

The Concept of the Constitution

In the Jurisprudence of Michael Oakeshott

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ABSTRACT

*Michael Oakeshott, Professor of Political Science at the London School of Economics (1950-1968), wrote and taught extensively on history, politics, philosophy, and law. Yet one of the central concepts in state theory, the constitution, goes almost unmentioned in his work, leading one to question whether, for him, such a concept even exists. This essay explores that question, arguing that such a concept does indeed exist. For Oakeshott, the constitution is learned and professed rather than written down and applied, in the manner of a vernacular language. This essay proceeds in six sections; section one examines the foundations of his thought, the Latin concepts of *lex* and *jus*, which stand for the written laws and ‘rightness’ of these laws. Section two explores how these concepts interact, and the relationship between politics and the law in the constitution. Section three expands on Tom Poole’s understanding of *societas* and *universitas*, the two ‘poles’ between which Oakeshott’s moral association may swing, to explain the reflexive, dialectical dynamic at the heart of his constitutional theory. Section four grounds Oakeshott’s jurisprudence in his theology, emphasising his individualistic philosophy and the central role moral discourse plays in it. Section five refocuses the debate on the rule of law, exploring Oakeshott’s argument that the constitution is an understanding we have of a ruler’s right to rule, and its relationship to another ambiguous concept, sovereignty. Section six concludes with a summation of Oakeshott’s concept of the constitution, and some thoughts on future comparative work.*

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INTRODUCTION

In his essay, *The Rule of Law*, Michael Oakeshott makes a characteristically sparing reference to the concept of ‘the constitution’, remarking that it is ‘neither more nor less than that which endows law with authenticity’.¹ It is one of the only times it appears as an object of discussion, let alone interest, in his works. Given his position as one of the leading British political thinkers of the twentieth century, this omission from his thought is perplexing, and begs an important question: Does a coherent concept of the constitution exist in the works of Michael Oakeshott?

A Fellow in history at Cambridge prior to the Second World War, Oakeshott took up the Chair in Political Science at the London School of Economics in the Michaelmas of 1950, lecturing on the history of political thought. He would remain the Convener of the Government Department at the School until his retirement in 1968, writing on history, politics, philosophy, and law. His most famous collection of essays, *Rationalism in Politics*, was a sustained attack on the post-war political consensus of contemporary Europe, gaining him repute as a leading liberal and conservative thinker. His magnum opus, *On Human Conduct*, was published in 1975, examining the theoretical foundations of what he called ‘civil association’; the general, abstract ideal of a political community. In 1983, *On History* added to many of the arguments of *On Human Conduct*, including an extended discussion on legal theory titled *The Rule of Law*. It is this last essay that has drawn a group of prominent scholars associated with the LSE to his work.² The legal philosophers Tom Poole, Martin Loughlin, and David Dyzenhaus, as well as the political theorists David Boucher and Jan-Werner Müller, have begun examining the importance of his philosophy for questions of law. The most

¹ Michael Oakeshott, ‘The Rule of Law’ in Michael Oakeshott, *On History and Other Essays* (Liberty Fund Press 1999) 152.

² David Dyzenhaus and Thomas Poole (eds), *Law, Liberty and State. Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press 2017); Martin Loughlin, *Public Law and Political Theory* (Oxford University Press 1992) 63-83; Martin Loughlin, *The Idea of Public Law* (Oxford University Press 2004) 153-163; Steven Gerencser, ‘Oakeshott on Law’ in Paul Franco and Leslie Marsh, *A Companion to Michael Oakeshott* (The Pennsylvania State University Press 2012).

striking account from these works emerges from Loughlin's *Public Law and Political Theory*, where he contrasts Oakeshott's 'conservative normativism' with what would later become his own 'Pure Theory of Public Law'. Loughlin claims that Oakeshott's philosophy, which exemplifies the prevailing 'language of [British] constitutional discourse', is 'now moribund', and has 'failed to meet the requirements of our times'.³ More recently, Müller has sketched an alternative vision of Oakeshott's 'constitutionalism'. Placing Oakeshott's idea of 'civil association' in the context of the Cold War, he draws a distinction between his value pluralist conception of the state and Hayek's model constitutionalism.⁴ However, while Müller comes closer than most to describing the true contours of Oakeshott's constitutional theory, his chapter is more an invitation to further discussion than a thorough-going constitutional investigation. His work explores historical and comparative factors behind Oakeshott's constitutionalism during the 1970s and 1980s, rather than the constitutional theory he is building per se. As such, despite this string of excellent critical engagements with aspects of his jurisprudence, none provide a comprehensive study into Oakeshott's constitutional thought.

Working in the shadow of these investigations, this article seeks to provide the groundwork for such a study, and to respond to some points made by the above authors. I argue that a novel, obscure, concept of the constitution lurks in Oakeshott's thought – one aligned more with contemporary 'common law constitutionalism' than he perhaps would have admitted. Continuing two main trends in current scholarship, I expand on the place of his writings in legal theory while implicitly questioning the extent to which his 'conservative normativism' is as moribund as has been thought. Oakeshott's thought, I claim, helps us understand the relationship between the various languages that comprise the constitution; the various manners in which it is discussed, understood, and practiced, such as politics or the law. If his jurisprudence is not as antiquated as has been thought, perhaps these reflections can help illuminate new pathways for thinking about the law in times of local and global constitutional questioning.

³ Loughlin (no 2) 234-235.

⁴ Jan-Werner Müller, 'Oakeshott's Peculiar Constitutionalism' in Terry Nardin (eds), *Michael Oakeshott's Cold War Liberalism* (Palgrave MacMillan 2015) 119.

~ I ~

THE FOUNDATIONS OF OAKESHOTT'S JURISPRUDENCE

Lex. Jus. Civitas.

Contemporary constitutional theory often draws a distinction between empirical, political constitutions and normative, legal ones. The former refer to the political conditions prevailing in a 'specific region at a given time', whereas the latter are specifically focused on the 'establishment and exercise of political rule' under law in that region.⁵ However, Oakeshott's writings weave together discussions of political, historical, philosophical and legal matters so tightly that 'to pull one out and consider it on its own without attention of the others would be to badly misconstrue the idea'.⁶ His concept of the constitution is no exception, blending both empirical and normative understandings such that their relationship becomes somewhat difficult to distinguish. Oakeshott thinks that there are a set of higher, non-man-made maxims of conduct that constitute 'The' constitution of civil association, which must be present in the goings-on of a constitution for it to uphold a state in the first place. These fundamental maxims he terms *lex naturalis* (natural law), although their usage differs significantly from the contemporary natural law theories of, say, John Finnis. They are the twenty maxims of 'true law' which Thomas Hobbes distinguished in his 1651 treatise *Leviathan*. These comprise not laws themselves, in Oakeshott's eyes, but the 'intrinsic character of law'.⁷ Principles that are not enforced or enforceable per se,

⁵ Dieter Grimm, *Constitutionalism. Past, Present, and Future* (Oxford University Press 2016) 3.

