a command, the general government exceed the limited powers which it derives from the federal compact, both the tribunals of the general government and the several governments are empowered and bound to disobey.”²³

The United States, according to Austin, was the definitive example of this arrangement: he found the sovereignty properly speaking, to reside with the several states “as forming one aggregate body”, held in common, with some powers delegated to the federal or “general” government.²⁴ It ought to be noted that Austin had no specific objections to federalism, either generally or in the American case. Certainly, in locating the sovereignty of a federal union in the aggregated states, commonly held, rather than concentrated in the “general” or federal government, opponents of federalism might allege weakness of the central government, as indeed they would in the 1860s. Certainly, too, would the disobedience inherent in judicial review worry those who preferred a more centralized and unitary structure. Austin, however, expressed no such opposition, nor such preference, and nothing in his treatise can fairly be said to argue that federal arrangements were either impossible or doomed. *The Province of Jurisprudence, Determined*, was a largely descriptive effort to understand the nature of sovereignty, and to distinguish positive law from positive morality. Austin’s goal was to clarify, not advocate. Though his successors, notably Dicey, would contend that sovereignty-sharing leads to irresolvable conflicts which culminate in resort to force of arms, John Austin set out simply to offer an analytical framework within which to understand positive law.

Largely on account of this high-flown, theoretical approach, Austin had been virtually unread in England before the 1860s. The English bar was a practitioner’s arena, and education was more apprenticeship than study – a curriculum in any meaningful sense would not emerge until the 1870s. General jurisprudence would not become an important field of inquiry for over thirty years. Furthermore, his prose (some would balk at the term: Austin reads like a patent application) was so technically precise as to be unreadable, perforated by an array of new terms of art. His lectures failed to attract students, and his book failed to attract readers. He died in 1959, inconspicuous and unremarked, “a most unlikely candidate for inclusion in the pantheon of English jurisprudence.”²⁵

Austin’s failure during life to achieve acclaim, significance, or even relevance stands in stark contrast to his remarkable posthumous vogue: his *Jurisprudence* is a central text in the study of the philosophy of law, and he is

²² *Id.* at 145-46.

²³ *Id.* 147.

²⁴ *Id.* at 147.

²⁵ RICHARD COSGROVE, *SCHOLARS OF THE LAW* 93 (1996).

currently regarded as the patron saint of legal positivism. His revival has been credited to the “wifely industry” of his wife, Sarah, in republishing his works in the early years of the 1860s.²⁶ Though Sarah Austin explained arranging republication of *The Province of Jurisprudence, Determined* as inspired by a desire to leave a proper legacy for her late husband, it was the atmosphere into which his treatise was released, not the mere happenstance of republication, that launched Austin into vogue.

A number of factors contributed to its ready reception. The Reform controversy made for fertile constitutional speculation, and general interest in otherwise abstruse constitutional theorizing had been piqued. 1861 saw both the republication of Austin’s analytical jurisprudence and the publication of Henry Sumner Maine’s great work of historical jurisprudence. Austin had a great deal of support from a prominent former student, as well. That same year saw the publication of John Stuart Mill’s *Considerations on Representative Government* which, though provoked by the Reform question, nonetheless contained a chapter “On Federal Representative Government”.²⁷ Mill had attended Austin’s lectures at Oxford in the 1820s and was deeply indebted to the elder scholar: this chapter relied heavily on the sixth lecture, and Mill cited his mentor extensively.²⁸ Finally, vogue struck England just as legal education was becoming professionalized, institutionalized, and formalized, and the first generation of what we would recognize as modern law professors in England, such as A.V. Dicey, had been trained at the height of the Austinian moment.²⁹

Primarily, however, it was his applicability to the pressing political and constitutional problems of the day that secured for Austin an immediate and dedicated readership. His work had already been flagged by the *Edinburgh Review* as particularly relevant to the debate over the American disruption, so it was not long before Austin’s book, along with Maine’s treatise, was reviewed both in the *Quarterly Review* and the *Edinburgh Review*. Naturally, *The Province of Jurisprudence, Determined* received very different treatment at the hands of these politically opposite quarterlies. The process was facilitated, no doubt, by

²⁶ See, e.g., *id.*, at 94.

²⁷ John Stuart Mill, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT.

²⁸ In addition to being enrolled in Austin’s lectures on jurisprudence, the Mills, the Austins, and the Bentham had a close relationship, and John Austin was a mentor for the young J.S. Mill. In his autobiography, Mill would remember reading Roman and English law with Austin in the winter of 1821-22, and when studying jurisprudence under Austin in the 1830s, Mill remembered his affinity for Austin’s approach. “Among the persons of intellect whom I had known of old, the one with whom I had now the most points of agreement was the elder Austin.” *Autobiography of John Stuart Mill* (New York: Columbia University Press, 1924) As we will see, Mill authored a detailed essay for the *Edinburgh Review* upon the publication of Austin’s *Lectures* in 1863, and would be a vigorous champion of Austin’s throughout the ferment of constitutional speculation in the 1860s.

²⁹ COSGROVE, SCHOLARS OF THE LAW (1996), at 90.

Austin's generally descriptive and analytical enterprise – his analysis could be fairly liberally interpreted, and his conclusions widely construed. The reception of Austin's *Jurisprudence* would therefore be shaped, to a very great extent, by partisans in the emerging debate over the lesson properly learned from the crisis in America.

In April of 1861, the *Edinburgh Review* had focused on the nature of the federal union, and recommended Austin as an authority of particular utility. Accordingly, the *Quarterly Review*, though ostensibly reviewing both Maine and Austin, dismissed Austin's book almost entirely. Heading the two-book review "Maine's *Ancient Law*", the twenty-four page article limited its consideration of Austin's *Jurisprudence* to two pages. Only briefly discussing the merits of the book (few), the reviewer spent the majority of his space lauding the wifely industry of Mrs. Austin in republishing her deceased husband's *oeuvre*.