⁶ Gerencser (no 2) 312.

⁷ Hobbes' twenty natural laws are as follows, set out in chapters XIV and XV of *Leviathan*: I. Man is commanded to endeavour peace; II. Man is to be content laying down his right to all things, and with so much liberty against other men as he would allow other men against himself; III. Men perform their covenants made; IV. The object of all acts is the good of the self; V. One should strive to accommodate oneself to the rest; VI. Man ought to pardon the offences past of them that, repenting, desire it; VII. In revenge, men respect only the good, to follow not the evil past; VIII. No man by deed, word, etc. should declare hatred or contempt; IX. Against pride, we should see each other as equal by nature; X. Arrogance, being against peace, is against the commonwealth; XI. Equity in judgements, if he has been entrusted to judge between them; XII. Equal use of things common, following law XI; XIII. First possession be determined by lots, of two sorts; XIV. i. Arbitrary, agreed by competitors; XV. ii. Natural, or first seizure; XVI. They who are at controversy submit

but which determine if a law is or is not authentic, and therefore applicable to a case. A given 'law' which does not conform to these principles is not unjust, but it simply is not a valid law. It may *look* like a law, but it is not promoting the basic essence of what law is designed to do. Whether or not this law is desirable is another question; a political question, as Oakeshott later argues. Yet Oakeshott recognises that 'imposter laws' that do not follow this theoretical framework, which look like laws, are used like laws, and enforced like laws, can and often do exist. However, his point is that these constructions undermine the very substance of what law is meant to uphold – the ideal of civil association, and therefore are not 'laws proper' in his sense. The *lex naturalis* of 'The' constitution exists in a dialectical dialogue with, what I shall term, 'A' historically constituted 'constitution'. 'A' constitution is a contingent manifestation of both a historic past and a local, present reality: the particular body of rules of a certain society at a given time, sustained day-to-day by what Oakeshott calls 'argumentative moral discourse', relating to their constitution of government.⁸ He draws a clear distinction between these two understandings of what a constitution is, and how they relate to one another. Still, the distinction can often be obscured by this tight interrelationship of politics, legality, and history. Any understanding of Oakeshott's constitutional theory requires an exploration of the relationship between his legal and political thought, and how he delineates the constitutional whole of *civitas* (the state) from these two, subtly different understandings of the constitution.

That neither sovereignty nor the constitution feature as important concepts in his central work, *On Human Conduct*, is significant for understanding how the legal and political spheres interact. They appear nowhere in the index, with 'constitution' appearing only briefly in passages on pages 116 and 189-192,⁹ and

to an arbitrator; XVII. No man is his own judge; XVIII. None can be judge who is partial; XIX. Controversies of fact require witnesses; XX. These XIX follow from the first Natural Law, *do unto others that which thou wouldst not have done to thyself*. The binding rule.

⁸ Oakeshott (no 1) 156.

⁹ 'Merely to produce a book of rules or to refer an inquirer to a 'constitution' would be disingenuous: such a constitution might be indistinguishable from that of another such association with an entirely different purpose', 116; 'For a 'constitution' is that in which rulers and subject express their beliefs about the authority of a Government.', 189.

‘sovereignty’ in passing discussion with Bodin.¹⁰ This is because of the peculiar way Oakeshott construes the concept of the constitution. He thinks the constitution is found in an attitude of conduct toward the distinct mode of association, *respublica*, that characterises the civil condition, *civitas*. Oakeshott made extensive use of such Latin terminology in his works to denote complex concepts, which can make his thought somewhat inaccessible at times. He does this, however, in a deliberate manner. Terms such as *lex*, *respublica*, and *universitas* create a degree of separation between his abstract, ideal, theoretical discussions and the concrete practices of politics or law that exist in any actual state. The separation of abstract and concrete practices also reinforces the distinction between ‘*The*’ constitution, a theoretical ideal underlying the concept of the constitution in general, and ‘*A*’ constitution, which is contingent, historical, and contextual. This first section therefore explores the intricate and foundational legal concepts of Oakeshott’s ‘constitutional’ theory; *lex* (written, declared law), *jus* (legal ‘rightness’), and *civitas* (the ‘state’, or ‘civil association’).

Oakeshott begins exploring the authenticity of law in *A Discussion of Some Matters Preliminary to the Study of Political Philosophy (DPP)*. Here, he argues that ‘law... can never form a complete guide to conduct, let alone to life as a whole’.¹¹ Arguing against Harold Laski, Oakeshott echoes Georg Jellinek’s claim that the ‘state is a multi-faceted entity’ incapable of being ‘reduced to any single aspect’.¹² To do so would misconstrue the interplay of these aspects for the constitution of the whole. Instead, law is merely one of multiple component parts comprising civil association, expressed through the concepts of *lex*, *jus*, and *fas* (things permitted, as opposed to forbidden).

These thoughts heavily influenced his theory of the ideal civil condition (*civitas*) in *On Human Conduct*, forming the foundations of his ‘two-tiered’ concept of the constitution. ‘Two-tiered’, in that these are certain basic maxims which ‘true

¹⁰ Michael Oakeshott, *On Human Conduct* (Oxford University Press 2003) 116, 189-192, 245, 253. Also, elsewhere in passing, such as his ‘*Lectures on the History of Political Thought*’ 429.

¹¹ Michael Oakeshott, ‘A Discussion of Some Matters Preliminary to the Study of Political Philosophy’ in *Early Political Writings, 1925-1930* (Imprint Academic 2010) 127.