Conceding Austin's status as essential reading for those aspiring to become jurists, the reviewer nonetheless expressed (but did not pursue) skepticism that Austin actually disposed of the questions he set out to address. In one paragraph, the *Quarterly Review* attempted respectfully but firmly to send Austin back to the dusty basement of the English legal library.

The *Quarterly Review's* dismissive treatment of John Austin speaks volumes. First, it highlights the dramatic rise in England's currency with Austin. Admitting the imbalance of spilled ink between Maine and Austin, the reviewer offered the following apology for skating lightly over *The Province of Jurisprudence, Determined*: "we hope to be understood as by no means undervaluing its importance. Mr. Austin's lectures are always mentioned with high respect, but they have never been extensively read. They failed, when delivered, to attract, or at least to retain, an audience, and it would have been extraordinary if they had not."³⁰ This admission highlights the prior obscurity of Austin's writing, an obscurity which would quickly disappear as the events of the American Civil War brought Austin into the Reform debate.

More importantly, however, the dismissive treatment visited on Austin's book demonstrates the central element of Tory strategy: keep the focus on the foibles of democratic government and ignore the complicating issues raised by federalism. The Tories clearly had no interest in responding the suggestion in July's *Edinburgh Review* that Austin's book had renewed relevance in light of American affairs and ought to be consulted on the knotty issue of sovereignty in the federal constitution. As was made clear in Lord Cecil's article of this particular issue, democracy was the problem, not sovereignty-sharing. The *Quarterly Review* would brook no distraction on this issue.

³⁰ The Quarterly Review, July 1861, p. 135

Indeed, if pressed, the Tories were unlikely directly to refute a claim by an English jurist which seemed to impugn divided sovereignty. As we will see, within a decade this precise circumstance would come to pass, and the Tories would unhesitatingly rally behind the Austinian position of Albert Venn Dicey in his vigorous exertions against the implementation of a federal solution to the Irish question. Thus, the Tories were obliged to dismiss Austin and the federalism question as of limited utility or irrelevant, rather than directly refute Liberal arguments.

The *Edinburgh Review*, however, would not let the Tories dodge the question. The next issue, released in October 1861, contained a comprehensive review of “English Jurisprudence”, and with subtle snark the editor reversed the *Quarterly Review*’s headings to list Austin first, Maine second. Devoting significantly more ink to Austin, the *Edinburgh Review* indulged in a far more serious inquiry as to why Austin had not been more broadly read and set forth in detail the contents of his lectures.

The *Quarterly Review* had offered some prefatory remarks to its study of Maine’s *Ancient Laws*, observing a paucity of general jurisprudence in England, and lauding Maine for bringing a sense of historical heritage to the mere practitioner. But the *Edinburgh Review* made a far more immediate claim for the relevance of Austin’s thoughts on jurisprudence. General jurisprudence, argued the reviewer, only achieves currency when political events propel it to the front of public consciousness – as the early stirrings of the French Revolution provoked searching meditations on the constitution of society. England, however, had been blessed with a dearth of such causes, and it is to this relative stability that England owed an underdeveloped legal philosophy: “the study of jurisprudence is injured by a good administration of justice and a good system of legislation, and favoured by a bad one.”³¹

After a detailed summary of Austin’s legal vocabulary, the *Edinburgh Review* made a case for what it found to be the most powerful element of Austin’s *Jurisprudence*. “The notion is sovereignty...is more remote from the common controversies of every day life than the notions of law, right, duty, and their correlatives. It colours, however, almost all political controversies which are of more than passing importance; and though such questions occupy little public attention in our own country, there is no reason to suppose that they may not derive prominence from the course of events at some future time”.³²

This reassuring passage served to divert attention from the bold (though vindicated) proposition that “Mr. Austin’s propositions on jurisprudence have as

³¹ “English Jurisprudence”, *Edinburgh Review* October 1861, 457. The reviewer was J. F. Stephen, according to H.L.A. Hart in his introduction to Austin’s *The Province of Jurisprudence, Determined* (New York: Noonday Press, 1954)

³² *Ibid.*, 470

much precision, and will in all probability be seen hereafter to have as much importance, as the propositions of Adam Smith and Ricardo”, and the reviewer swiftly proposed an appropriate, significantly “important” application of Austinian sovereignty: the American Civil War.

“Till the know was cut, or perhaps complicated, by civil war, the question where the sovereignty of the United States resided was one of great interest, and played a considerable part in those discussions between advocates of States rights and the advocates of the paramount authority of the Union, which for many years inflamed the quarrel between the North and South, and so prepared the way for civil war.”

Supporting the Whig proposal to expand the franchise, and facing a grim situation in American democracy, the *Edinburgh Review* naturally found it expedient to focus on the constitutional element of the American government which would distinguish the American crisis from the English proposal. By framing the American Civil War as a crisis of federal sovereignty, not democracy, the *Edinburgh Review* shrugged off the domestic ramifications of the American debacle and charged federalism and its muddled sovereignty with the dissolution of the American union.

John Austin’s work played neatly into this strategy. It would be (at least for Austin) as the *Edinburgh Review* observed, that only great political passions would propel a general theorist to the forefront of disputation. The prominence of the American Civil War in the English debate over parliamentary reform was sufficiently great to bring John Austin and his conception of sovereignty to an unprecedented level of currency in English constitutional thought, and as the federalism debate played out, the use made of John Austin would color English opinions on federalism in powerfully enduring manner.

IV. PROSECUTING FEDERALISM

Having examined John Austin, their witness, the liberal Whigs were prepared fully to redirect the trial of democracy and prosecute federalism as the cause of the American Civil War. In the same issue containing the review of Austin’s *Jurisprudence*, the *Edinburgh Review* condemned the Federal effort at unification by force as the unjustified pursuit of “territorial dominion”, adopting a

Calhounian view of the American Constitution and deploying John Austin's conception of sovereignty to denounce the viability of a federal constitution.³³

In October 1861, the "proper" understanding of the American federal experiment itself was ambivalent, to say nothing of federalism as a general proposition. The constitutionality of secession was yet an unsettled question: after describing John Lothrop Motley's interpretation of the American federal constitution, which favored federal authority, the *Edinburgh Review* offered its readers several Calhounian arguments in favor of nullification: several based on passages from the Federalist and opinions attributed to the Founders, and one from a former Attorney General of Pennsylvania.³⁴ Significantly, the reviewer presumes familiarity with "Mr. Calhoun" to such an extent that the Southern constitutional theorist appears by reference alone.³⁵

England was uniquely situated to examine both "orthodox" and Calhounian theories of federal jurisprudence. Having declared neutrality as to the combatants, the English press considered constitutional arguments from both sides without partisan fervor. And in fact the *Edinburgh Review* came down strongly in favor of a right to secede. Citing Madison in Federalist 39, the reviewer surveyed the process of ratification and concluded that the Federal government was exercising national powers in violation of the "express *dicta* of the authors of the Constitution", inventing a doctrine "new in American constitutional law".³⁶

Indeed, the *Edinburgh Review* declared the conviction, expressly on behalf of all European statesmen, that "if there be in America a party who think they are contending for the maintenance of the Constitution of 1789, these men are self-deluded." The "high doctrines of allegiance" in monarchies and unitary states were inapplicable to a federal system with a divided sovereignty.³⁷ No, federalism engendered a right to secede – a Calhounian "out" mechanism.

Ultimately, argued the reviewer, it was this ill-considered scheme of divided sovereignty that caused the American Civil War. Citing Calhoun and a Pennsylvanian named William Rawle in favor of a right to secede, the *Edinburgh Review* rejected John Lothrop Motley's 1861 "Causes of the Civil War in America", which "considerably overstated the sovereign powers of the Union . . .

³³ *The Disunion of America*, THE EDINBURGH REVIEW, October 1861, at 556, 561 ("Absolute sovereignty, in the true and correct meaning of the term, does not exist in a Federal State, unless it be represented by the concurrence of all the members of the State, both collectively and severally: in the absence of that concurrence the highest power is divided between two sovereignties, the one limited by the other, and neither supreme.").

³⁴ *Id.* at 559-565.

³⁵ *Id.* at 565.

³⁶ *Id.* at 561.

³⁷ *Id.* at 564.

no such paramount supremacy as he ascribes to it ever had any real existence.”³⁸ Motley had argued that the war was just and necessary to defend the Constitution, but the *Edinburgh Review* flatly rejected this construction of the American federal constitution. Adopting Calhoun’s position, the reviewer contended that federal unions, and particularly the American federal system, do not engender sovereign national government. Should a member state desire secession, no legal roadblock could ultimately frustrate a state’s desire to sever the legal relationship. The suffering and bloodshed, lamented the reviewer, was merely the result of territorial aggression. The essay closed with an earnest plea to the North to recognize the Confederacy.

This was no casual survey. Nor was it the uncritical assimilation of Northern federal theory which might have produced the lacuna in European federal theory Backer takes such pains to bemoan. As evidenced by this essay and the others reviewed above, commentary in England was extensive and critical, specially noted by the author of the essay on “The Disunion of America” (a title strategically chosen to offset the *Quarterly Review*’s “Disruption of America”). Responding to John Jay’s Mount Kisco Fourth of July oration, in which Jay alleged that the English were ignorant of the constitutional landscape across the Atlantic, the reviewer returned:

“[I]f he were at all acquainted with the political literature of England and Europe, he would be aware that few subjects have been the theme of so much discussion amongst ourselves for the last half century as the American Constitution. . . . we venture to affirm, that the question being dispassionately viewed in this country from a greater distance, has been, on the whole, more accurately judged here by the American people themselves.”³⁹

What was this “more accurate” verdict? “The controversy between State sovereignties and Federal sovereignty is interminable, for it is inherent in the nature of all governments the members or subjects of which are in some measure sovereign.”⁴⁰ Democracy had not caused the American Civil War: the culprit, rather, was the inevitable working of a federal scheme, under which a disenfranchised state overruled by the majority and oppressed by the federal government could rightfully secede. Where Austin had observed that federal governments were beholden to the sovereignty of the Union held in common by the aggregated states, the *Edinburgh Review* made the normative claim that this necessarily causes divisive strife and invites minority tyranny, naturally

³⁸ *Id.* at 566.

³⁹ *Id.* at 568.

⁴⁰ *Id.* at 561.

culminating in resort to arms to settle constitutional insufficiencies. From this perspective, the use of force to maintain the federal union was a constitutionally unjustifiable act of aggression, and the war was thus the product of Northerners frustrated with the inevitable consequence of the innovative American constitutional scheme. That holy English terror was invoked for rhetorical effect – “Never, since the great French Revolution of 1789, has a country been thus lacerated by its own sons” – and federalism was found liable.⁴¹

V. CLOSING ARGUMENTS

The next year was filled with bloodshed in America. The land war had begun in force, and Union armies marched on Virginia. English public opinion swung even more firmly against the war, in large part because English merchant ships attempting to circumvent the blockade were routinely seized by Union troops. The summer was an extremely bloody one, culminating in the Battle of Antietam on September 17th, 1862, and Lincoln issued a preliminary Emancipation Proclamation quickly thereafter on the 22nd, which the English derided as further proof that the question of slavery in the war was one of expediency, not principle.