¹² Michael Oakeshott (no 11) 117; Gerencser (no 2) 333-335; See also Georg Jellinek, *Allgemeine Staatslehre* (Springer 1922) (as cited in Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2014) 193.

law' ought to adhere to, and also a 'prevailing moral discourse' against which laws that meet these basic conditions must be measured and found to be desirable. *Civitas* expresses a relationship he terms 'civil association', by which *personae* called *cives* are related to one another through a mutual recognition of common 'authority'. *Cives* are just one among numerous *personae* that human beings can, and do, adopt. Although politics and the law are closely connected to the idea of *civitas*, *cives* in civil association are not related in a 'political' nor a 'legal' manner, but a 'civil' one.¹³ *Civitas* is characterised by 'the recognition of rules' commonly called 'law', but to distinguish these 'laws' from the 'collection of rules and rule-like instructions... etc' that comprise existing states, Oakeshott terms them *lex*.¹⁴ *Lex* comprises 'formal' law, in that it is 'declared', 'spoken' or 'read out', having been written down to reflect a legislative process of a certain time as the 'will of the imperator'. His *Lectures* detail its two fundamental characteristics; that it is a 'rule' set from a particular date, and thus is capable of repeal, and it is a bargain or 'covenant' of essentially an arbitrary nature depending on 'keeping faith' with the Roman people.¹⁵

Lex draws heavily on the Hobbesian image of 'Civill Lawes' as 'Artificiall Chains', which are 'by mutual covenants... fastened at one end, to the lips of that Man, or Assembly, that hath the Sovereigne Power; and at the other end to their own Ears'.¹⁶ The understanding that laws are easily broken, being affixed as they are to the subjects 'Ears' and not their minds and held together not through 'difficulty of breaking them' but by the danger of doing so, is central to *lex*.¹⁷ It is neither a system of binary commands nor simple moral injunctions. It comprises the 'rules' of the social 'game', or the hedges keeping travellers on the road, denoted by its 'non-instrumental' character.¹⁸ *Lex* does not specify where to go, only marking paths by which one might get there. One may always choose to

¹³ Oakeshott (no 10) 108.

¹⁴ *ibid* 128.

¹⁵ Michael Oakeshott, *Lectures on the History of Political Thought* (Imprint Academic 2006) 241-242.

¹⁶ Thomas Hobbes, *Leviathan* (Penguin Books 2017) 173.

¹⁷ *ibid*.

¹⁸ Erika A. Kiss, 'The Rules of the Game' in David Dyzenhaus and Thomas Poole (eds), *Law, Liberty and State. Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press 2017).

break these rules, on the proviso that they are obligated to abide by the conditions set for breaking them.

Lex is kept conceptually separate from the customary and societal practices of a society, *fas*, *nefas*, and *jus*.¹⁹ *Fas* and *nefas* are religious ideas of the pre-legal mind, standing for ‘what was permitted... and forbidden to a Roman’ in relationship to the gods. They exist in contrast to *jus*, that which is right or ‘fitting’ by custom of the society. The custodians of *fas* were priests, the custodians of *jus*, specifically *jus humanum*, were magistrates.²⁰ Both, Oakeshott notes, were unwritten customary practices expressing ‘the legal order of the *communio Romanorum*’.²¹ This *communio* is contrasted to *lex*, which may always be repealed or amended given its ‘spoken’ status, if it is judged to contravene *jus* or *fas*. However, while both *jus* and *lex* form the basis of understanding *civitas*, it is the way they interact – the *jus* of *lex* – that is of significance to the concept of the constitution. I now turn to this relationship.

~ II ~

Moral Association and Natural Law

Lex naturalis and the jus of lex

This *jus* of *lex* – the ‘rightness’ of the law - is key; even if *lex* (law) has its validity confirmed through the procedure it is made, Oakeshott also thinks is also not ‘magically insulated from being unjust’.²² However, there are conflicting interpretations of what Oakeshott’s *jus* of *lex* means. These require clarification. The first, articulated by Martin Loughlin, argues Oakeshott’s *jus* of *lex* is a purely juridical distinction. Loughlin thinks Oakeshott is making a legal claim about what is and is not law, rather than a political claim about the law’s desirability.²³ The second argues that this legal interpretation misses the relationship between a law’s desirability and a law’s authority.²⁴ It claims that the *jus* of *lex* is formed both by

¹⁹ Oakeshott (no 15) 238-239.

²⁰ *ibid.*

²¹ *ibid* 240.

²² Oakeshott (no 10) 171.

²³ Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2014) 324-332.

²⁴ David Dyzenhaus, ‘Dreaming the Rule of Law’ in Poole and Dyzenhaus (eds) *Law, Liberty and State. Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press 2017) 256-260.

an *internal* fidelity to a form of ‘natural law’, *lex naturalis*, as well as a complex, *external* coherence to prevailing moral standards, which Oakeshott calls *respublica*; the ‘public concern’ of the citizens of the state. The following section will explore these readings of the *jus* of *lex*, and how this crucial concept functions in Oakeshott’s constitutional thought.

Respublica is the ‘public concern or consideration of *cives*’ (citizens), joined in ‘that relation of somewhat ‘watery’²⁵ fidelity called civility’.²⁶ *Respublica* is held together by a belief of *cives* that ‘the law was not conceived as the organisation of an enterprise’ but ‘the terms by which the Roman people kept faith with one another’ in their common adventuring in life.²⁷ This idea of a *respublica* as a civil relationship, consisting of a system of rules that promulgate individual ‘adventuring’ rather than promoting any substantive purpose, is of central importance. This is not to say, as Nardin suggests, that Oakeshott’s constitutional theory promotes ambivalence toward substantive governmental activity. Indeed, any activity that sustains the ‘rule of law’, which we shall explore in §VI, is valid for debate in *respublica*.²⁸ Oakeshott is simply acknowledging here that the *jus* of *lex* is not just a legal but a political and moral concern. It is not only a question of whether ‘law is law’, which is determined by *lex naturalis*. Rather, it concerns the external standard by which law is judged by its rightness or wrongness, in relation to the contingent assemblage of customs and practices of a particular, historically constituted *respublica*.

This paradox – that a law can be made in the proper manner and yet still be unjust by virtue of what it prescribes – is a perennial issue faced by the legal theorist. The Romans appealed to *lex naturalis* to tackle this problem, holding *lex* to the immutable standards of higher, ‘natural’ law. Yet Oakeshott rejects the idea of a ‘higher’ law, arguing that these so-called ‘fundamental laws’ are simply the intrinsic quality of what the rule of law *is*. They are not enforceable laws as such,

²⁵ By ‘watery’, Oakeshott is distinguishing his idea of civility from other, stronger notions of political unity or common purpose. For him, this is a thin and diluted concept, less prone to political weaponization against an ‘other’.

²⁶ Oakeshott (no 10) 147.

²⁷ David Boucher, ‘Oakeshott, Schmitt, and the Hobbesian Legacy’ in David Dyzenhaus and Thomas Poole (eds) *Law, Liberty and State. Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press 2017) 152.