For the purposes of the debate raging in the English press, however, very little changed. For many commentators in the learned quarterlies, events in America were only of interest insofar as they bore on the pressing issue of further domestic democratization.⁴² The intervening year between the appearance of “The Disunion of America” in October 1861 and the next major essays served only to refine the previously articulated positions in the *Edinburgh Review* and the *Quarterly Review*. In their respective October 1862 issues, each quarterly printed what can best be characterized as closing arguments in this “trial of democratic institutions”. The essays each had the elements of arguments in summation. The central issues had been settled and laid out; the essential authorities examined and cross-examined. The challenge now was to summarize the course of the debate, address counter-arguments, and confirm the guilt of the proposed culprit.

⁴¹ *Id.* at 579. The spectre of the French Revolution was another recurring theme in this debate, first introduced by Lord Cecil in his opening salvo *Democracy on its Trial*, *supra* note 6 at 251 (Noting that faith in democracy produced the French Revolution).

⁴² This was less true of the daily papers and weekly magazines, which provided more responsive coverage of developments in the civil war and international relations. In the learned periodicals, however, especially as time wore on, there was an unmistakable bias towards viewing the American Civil War primarily as an instructive constitutional problem. They were more directly partisan, so the franchise question provided a natural point of adhesion for the constitutional analysis. Plus, the format was conducive to theorization and extended analysis. Finally, their readerships were typically erudite, upper-class Englishmen likely to be plugged into Whitehall debates, and thus particularly interested in and responsive to topics which bore on domestic English disputes.

Appropriately, Lord Cecil delivered the summation for the Tories in the *Quarterly Review*. Tellingly entitled “The Confederate Struggle and Recognition”, Lord Cecil’s sketch of the debate was largely in line with his earlier analysis. Summarizing the march of English public opinion on the subject, which began with an instinctive sympathy with the North and its abolitionist elements and culminated with utter English disillusionment with an unconscionable war, Lord Cecil urged England to recognize the Confederacy.

The bulk of the essay, however, was devoted to the domestic implications of the American struggle. Lord Cecil once again observed that “there is no doubt that American proceedings would have been discussed less eagerly in England, and possibly criticised with less freedom, if they had not been made the turning point of a political controversy of our own.”⁴³ The American Civil War was “fraught with instruction” for England: “every step that it takes teaches us something with respect to the working of the political system which has been tried in America for the first time on a large scale, and which England has been so frequently called upon to imitate. And the more the civil war progresses, the more important its teaching becomes.”⁴⁴

Lord Cecil’s thesis was straightforward: England had been intoxicated with American prosperity, attributing the tangible economic might of the new nation to their form of government, but recent events had permanently discredited democratic systems. “The impression produced upon the majority of spectators in England has undoubtedly been that democratic institutions have failed.”⁴⁵ Reviewing sundry pre-war statements in favor of further democratization, Lord Cecil adopted a tone of paternal admonition, suggesting that “this feeling [that democracy was discredited] would not have been so general or so decided if the particular virtue of democratic institutions had not been so strenuously vaunted.”⁴⁶ He demanded that the admirers of democracy be held accountable for their choice of venue – “[t]hose who originally chose the battle-field must be responsible for the choice—not those who perforce accepted it” – and urged a verdict against democracy.

The essay was very much in line with Lord Cecil’s earlier screed. As far as his critique of democracy was concerned, nothing had changed. Lord Cecil simply followed Tocqueville’s criticism of statesmen in democracies and denounced democracy as a “fair-weather system” unable to produce statesmen of

⁴³ *The Confederate Struggle and Recognition*, THE QUARTERLY REVIEW, October 1862, at 538.

⁴⁴ *Id.* at 541.

⁴⁵ *Id.* at 538.

⁴⁶ *Id.* at 538.

sufficient merit: “a State must have a more tenacious organisation and abler rulers than Democracy can give it”.⁴⁷

There was one significant development, though: when addressing the Liberal counterarguments, Lord Cecil ceded the *Edinburgh Review*’s position on federalism. The extensive and detailed commentary on Calhoun’s views on federalism, Austin’s *Jurisprudence*, and the tendency of federal systems to engender an “interminable” tension over the location of sovereignty, which the federal government was insufficiently vigorous to quell, had overcome the *Quarterly Review*’s attempt to dismiss federalism from the debate. Lord Cecil was thus obliged to confront and concede those arguments.

Of course, Lord Cecil treated the ramifications of that particular conclusion dismissively, arguing that the faults inherent in federalism did not exculpate America’s more blameworthy democratic institutions. “The essential weakness of a Federal form of government was a moral that lay on the surface of Secession. But as we have nothing Federal in the form of our Government, and are never likely to have, the moral had no peculiar interest for us.”⁴⁸ The real question for Lord Cecil was whether or not democratization was advisable, to which point Liberal quibbling about the weaknesses of federalism was irrelevant.⁴⁹ In fact, he cheerfully granted the point, acknowledging that “[t]he mere event of Secession was, in a considerable degree, due to the defects of the Federal system”.⁵⁰

In Lord Cecil’s demurrals, blaming federalism as a root cause of the American Civil War, we can see the earliest consensus articulation of what would become a deeply rooted English suspicion of federal arrangements. As a result of this debate, the twin poles of English political ideology agreed that federalism was a but-for cause of the Civil War. Austin’s understanding of sovereignty seemed to be the finest conceptual model for understanding why this was so – in analyzing the location of sovereignty in a supreme federal government, Austin had placed the sovereignty in the states, collectively, against the federal government, which seemed far too weak to sustain the Union in the face of inevitable fissures. Furthermore,

⁴⁷ *Id.* at 556.

⁴⁸ *Id.* at 541.

⁴⁹ *See Id.* at 542 (“Let us, then, eliminate from the problem all disturbing and collateral causes. The mere event of Secession was, in a considerable degree, due to the defects of the Federal system; and the Federal system has no necessary connexion with Democracy. Let us, then, pass by the question of Secession, and confine our attention to more recent events. Since the Secession, at all events, the Federal principle has not interfered. The government of the United States for fifteen months has been in practice as centralized as that of France. Those fifteen months will form a fair test of the working of government by the multitude.”).

⁵⁰ *Id.*

Democracy might or might not be a terrible idea – as it would happen, the Reform bill would pass and the English franchise would expand – but the bell warning England that federalism is inherently threatening to the stability of a political state, and linking Austin’s conception of sovereignty to that conclusion, could not be unrun.

VI. PRECEDENT?

By the early 1860s, educated England had concluded that federalism was irredeemable as a constitutional proposition. At the time, however, this conclusion seemed purely academic. As Lord Cecil put it, conceding the inherent danger of a federal constitution, “as we have nothing Federal in the form of our Government, and are never likely to have, the moral has no peculiar interest for us.”⁵¹

The irony of this statement is clear today, as the United Kingdom has become a member-state of a quasi-federation and has become itself more federal in form. European integration proceeds, U.K. devolution marches on, the English judiciary has been severed from its ancient seat in the House of Lords, and England is pressured to meaningfully enforce Convention rights. The heightened interest modern scholarship has taken in federal theory is thus highly warranted.

Lord Cecil’s bold words are doubly ironic, for within a decade, federal proposals quite close to London produced quite a bit of domestic interest in the lessons of the American Civil War. In this, the *Edinburgh Review* was a far more accurate prophet, having noted that “though such questions [the applications of Austin’s conception of sovereignty to federal constitutional arrangements] occupy little public attention in our own country, there is no reason to suppose that they may not derive prominence from the course of events at some future time”.⁵²

The necessary “course of events” came to pass within a decade. Indeed, as Michael Burgess has observed, “1870 was an important turning-point in the growing appeal and relevance of federalism in British politics.”⁵³ A proposal for Canadian federation was fully articulated in 1865, and throughout the 1870s and beyond Irish parliamentarians would propose various forms of federation with

⁵¹ *The Confederate Struggle and Recognition*, *supra* note 39, at 541.

⁵² *Id.*, at 470. Austin’s authoritativeness by this point was confirmed. Following the English federal debates, the rest of Austin’s works were published in 1863, and were the subject of an extensive and glowing review in October’s *Edinburgh Review*. Though conceding that Austin’s name had hitherto been known only to students of jurisprudence, the reviewer attributed the expansion of that field directly to Austin, and predicted that Austin would inescapably be better known to posterity, essential not merely to practitioners, but to “the higher class of intellects” generally. *Austin on Jurisprudence*, THE EDINBURGH REVIEW, October 1863, at 439.

⁵³ MICHAEL BURGESS, THE BRITISH TRADITION OF FEDERALISM 23 (Leicester University Press 1995).

England as a practicable way of securing Home Rule for Ireland. The innocuous Canadian proposal, far from English shores and concerning a territory with a less antagonistic history, did not produce a constitutional firestorm, but the Irish proposals were another matter entirely. Invoking the fury of the prominent Victorian jurist Albert Venn Dicey, who vigorously revived the position attributed to Austin during the “trial” of federalism in the early 1860s, England’s condemnation of federalism was renewed with a vengeance.

Canadian Federation

Even though Canadian federation failed to raise the level of English constitutional outrage we have seen (with regard to the American Civil War) and will see (in response to suggestions for a federal Ireland), hints at the beginnings of a legacy left by the American federal debates are evident even in the relatively limited English commentary on Canadian matters. Because a closer look may furnish interesting perspectives on the hardening of English attitudes to federalism, I sketch here the broad outlines of Canadian federation and invite those more familiar with the subject to provide such further detail as may prove relevant.

In October 1864, delegates from around today’s Canada gathered in Quebec City to discuss the possibility of a federal union. Canada had once been bifurcated into West and East Canada (today Ontario and Quebec) and was united in 1840 to form the Province of Canada by Pitt’s government, while British Columbia, Nova Scotia, and several other . Circumstances since 1840, however, drastically changed the population landscape and rendered the 1840 Act obsolete in its representation schematics. British American Federation, as it was called, was the proposal by delegates from New Brunswick, Nova Scotia, and Canada proposing a “Federal Union under the Crown of Great Britain”, and after two conferences, the first in September at Prince Edward Island, and the second in Quebec City in October, the delegates promulgated a series of draft resolutions attempting to strike a balance which would preserve provincial rights and identities while creating a strong central government.⁵⁴

The resolutions of the Quebec Conference were published in *The Times* on October 24th, 1864. *The Times*’ evaluation of the proposals was sunny: seeing them as prudent measures to improve the governance of a “pre-eminently loyal” territory, *The Times* particularly approved of the strong central government.

⁵⁴ I do not focus on the discussion surrounding the Quebec Conference and the British North America Act, as it had a less incendiary effect on English commentary than the Home Rule issues, and aroused less extensive constitutional inquiry. See note 57, *infra*. Nonetheless, it raises many of the issues inherent to this discussion, having strong analogues to the debate between European integrationists and statists and may produce equally revealing findings.

“The Canadians and their neighbours probably think that the worst point of the American Union was the weakness of the Federal authority, and are anxious to obviate such an evil in their own Constitution.”⁵⁵

The *Edinburgh Review* also welcomed the resolutions, and expressed hope that the proposals would prepare Canada for independence.⁵⁶ Weighing in on the Quebec City resolutions, however, in January of 1865, the *Edinburgh Review* was quick to raise an Austinian concern regarding the institutional structure proposed for a “Federal Union under the Crown of Great Britain”. “It is the essence of all good Governments to have somewhere a true Sovereign power”, noted the reviewer, and “the vital question for the framers of this Constitution is how the inherent weakness of all Federations can in this instance be cured, and the Central Government armed with a Sovereignty which may be worthy of the name.” The natural point of reference was the American Civil War, and the *Edinburgh Review* took a less than cheery view of the Resolutions.