²⁸ Terry Nardin, ‘Michael Oakeshott’ (*Stanford Encyclopaedia of Philosophy* 2020).

but conditions that, when upheld in the process of adjudicating specific cases, embody the rule of law. Like Hobbes, Oakeshott thinks *lex* and *jus* ‘contain each other, and are of equal extent’, being interrelated in a process that keeps the legal and political realms conceptually distinct, whilst retaining an overlapping relationship.²⁹ He argues Hobbes’ twenty *lex naturalis* are not themselves law, but rather the fundamental requirements of a legal order. They demand observation in order for the association to exist, comprising the conditions one must subscribe to ‘keep the conversation of mankind going’.³⁰ Hence, a law may be deemed morally ‘unjust’ by a particular society, but it is not illegitimate by virtue of being unjust. Its legitimacy as a law is a product of the procedure that creates it, rather than its outcome. Instead, these conditions are part of its external legitimacy, which determine its survival and utility in the political sphere.

This is the problem with Loughlin’s understanding of Oakeshott. He overlooks the ‘substantive’ aspect of the *jus* of *lex* which links statecraft with legality, whereby the moral and political aspects of Oakeshott’s constitutional theory relate to the skeletal dimension of *lex naturalis*. It is true that *lex* may only be declared *injus* (unjust) if it breaks one or more of the maxims – *lex naturalis* – of civil association. However, as Dyzenhaus recognises, *lex* has an external dynamic of political survival related to its ‘virtue’, or ‘coherence’ to *respublica*.³¹ This survival determines its ultimate inclusion and retention by a system of *lex*, but it does not change that fact that it is a law, providing it has been made in accordance with *lex naturalis*. To strike down *lex* and its internal and external *jus* must be debated politically. Only then can the sovereign legislature proclaim whether this particular *lex* fits with the historically contingent character of *respublica*.

Here, Oakeshott places politics at the heart of *respublica* without directly associating it with the legal system. Rather, it exists in continuous debate and conversation with law. Deliberating the conditions of *lex* occurs outside of the legal system itself, but in regard to the *respublica*. Such deliberation comprises the moral discourse over the external *jus* of *lex*, as well as ensuring as the internal *jus* of *lex naturalis* is met. As Nardin surmises, considering ‘the desirability of a law’

²⁹ Hobbes (no 16) 218.

³⁰ Oakeshott (no 1) 170; Hobbes (no 16) 100-131; Kiss (no 18) 214-233.

³¹ Dyzenhaus (no 24) 258.

means engaging in a narrow activity ‘focused on the question of whether that law is an appropriate expression of *respublica*, conceived not as a substantive good, interest, or purpose but as rules, procedures, and offices governing the conduct of the associates’.³² Here, the relationship between *jus* and *lex* constitutes an intrinsic connection between law and politics with considerable overlap with Loughlin’s *droit politique*, that determines whether a law ‘keeps faith’ with the given *respublica*, which we previously referred to as the *communio Romanum* (the community of the Romans). Thus, although *lex naturalis*, *jus* and *nefas* do not themselves comprise law, nor are *jus* or *nefas* an activity proper for legal consideration, they are a part of the conversation of the constitution. This collection of higher, non-legal law may be thought of as the ‘source from which just *lex* might be generated’ yet, while vital to its discussion external to the law, it is not what is ‘declared’ by *lex* itself in a *civitas*.³³

As we have begun to see, Oakeshott tries to preserve the unity and ‘ordinariness’ of law by implementing a two-tiered understanding of the constitution into the structure of all law. This two-tiered interpretation is formed by both the internal *jus* and external *jus* of *lex* – the characteristics of ‘true law’ as well as the moral discourse that sustains it. This aligns in many respects with what has come to be called *common law constitutionalism*, associated with T.R.S. Allan and G.J. Postema. However, his disagreement with common law jurists comes from their insistence that judicial precedent forms genuine *lex*, rather than advisory principles of interpretation for contingent situations. Conversely, his dislike of ‘fundamental’ law comes from thinking it is more prone to ‘essentialisation’, or to being mistaken for ‘concrete experience’.³⁴ He fears that placing *lex* other than *lex naturalis* beyond the bounds of political consideration – whether through ‘fundamental law’ or a Bill of Rights – is tantamount to ‘ending the conversation’ of mankind, polarising the moral discourse that is vital for upholding *respublica*. Oakeshott thinks that keeping written laws open to deliberation prevents people from treating essentially flexible or historically contingent rules as inalienable rights. This keeps constitutional questions from devolving into entrenched, existential issues over which serious conflicts may erupt.

³² Nardin (n 28).

³³ Oakeshott (no 15) 246.

³⁴ Elizabeth Corey, ‘Rationalism and the Rule of Law: Michael Oakeshott and the American Constitutional Order’ (2015) 4 *American Political Thought* 4, 651.

The clearest example of this is the historical contingency of the US Second Amendment, regarding the right of a ‘well-regulated militia’ to bear arms. The contemporary difficulty of engaging in civilised discourse over the relevant bounds of this constitutional law emerges from its polarising status as an unfringeable right. Such entrenched ‘rights’ constitute, in Oakeshott’s view, an improper understanding of law and legality. They regard the written law as a fixed assertion to be literally applied, rather than as specifying ‘general adverbial conditions’ that are interpreted in a given case, evolving with changes in the prevailing moral concern of citizens.³⁵ This difficult phrase – ‘general adverbial conditions’ – is a hallmark of Oakeshott’s legal theory, encapsulating the idea that a law ‘exists in advance and in necessary ignorance of’ future conditions to which they are required to relate.³⁶ Here, while a judge may be informed and guided by prior case decisions, they are not beholden to these in any specific judgements they pass. Viewing the Second Amendment as a simple injunction to bear any form of arms – from concealed carry handguns to military-grade AR-15s – is a specific, contingent, and originalist reading of a constitutional norm. It misses the general adverbial character of this rule, which is a constitutional norm designed to allow citizens to resist the power of a tyrannical federal government, if necessary, by force. The ‘tyrannical’ character is key, as the rule presupposes that the executive has assumed this attitude, and therefore it is the right of individual states to maintain a force which can resist this kind of oppression.³⁷ It outlines an exceptional event – civil conflict between federal and state government – and proposes a general rule by which states may organise to ensure their collective security against that event. Yet enshrining this ‘right to bear arms’ as a written, ‘constitutional’ right places it beyond moral debate, which, Oakeshott thinks, heightens the potential for polarised political discourse, hastening the breakdown of the very civil conduct vital for upholding civil association. On this reading, the right to bear arms *can* be interpreted as the right for all citizens to carry assault weapons. However, this is only one narrow, anachronistic interpretation of this general, adverbial rule, one which does far more harm to a state’s safety or internal political unity than it does good in the exceptional case. This explains why Oakeshott is opposed to laws (*lex*) that are thought of as ‘constitutional’, ‘basic’, or ‘fundamental’. If they are interpreted as literal rules, rather than general

³⁵ Oakeshott (no 1) 156.