It has been assumed by those who take a sanguine view of this political experiment that its authors have steered clear of the rock on which the Washington Confederacy has split. But if the weakness of the central government is the rock alluded to, we fear that unless in clear water and smooth seas the pilot who is to steer this new craft will need a more perfect chart than the Resolutions of the Quebec Conference afford...

This sidelong criticism reveals the Austinian concern gleaned from recent debates over the American Civil War. A complicated sovereignty-sharing arrangement had been discredited, and the *Edinburgh Review* instinctively shied away from such proposals. “Sooner or later, the shadow of authority which is reflected from an unsubstantial political idea must cease to have power among men.” Notwithstanding workability concerns, however, the Canadian proposal itself excited little public constitutional controversy, in stark contrast to the American events of the decade.⁵⁷ Parliament, following the seventy-two resolutions from

⁵⁵ Correspondent’s report, THE TIMES (London), Nov. 24, 1864, at 8.

⁵⁶ Self-government would come in 1867 with the passage of the British North America Act, which ratified Canada’s status as a federal dominion, or self-governing territory of the British Empire.

⁵⁷ This is readily explained: federalism had been the subject of sustained inquiry for the limited purpose of excusing democracy from fault. The question does arise, however, if federalism had been so comprehensively discredited, how was it that the English failed to raise a colossal fuss when their Dominion proposed a federal scheme? Indeed, as we will see, when a federal solution to the Irish Question was advanced, a parade of horrors was invoked, culminating with the disintegration of the mighty Empire. The answer is fairly simple. Canadian federalism was both geopolitically unthreatening and economically attractive. Canadian federalism would not alter its dominion status – Canada would still be a property of Queen Victoria’s, entirely subordinate to Parliament. Moreover, Canada was a very remote property, and hadn’t the history of armed insurrection that England’s nearer neighbor presented. As Albert Venn Dicey would point out, however, federalism for Ireland was an entirely different proposition. Federalism for Ireland meant federalism for the entire United Kingdom, because it was generally contemplated that

the Quebec City conference, passed the British North America Act in 1867 and the matter was settled.

Albert Venn Dicey and Irish Federalism

The Irish situation, on the other hand, re-ignited the devastating conclusions reached concerning federalism during the early 1860s. Ireland had been subsumed into Great Britain by the Act of Union in 1801, and had been pressing for increased measures of self-government (and independence, in some circles) ever since. As liberal members of Parliament articulated increasingly serious proposals for a federal solution to the vexing “Irish Question”, the earlier, liberal criticisms of federalism were taken up vigorously by Conservative Unionists, who feared that federalism would poison the unitary sovereignty of Great Britain and fracture the British Empire.

The intellectual lineage of this startling political volte-face is best traced through the constitutional exertions of Albert Venn Dicey. As his biographer notes, the Austinian revival “coincided with Dicey’s call to the bar in 1863” and exerted a profound influence on the development of his legal thought.⁵⁸ Though Dicey would come to disagree with his intellectual role model on some points, he accepted the broad strokes of Austin’s conception of sovereignty, especially regarding the indivisibility of sovereignty properly so called. Indeed, Dicey’s major *oeuvre*, *The Law of the Constitution*, took this position as its bedrock premise. Contemporaries were well aware of “the debt Dicey owed Austin, coupling the two men repeatedly.”⁵⁹ “I consider your defense of Austin—as to sovereignty in England—the best that can be made”, one admirer of *The Law of the Constitution* wrote Dicey in 1885.⁶⁰

Dicey would bring the Austinian criticisms of federalism, already academically voiced during the American Civil War, to bear sharply and practically upon a serious domestic issue. His use of the American Constitution as a direct foil to the English may have been preceded by Walter Bagehot’s *The English Constitution*, but his vituperation against the consideration of that American scheme for Britain was a dramatic departure from his predecessor’s more descriptive venture. Diceyan jurisprudence would enshrine the application

Ireland would become something like a “state” to the Great British “Union”. Canadian federalism, on the other hand, would simply create a discrete federal entity which would owe allegiance as a whole to the UK. Thus, “Irish federalism” seemed to shake the philosophical foundations of the Union to the core, while the Canadian dominion, organized in whatever form, would still simply be an entity owing allegiance to the UK without representation in Parliament.

⁵⁸ RICHARD A. COSGROVE, *THE RULE OF LAW: ALBERT VENN DICEY*, VICTORIAN JURIST 23 (University of North Carolina Press 1980).

⁵⁹ *Id.* at 26.

⁶⁰ *Id.*

of John Austin's conception of sovereignty as an anti-federal proposition firmly within the canon of English constitutionalism.

In August, 1870, an Irish Member of Parliament named Isaac Butt distributed a pamphlet entitled "Home Government For Ireland: Irish Federalism".⁶¹ By the summer of 1874, the idea would be the subject of intense debate in the House of Commons.⁶² Butt's proposal was voted down, but the seed was planted, and as Fenian insurgence in Ireland grew increasingly prominent and the nationalist movement gained depth and political clout, London increasingly took note of the possibility of a federal solution to the Irish question: how to preserve English sovereignty while permitting a secure measure of self-governance to Ireland. By 1885, this proposal had reached the highest ranks: Gladstone was convinced that some form of Home Rule was necessary for the good government of Ireland and proposed an essentially federal solution.⁶³

These developments infuriated Dicey, then a rising star in English legal circles. He had been in the midst of his legal education during the period of constitutional ferment in the early 1860s. Just as John Austin's ideas were becoming broadly known and highly acclaimed, and as federalism was the object of a highly charged inquiry, Dicey was studying law at the Inns of Court. "The final influence on Dicey was his study of and enduring admiration for the writings of John Austin", Richard Cosgrove observes, for Dicey arrived in London from Oxford in 1861, just as the Austinian revival had begun, and Austin's formative influence on the young barrister was profound.⁶⁴

Dicey had been at Oxford with Edward A. Freeman, the author in 1967 of a sweeping history of federalism, and between this friendship and the political controversies of the period his familiarity with the subject of sovereignty in federal systems was assured.⁶⁵ The trial of federalism traced above would have deeply interested him: indeed, until 1867 he found himself in the Liberal party,

⁶² This debate, carried on in Parliament from June 30 to July 2, 1874, would no doubt be revealing, but is beyond the scope of this paper. Of additional interest would be a piece entitled "Federalism and Home Rule", in which Edward Freeman argued that Federalism cannot be a divisive force. As noted *supra*, Freeman and Dicey were Oxford chums – this would be an interesting thread to pursue. See JOHN KENDLE, IRELAND AND THE FEDERAL SOLUTION at 18.

⁶³ The proposal was a mix of colonial and federal features. Introducing the bill, Gladstone "stated flatly that he was not adopting federal arrangements", which is a testament to the power of Dicey's 1882 broadside. For the record of the speech introducing the bill, see 3 Hansard (House of Commons) volume 304, 8 April 1886, Column 1037. Federal issues were raised in the debate: Chamberlain, in fact, preferred a more federal solution. See KENDLE, *supra* note 57 at 51-53. The second-reading debate ended on June 8th, 1886, and Gladstone's bill was voted down.

⁶⁴ COSGROVE, *supra* note 53 at 23.

⁶⁵ Dicey would later list Tocqueville as one of the formative influences on his constitutional thought. See *id.* at 13. Additionally, Dicey spoke at the Oxford Union on the subject of secession in America. *Id.*, 17.

the party which most directly impugned the viability of federal constitutional arrangements, and the intense constitutional theorizing of that period affected him deeply. In the words of his biographer, “[t]he world of 1854-1867 remained ever after for Dicey the zenith of the English political system, and nostalgia for that era was the primary motif of his later politics.”

His later politics, indeed, formed the issue with which he would forever be linked: opposition to Home Rule for Ireland. Though his legal career was unremarkable, and followed by an equally unremarkable government post at Inland Revenue, Dicey found his calling as a legal scholar in 1870 with the publication of a treatise on the forms of pleading.⁶⁶ After a tour of America with James Bryce and several scholarly appointments, Dicey was appointed to the Vinerian Chair of Jurisprudence at Oxford in 1882. By this point he had published several legal treatises and had played a significant role in the development of English legal education. With the appointment to the Vinerian Chair, however, Dicey could devote his full energies to what would become his best-known work, *The Law of the Constitution*.

Coincident with his new role, the Home Rule debate reached a new apogee, and in 1882 Dicey could no longer resist entering the fray. His time in America during the 1870s had provoked a great deal of reflection on first principles of constitutional design.⁶⁷ This would be obvious in 1885 with publication of *The Law of the Constitution* – Dicey would later speculate that “neither the Law of the Constitution nor certainly Law and Opinion would have been produced but for this journey”⁶⁸ – but the effect of his reflections emerged in 1882 for more immediate purposes.

Justin McCarthy, a Home Ruler and MP for Longford County, Ireland, had proposed an arrangement which “would establish between Ireland and the Imperial Parliament the same relations in principle that exist between a state of the American Union and the Federal Government, or between any State of the Dominion of Canada and that Central Canadian Parliament which meets in Ottawa.”⁶⁹ This proposal drew Dicey into the arena, and his trenchant rebuttal appeared as “Home Rule from an English Point of View” in the *Contemporary Review*.⁷⁰ In this essay, the object of which was “to answer reasoners who

⁶⁶ The Judicature Act had not yet been passed, and Dicey’s book, distilling the mass of forms into a sequence of carefully delineated rules, provoked a congratulatory letter from Baron Bramwell. *See id.* at 33.

⁶⁷ *See id.* at 35 (Observing that Dicey’s “experience with American federalism sharpened his insight into the British constitutional principles dealing with sovereignty.”).

⁶⁸ *Id.*, 35. Cosgrove notes that Dicey’s “experience with American federalism sharpened his insight into the British constitutional principles dealing with sovereignty.”

⁶⁹ Albert Venn Dicey, *Home Rule from an English Point of View*, THE CONTEMPORARY REVIEW, v. 42 (July 1882), at 72.

⁷⁰ *Id.* at 66.

maintain that Federalism will not injure, or may even benefit, Great Britain”, the seeds planted by John Austin and nourished by the fertile discussions of the 1860s flowered.⁷¹

The manner in which Dicey undertook to meet McCarthy’s proposal reveals the extent to which his thought was dominated by the larger questions he would address in *The Law of the Constitution* – larger questions which expose his intellectual pedigree as a man who received his legal education during the American Civil War and the Austinian revival. Dicey did not deign to notice the institutional particularities of the most recent Home Rule scheme, electing to wage his war against federalism *per se*. “Home Rule is Federalism”, Dicey stated bluntly, and “[t]he best way, therefore, to criticize the ideas of Home Rulers is to assume that in principle, though not in detail, they involve the adoption throughout the present United Kingdom of a constitution like that of the United States.”⁷²

In choosing the general theorist’s approach, Dicey demonstrates the extent to which Federalism, notwithstanding the soothing words of Home Rulers and the success of the Canadian experiment, was still a bogey-word in England. One of Dicey’s strategic moves in the essay was to remind his readers that “Irish Federalism”, the title of Isaac Butt’s pamphlet, was a misnomer – the proposals necessarily entailed “British Federalism”. His efforts to reframe the terminology demonstrate that Dicey, a savvy rhetorician, anticipated the chilling connotations the latter moniker would bear.