³⁶ *ibid* 156-157.

³⁷ See Oakeshott (no 15) 430-431 for passages on the character of rule and ideas on the nature of authority, such as ‘usurpation’, ‘tyranny’, and the ‘liberal man’.

adverbial conditions, then they are liable to be misconstrued. They may be imagined to be beyond reproach, even when their literal meaning has long fallen into constitutional disuse. This tendency to view constitutional laws as sacred, he fears, will stifle debate on issues that must be discussed and accepted politically to gain authoritative legitimacy from each *respublica*. Therefore, Oakeshott designates *lex naturalis* as the maxims by which ‘true law’ is made, rather than as ‘constitutional’ laws themselves.

This understanding acknowledges Carl Schmitt’s famous point that the constitution is more than the set of norms codified in a written document, without recognising the legitimacy of a transcendent or meta-legal sovereign will in determining questions of law. Oakeshott supports reason of state logic only once, stating there may occasionally be times where *respublica* must ‘temporarily and equivocally’ be defended against dissolution.³⁸ Yet this is couched against a wider understanding that other ‘manners’ of rule are inimical to the concept of civil association, such as the ‘usurper’. Like the ‘tyrant’, the ‘usurper’ is an archetypal attitude concerning the activity of governing. Unlike the ‘oppressor’, who has a right to rule but ‘rules badly’, the usurper ‘has no right to rule no matter how well he may happen to rule’.³⁹ These sorts of attitudes undermine the non-purposive ideal for which *civitas* strives. Conversely, there exists a type of conduct that upholds the integrity of the association itself, and to this conduct I now turn in more depth.

~ III ~

The Poles of Moral Association

Societas, universitas, and the Dialectic of the Constitution

Understanding the character of this ‘civil conduct’ is central to Oakeshott’s constitutional theory. As we have seen, determining the external *jus* of *lex* (the rightness of a law) relies on moral discourse, deliberating the degree to which a given *lex* (law) has its *jus* (rightness) determined to be in coherence with the *respublica* (moral conduct) of a contingent *civitas* (state). However, this deliberation

³⁸ Oakeshott (no 10) 147.

³⁹ Oakeshott (no 15) 431.

is shaped by attitudes to the idea of association itself: ‘competing dogmas’ and ‘dispositions’ towards the composition of the state.⁴⁰ The ideal characters of these attitudes are termed *societas* and *universitas* by Oakeshott, and they form another major piece of his constitutional puzzle. They exist as poles between which human attitude towards the idea of government can swing. This section explores how these extremes relate to one another in civil association, and how the conflict between these ideals is a driving force behind the character of the state.

Societas denotes an association in terms of ‘loyalty to one another’, the ‘product of a pact or agreement, not to act in concert, but to acknowledge the authority of certain conditions in acting’. It is the ‘recognition of such terms of relationship’ which, for Oakeshott, comprises *societas*. *Societas* thus expresses a normative, positivist order along the lines of Hans Kelsen, emphasising fidelity to the rule of law. This is contrasted to *universitas*,⁴¹ an association with a single goal, and thus a common purpose to achieve. Given its purposive nature, pure *universitas* operates on a reason of state logic similar to Carl Schmitt’s, as it seeks a satisfaction of ‘particular substantive wants’.⁴² These concepts function as the ‘poles’ of civil association for Oakeshott; two historical ‘modes’ that the character of a state can assume.

Tom Poole levels a powerful criticism at Oakeshott on this point, arguing that although he comes closer than Hayek or Schmitt in his understanding of the constitution, Oakeshott ‘fails to develop a reflexive account’ akin to Hans Lindahl’s,⁴³ where ‘normality is always the outcome of a process of normalisation’.⁴⁴ That is, Oakeshott does not recognise laws act on themselves to create and reinforce normative standards. He further claims Oakeshott’s dynamic account ‘threatens to leave law and legality in... limbo’ between ‘law as normative order and law as managerial technique’.⁴⁵ His critique raises several questions. First, how are these two concepts of *societas* and *universitas* related? Second, does

⁴⁰ Oakeshott (no 10) 200.

⁴¹ *ibid* 201, 203, 205.

⁴² For further discussion see Thomas Poole, *Reason of State. Law, Prerogative, and Empire* (Cambridge University Press 2015) ch.7-8.

⁴³ Hans Lindahl, ‘Constituent Power and Reflexive Identity’ in Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism* (Oxford University Press 2007).

⁴⁴ Poole (n 42) 184.

⁴⁵ *ibid* 182-183.

this then leave Oakeshott's theory without answers to 'the most pressing questions concerning reason of state?'

An answer to the former requires us to build on Poole's engagement with these concepts, bringing them in dialogue with two of Oakeshott's earlier works, *Leviathan. A Myth*, and *The Politics of Faith and the Politics of Scepticism*. The former contrasts the Augustinian myth of the 'Fall of Man' to the Hobbesian myth of man's 'littleness', painting both pictures as extreme poles in the political world.⁴⁶ The Augustinian emphasises man's 'power and pride', imagining him to have fallen from grace. Conversely, the Hobbesian highlights man's 'mortality and imperfection', recalling him to the necessity of a sovereign office of government to allow his pursuits to be realised.⁴⁷ Oakeshott thought both were deficient, writing that 'Pride and sensuality, the too much and the too little - these are the poles between which, according to our dream, human life swings'.⁴⁸ They were ideal types, but not in themselves ideal for the realisation of the 'appropriately argumentative form of discourse' that should debate the *jus* of *lex*.⁴⁹ Oakeshott thus thought that while Hobbes' myth was a welcome emergence of a countermyth to the Augustinian in 1651, it fell equally short of capturing the ideal 'essence' of moral discourse. It is just one pole to which man could swing in his interpretation of the ideal of the state.