The other significant benefit to Dicey’s generalist approach was that it allowed him to make more direct references to the American Civil War without being bogged down with minor institutional differences. Every major point Dicey scored against federalism was supported by a reference to the “War of Secession”. Arguing that federalism “destroys the sovereignty of Parliament”, the hidden genius of the British Constitution, Dicey observed that federalism entailed a sovereign court, which could not be optimistically restrained. “If any one wishes to see the extent to which the power of such a court has gone in fact, he should study the decisions on the Legal Tender Act, which all but overset or nullified the financial legislation of Congress during the War of Secession.”⁷³ Contending that a federated Ireland was just as prone to liase with enemy nations as an independent Ireland, Dicey was quick to observe that “the Government of the Union found the disloyalty of South Carolina harder to check than the enmity of Canada.”⁷⁴ Arriving inexorably at the argument that federalism promotes disunion, Dicey pointed out that “the two most successful confederacies in the

⁷¹ *Id.* at 67.

⁷² *Id.* at 73.

⁷³ *Id.* at 77.

⁷⁴ *Id.* at 79.

world have been kept together only by the decisive triumph through force of arms of the central power over real or alleged State rights. General Dufour in Switzerland, General Grant and General Sherman in America, were the true interpreters and preservers of the constitutional pact.”⁷⁵

The essay reads at first more like a prospectus than a screed. Dicey began with definitions and first principles, setting forth the distinguishing characteristics of a “Federal pact” and noting the challenges of federal constitution-making and the attendant requirements of the division of sovereignty. He proceeded to make what would become the central point of *The Law of the Constitution* – that “[u]nder all the formality, the antiquarianism, the shams of the British constitution, there lies latent an element of power which has been the true source of its life and growth. This secret source of strength is the absolute omnipotence, the sovereignty of Parliament.”⁷⁶ Thus, in Dicey’s first and lengthiest objection to federalism – that it “destroys the sovereignty of Parliament”⁷⁷ – we have a window into the composition of his larger *oeuvre*. Additionally, in the nature of his objection we can observe the lingering effect of the trial of federalism in the 1860s, and the shadow presence of Austin’s thoughts on sovereignty.

Indeed, the Irish controversy forced Dicey’s hand. Three years later, he would publish *The Law of the Constitution*, which still occupies a central place in a barrister’s education. And, as we can observe from his essay on Home Rule, the American Civil War and the conclusions England drew concerning federalism fuelled his convictions that the “secret strength” of the England’s constitution was the absolute sovereignty of her Parliament. Thus began the process whereby the “torch” of Austinian legal positivism, in “its commitment to a legally limitless sovereign power”, was “passed and carried into contemporary English thought by Dicey”.⁷⁸

VII. CONCLUSION

To revisit Ian Ward’s metaphor, it appears that we can locate our elusive Cheshire Cat in the English federal debates of the 1860s. Historical caprice was the driver behind John Austin’s remarkable revival. The coincidence of domestic constitutional politics with civil war in the land of the definitive ‘democratic experiment’ – and his widow Sarah’s timely industry – produced an unprecedented vogue for John Austin’s arcane treatise. During the debates over

⁷⁵ *Id.* at 83.

⁷⁶ *Id.* at 75.

⁷⁷ *Id.*

⁷⁸ 52 Am. J. Comp. L. 383 at 386.

franchise expansion, *The Province of Jurisprudence, Determined* became an essential text, and as interpretation of the American Civil War functioned as the primary battleground for English politics, Austin was pressed into service as the champion of indivisible sovereignty against the folly of federalism. As this *post mortem* identity was reinforced both by the subsequent efforts at Irish federation and Dicey's vigorous pen, which vested absolute sovereignty in Parliament, Austin's ghost was dragged from its quiet and largely apolitical repose in the halls of legal academe and pressed into service as the undying opponent of any proposal complicating English sovereignty.

Does this story, however interesting as historical marginalia, inform the present landscape of sovereignty in the United Kingdom? By observing how bound Austin's ideas were to a particular historical moment, and how extensively (and perhaps unfaithfully) they were shaped by the politics of that particular historical moment, we will be better able to address how usefully John Austin and his heirs can speak to contemporary debates over sovereignty in the United Kingdom.

The doctrine of parliamentary sovereignty has exercised a great deal of force in the United Kingdom, restraining efforts to create vigorous compliance mechanisms for the European Convention on Human Rights, and obstructing fuller integration into the European Union. This doctrine precedes Austin at least to Blackstone, and was most fully explicated after Austin's death by his disciple, Albert Venn Dicey. However, we can have no doubt that the degree of English recalcitrance on this question was shaped by the English federal debates during the 1860s. In the highly charged political atmosphere surrounding the battle over the extension of the franchise, federalism emerges as an incidental casualty of a different dispute. With this shaky, pseudo-historical foundation at the root of an entire school of constitutional dogma, commentators in England fond of deploying Austinian criticisms of new models of sovereignty, both domestically and internationally, will have to address the manner in which the intellectual and political landscapes have changed.⁷⁹

The recent evolution of a radically different constitutional order stands out as a particularly fertile area for inquiry. Indeed, a chief objection of Austinian commentators during the 1860s to federal arrangements was the presence of a Supreme Court with the power to overrule legislation – the very institution presently implemented in the United Kingdom.⁸⁰ If such a proposal was anathema to Austin's theory of sovereignty, how effectively can the theory function in a

⁷⁹ See David Jenkins, *From Unwritten to Written, Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863 (2003); Douglas E. Edlin, *From Ambiguity to Legality: the Future of English Judicial Review*, 52 AM. J. COMP. L. 383 (2004).

⁸⁰ See Peter L. Fitzgerald, *Constitutional Crisis Over The Proposed Supreme Court For The United Kingdom*, 18 TEMP. INT'L & COMP. L. J. 233 (2004).

constitutional order which has embraced it? As European integration progresses, and the newly independent U.K. judiciary determines how extensively to review potential violations of Convention rights, the traditional doctrine of parliamentary sovereignty will likely continue to lurk in the background. It would be well to remember how capricious was the last English debate on the merits of federal arrangements, and perhaps to revisit the debate unencumbered by its lingering debris.