Oakeshott expanded on this claim in *The Politics of Faith and the Politics of Scepticism*, arguing the 'ambiguity of language has served to conceal divisions which to display fully would invite violence and disaster'.⁵⁰ The politics of scepticism, embodying pure *societas*, are to be preferred to the politics of faith, or pure *universitas*, only because the prevailing current of political discourse is profoundly faith-based.⁵¹ Oakeshott is making a political point here based on his judgement of the character of the modern European state. He thinks that in moral discourse

⁴⁶ Michael Oakeshott, 'Leviathan, A Myth' in Michael Oakeshott, *Hobbes on Civil Association* (Liberty Fund Press 1975) 161.

⁴⁷ *ibid* 163.

⁴⁸ *ibid*.

⁴⁹ Oakeshott (no 1) 156.

⁵⁰ Michael Oakeshott, *The Politics of Faith and the Politics of Scepticism* (Yale University Press 1996) 21.

⁵¹ Ian Frowe, 'Michael Oakeshott, Education and Extremism' (2007) 55 *British Journal of Educational Studies* 3.

one should seek to ‘recall our political activity to that middle region of movement in which it is sensitive to the pull of both its poles and immobilizes itself at neither of its extremes’.⁵² As the prevailing trend towards government when he wrote *On Human Conduct* was, on his account, tilted strongly towards *universitas*, it was prudent to redress this balance by rediscovering and reaffirming the *societas* understanding of government. This point is best summarised by Allan, who contends that issues of constitutional and public law will always be ‘more a matter of wise judgement in the light of experience than rigorous adherence to published rules or official guidelines’, and that constitutions are at bottom a ‘highly nuanced accommodation between the legal and the political, sensitive to the particular governmental context’, requiring a kind of inner fidelity to the activity of legal and political conduct to function.⁵³ The activity of *universitas* then, while a proper stance valuable to the political consideration of *jus*, is discouraged due to its dominance in the modern state. By recognising *societas* and *universitas* as two metaphysical propositions about the purpose of the state, but not in-themselves the ideal expression of the state’s moral discourse, Oakeshott keeps them from devolving into the binary poles of Hayek’s model constitution, or labelling the former unequivocally ‘good’ and the latter crudely ‘bad’.⁵⁴ The Augustinian and the Hobbesian are but two recognisable modes in the character of the modern European state which must be contended with in constitutional discourse.

Read through this lens, the tension between *societas* and *universitas* constitutes a dialectical dynamic at the core of the theory of *civitas*, one which keeps the extremes of ‘reason of state’ thinking and ‘pure normative order’ at bay. As ‘no *respublica* can be systematically perfect’ there will always exist this tension that seeks resolution.⁵⁵ Resolving these tensions doesn’t perfect the association so much as renew its inherent vitality, reaffirming faith in civil political conduct. These poles therefore form an agonal relation underpinning the political conversation of *civitas*, similar to the reflexive relationship both Loughlin and Lindahl describe.⁵⁶ In this light, the worry that legality is ‘perched uncomfortably’

⁵² Oakeshott (no 50) 128.

⁵³ Trevor Allan, *The Sovereignty of Law. Freedom, Constitution, and the Common Law* (Oxford University Press 2015) 348.

⁵⁴ Poole (no 42) 173-176, 183.

⁵⁵ Oakeshott (no 10) 151.

⁵⁶ Loughlin (no 2) 40; Loughlin (no 23) 227-232; Lindahl (no 43).

between these poles is recast as a fear that discourse will become toxic, polarised, or inimical to the rule of law.⁵⁷ Such an outcome would indeed be undesirable, but it is precisely what Oakeshott hopes to avoid by maintaining an argumentative form of moral discourse *external* to the law, but *integral* to the concept of the constitution. Rather than ‘fail[ing] to develop a reflexive account’ akin to Hans Lindhal’s, then, Oakeshott locates this reflexivity in the dynamic dialectic of *societas* and *universitas* when debating the *jus of lex*.⁵⁸

However, Poole makes a final point concerning a nexus of important questions: ‘When ought you trade off the demands of *societas* for the needs of *universitas*? Who makes this choice, and under which conditions?’⁵⁹ The problem he faces in trying to get an answer out of Oakeshott on these is that in his mind these are not, and *cannot*, be determined in any other way than by historical, contingent and contextual practices within the bounds of knowledge of each *civitas*, each aspiring to further refine its own *lex* through mediations of its *jus* with regard to their overarching *respublica*. It is this that leads to Oakeshott’s hostility toward copies being ‘struck-off’ states, or the idea of a basic, universal law. Such laws may exist, but they can only be adopted by a *civitas* and upheld through a strong deliberative moral discourse, deliberating their appropriateness as principles for constituting a government. Besides those principles that define civil association itself and prevent its dissolution (the ‘fundamental’ principles of the rule of law inherent in true *lex*), beliefs about the constitution of authority are the product of political, not legal, deliberation.

Poole’s essay asks one final question: Does Oakeshott’s theory not lead to a sort of tragic relativism, where due to historical development we are incapable of ‘re-cast[ing] political life in a way that would allow us to be truly free?’⁶⁰ How Oakeshott understood freedom here is key, and an answer requires a more comprehensive reflection on the place of *lex* within *jus* and *fas*, in relation to his theological views. Specifically, it can be found in the Nietzschean character of the ‘adventuring’, quasi-aristocratic *persona* that embodies the ideal *cives* in his thought.

⁵⁷ Poole (no 42) 183.

⁵⁸ *ibid* 184.

⁵⁹ *ibid* 183.

⁶⁰ *ibid* 182.

~ IV ~

Cives, Theology, and Moral Association*The Languages of Constitutional Discourse*

Oakeshott's jurisprudence can only be fully apprehended through his reflections on religion, which are best viewed in contrast to Carl Schmitt's political theology. The emblematic theorist of 'reason of state' politics, Schmitt sought to recombine the separation of church and state to augment the powers of an extra-legal sovereign,⁶¹ undoing what he saw as four centuries of their 'prising apart' by Spinoza and other 'liberal Jews'.⁶² Schmitt's theory is repugnant not only for his antisemitism here, as by blending the political and the divine he places 'awe' back upon the sovereign, subordinating citizens to the will of a single ruler through a vertical idea of the divine. Conversely, Oakeshott places 'a peculiar version of life-affirming religion within the commonwealth'.⁶³ Here, 'divinity' is horizontal, with Oakeshott's 'higher' law, *lex naturalis*, only 'higher' in the sense that it is not 'man-made'.⁶⁴ These natural laws are not bestowed by a divine person, but maxims inherent to the idea of the rule of law – they are not decided on or altered by people, but constitute the general characteristics of the rule of law itself. This transformation is predicated on the relocation of awe away from the sovereign person and onto the individual. The external *lex* of the sovereign forms some kind of 'public conscience' to which individuals must subordinate themselves to enjoy the liberty they provide, but;

'Since the sovereign is no more than the soul of the artificial person – the state – that the individuals themselves have created, the person they should be in awe of if they are to have peace and liberty under

⁶¹ Dyzenhaus (no 24) 260.

⁶² Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes* (University of Chicago Press 2008) 57.

⁶³ Jan-Werner Müller, 'Re-imagining Leviathan: Schmitt and Oakeshott on Hobbes and the problem of political order' (2010) 13, *Critical Review of International Social and Political Philosophy* 2-3, 332.

⁶⁴ Dyzenhaus (no 24) 242.

and order of public law is their artifice. What they must be in awe of, therefore, is themselves'.⁶⁵

This is a masterful summary by Dyzenhaus, explaining an obscure but revealing note by Oakeshott about his conception of sovereignty and the constitution. Replying to Nietzsche's statement that the state is 'nature's round-about way of making a few great individuals', Oakeshott remarks, 'Yes, but it is the *raison d'être* of the state to struggle to make the million of what the one attains to be'.⁶⁶ Oakeshott's 'peculiar constitutionalism' here is demanding of its citizens, as only through 'civility, moderation, and, not least, *conversation*' could 'what might have seemed like an inevitable and permanent war of different gods' or competing claims to the 'good', be attenuated.⁶⁷ It both recognises these differing, pluralistic, claims, prescribing a 'noble' attitude toward the arena of moral discussion in which they are debated.

O'Sullivan explores this attitude best, recognising that a Hobbesian question runs right through the body of Oakeshott's *oeuvre*. This question asks, 'Why are there 'such diversity of ways in running to the same mark, *felicity*, if it be not night among us?'. Oakeshott answers that a person with:

'inner, invisible faith does not need to be equipped with a substantive doctrine of what is best; it will suffice to know what the canons of good conduct toward other human beings are, summarized in the golden rule, and affirmed in the act of authorising the sovereign to make the laws of the land'.⁶⁸

Müller rightly regards this as the ingenuity of Oakeshott's constitutional theory. Rather than augmenting the power of the sovereign governmental person, as Schmitt does, Oakeshott locates sovereignty in the relationship constituting sovereignty itself. For Schmitt sovereignty is an expression of the will of a unified

⁶⁵ *ibid* 260.

⁶⁶ Michael Oakeshott, *Notebooks, 1922-86* (Imprint Academic 2014) 38; [Notebook 5, No.31].

⁶⁷ Müller (no 4) 119, 130.

⁶⁸ Luke O'Sullivan, 'Introduction' in Michael Oakeshott, *1993. Religion, Politics, and the Moral Life* (Yale University Press) 21.

people through the acts of a sovereign person. For Oakeshott, sovereignty is a relationship of sovereign persons, joined by a civil attitude to human conduct, to deliberate the rightness of each law. This association seeks to ‘multiply the number of noble characters’ in a given society or ‘even better, somehow make the noble character the norm, rather than the exception’.⁶⁹ Here, it is ‘not so much that such characters could recognize themselves in the state as that they could recognize civil association as a condition of possibility of their unfettered self-realization’.⁷⁰ Oakeshott is arguing that a fidelity to a mode of conduct committed to resolving disputes in a civil manner is integral to the concept of the constitution. This explains why Poole thinks the ‘ordinary and extraordinary’ are made ‘partially redundant’ in Oakeshott’s constitutional theory.⁷¹ Eliminating both these categories – ‘reason of state’ prerogative power and normalised, ‘bureaucratized’, unadventurous existence – is the aim of civil association. Oakeshott’s ‘adventurous, quasi-aristocratic’ citizens have no need of the extraordinary or the purely normative, ordinary, regulated life. Their ‘ship of state’ will, of course, be buffeted by all sorts of storms on the ‘boundless, bottomless sea’, as Oakeshott put it in *Political Education*.⁷² However, it keeps afloat not because of any planned destination or the methods implemented to reach it, but simply the attitude the crew keeps concerning the nature of the voyage itself. Reason of state thinking, on this account, denotes a failure of the constitutional order; a failure of that genuine, moral, argumentative discourse, which comprises the dynamic heart of the constitution.

It is here that we peer into the core of Oakeshott’s constitutional theory, which at bottom concerns a faith in a ‘collective dream’ of human conduct.⁷³ This dream is indeed ‘highly demanding’, not least because it involves a collective of *cives* to keep faith to one another through a certain attitude to moral discourse.⁷⁴ The preservation of this discourse is integral to the function of the ‘rule of law’, which allows these *cives* to pursue their individual ‘adventuring’ by promulgating

⁶⁹ Müller (no 63) 325.

⁷⁰ *ibid* 327.

⁷¹ Poole (no 42) 184.

⁷² Michael Oakeshott, ‘Political Education’ in Michael Oakeshott, *On History and Other Essays* (Liberty Fund Press 1999).

⁷³ Michael Oakeshott, ‘Leviathan: A Myth’ in Michael Oakeshott, *Hobbes on Civil Association* (Liberty Press 1975) 160.

⁷⁴ Müller (no 4) 130.

the conditions conducive to such activities. This is similar to Allan's defence of the sovereignty of law, for while it concurs that the rule of law is paramount, it notes it is only possible through an equal rigour in a *civitas*' political sphere.⁷⁵ A rigour that is characterised by the debate of the *jus* of any and all *lex* produced by the sovereign legislature. Without such argumentative moral discourse, the discussion of the *jus* of *lex* falters, as does the dynamism of the constitution.

Returning to Poole's concern, does this not doom us to a form of tragic relativism, incapable of achieving any form of true freedom? Oakeshott thinks this is the wrong question to ask, as the contingency of *lex* does not deny it authority. *Lex* is *lex* by virtue of the process it is made, and only is unjust if it is made against the maxims of civil association, *lex naturalis*. All other talk of so-called 'natural law' is just prevailing moral discourse, subject to opinion and political disagreement: these disagreements take the character of debates, held over the external 'rightness' (*jus*) of individual laws in strong, civil, moral discourse. However, even if values are held 'universally' so as to be practically unassailable, they are not 'fundamental' law.⁷⁶ They may form 'constitutional' law, but this is particular and contingent to the composition of the constitution of that moment in time, responding to its own equally contextual concerns. These laws are merely the embodiment of a particular *respublica*, with the 'rightness' of each particular law depending on a given *respublica*.⁷⁷ It may constitute that particular *respublica* at that particular time, but it may always be repealed.

Hence, the reflexivity we thought missing in Oakeshott in §III is to be found in two major locations: The relationship of *jus* and *lex*, and the debate of *jus* through *societas* and *universitas*. These are two separate discourses, and statements in one are not relevant in another, even if the concepts discussed in each – law, sovereignty, the rule of law – are linguistically the same. This locates the idea of the constitution inside both the legal discourse of the law and the moral discourse of statecraft, as well as the relationship these two spheres have with one another. Legality here is maintained by the 'rule of law', determined by a fidelity to the Hobbesian maxims that prevent the dissolution of civil association. It is about realising the *lex* of the *respublica* in particular, contingent cases, meting out the punishments of *lex* as decided by the legislative office. These *lex* are innately

⁷⁵ Allan (no 53) Ch. I-II.

⁷⁶ Oakeshott (no 1) 154.

⁷⁷ Oakeshott (no 10) 168, 169.

authoritative, having been made in accordance with the maxims of civil association. Only laws not made in this way can be said to be truly unjust.

Statecraft, meanwhile, is ruled not by maxims of prudence but by ‘argumentative moral discourse’, deliberating the *jus* of existing *lex* against their external considerations, and the character of the given *respublica*. *Cives* negotiate these terms within the context of a pre-existing ‘prevailing wind’, whose quality is determined by the vitality of that moral associations’ discourse; a wind which blows, to a greater or lesser degree from one of the two poles, *societas* and *universitas*. Neither is inherently ‘just’ or ‘more conducive’ to civil association, for Oakeshott’s point is that deliberation must balance between these two. *Universitas* is merely what he thinks has prevailed in the era of the modern European state. This attitude must have a mind for the maxims of civil association that keep it from dissolution, an eye for the ‘prevailing wind’, and a will that can balance this against the ideals of a historically contingent *respublica*. Importantly, these debates must be conducted in a civil manner, denoting one has kept faith with the maxims of civil association. This is not to blend law and statecraft, as Schmitt seeks to do, making law the pure will of the sovereign. They remain separate spheres, influencing one another because of, not despite, their separateness. In splitting the authority of *lex* from the consideration of its *jus*, Oakeshott maintains the interrelation of both, without reducing his theory to a pure natural law or pure positivist account of law.

The ‘truly free’ ideal for civil association is therefore obtained through the preservation and promulgation of a certain form of strong moral discourse in the conversation of politics, freeing up adventurous *cives* to pursue the sorts of lives they might want to lead, bound by a common allegiance to the rule of law.⁷⁸ This fidelity to political discussion goes beyond Michael Sandel’s call for ‘robust public discourse’⁷⁹: it is concerned with a civil kind of moral deliberation that upholds and preserves this ideal of freedom. ‘True’ freedom is not given to persons by civil association; this is a relative aspiration which the constitution cannot mete out itself. Rather, it is something possible only *through* the kind of rule that civil association promotes. Equally, *lex* (declared law) cannot provide a human being their freedom directly. It only allows the conditions through which this freedom

⁷⁸ Oakeshott (no 1) 156; Müller (no 4) 332.

⁷⁹ Library of Congress, ‘Justice, Neutrality, and Law’ (*Kellogg Lectures in Jurisprudence* 2015).

– human excellence’ or ‘self-realisation’ – might be realised. The precise reason why the ‘the *jus* of *lex* cannot specify anything so grand’ as this is because the debate of *jus*, unfolds against the backdrop of a prevailing *respublica*, or public, moral concern.⁸⁰ *Respublica* is an imagined thing, just as *Leviathan* is one sort of myth that might form its foundations, and while one might discuss the substance and appropriateness of that dream, it is nevertheless a legitimate foundation for society. *Societas* and *universitas* are two modes of association, underpinned by the politics of scepticism and the politics of faith, that operate as the poles of a *respublica*. It is this irresolvable tension which drives the conversation of the constitution, as it encounters new issues to resolve.

~ V ~

The Understanding of Authority

Sovereignty, Constitution and the Rule of Law

Journeying through Oakeshott’s legal and political thought, we have struck upon the essence of his constitutional theory without directly considering any of his writings on the constitution. Some phrases have therefore emerged - ‘rule of law’, the ‘sovereign legislature’, and ‘constitution’ itself - without proper explanation. As his references to the ‘constitution’ are sparing, this has been deliberate. Having sketched his overall theory, we can now turn to one of the few instances where he provides an idea of what the concept *is*.

Oakeshott’s *Lectures* expand on the introductory quotation from *The Rule of Law* regarding the authenticity of the law,⁸¹ making the spartan assertion that a ‘constitution is that in which rulers and subjects express their beliefs about the authority of a Government’,⁸² This alone tells us little. The constitution merely appears as a core of collective beliefs about the composition of authority that legitimates government. He further notes that:

‘The question: by what right does a ruler rule? can be properly answered only in the terms of the character or constitution of a

⁸⁰ Oakeshott (no 1) 154.

⁸¹ See this article’s Introduction.

⁸² Oakeshott (no 10) 189.

ruler or government’, for ‘A government can never have the right to rule in virtue of its power, or the agreeableness to what it does, but only in virtue of the manner in which it is constituted, composed, or got together’.⁸³

Here, a constitution only concerns the *authority* a government has to rule, and even if inquiries into its nature might focus on the sorts of outcomes a constitution generates, considered in terms of its ‘efficiency’, ‘costliness’, or ‘aptitude’, these considerations are not about the right it has to rule. These considerations may be relevant when debating the *jus* of a government’s *lex* and may even result in a constituted government’s office holder being removed from office, but they are not what a constitution *is*. A constitution here merely denotes that *cives* be united in recognising the authority of the rules that comprise it, and the obligations prescribed by these rules, by virtue of how they are composed.⁸⁴

This seems to go against much of what we have been outlining thus far regarding moral discourse, or the independence of *lex* from direct moral consideration. However, reading this alongside the understanding we have been developing, we see he is constructing a two-tiered, proto-reflexive concept of the constitution. This two-tier model distinguishes the necessary location of authority from the sort of constitutive activity that sustains it in practice. The concept of the constitution can refer, rather banally, to ‘*The*’ constitution, formal conditions which recognise the universal aspect of the rule of law and obedience to the sovereign authority as constitutive of the idea of civil association. This is the *lex naturalis* of Hobbes, or the universal maxims for constituting an authority that doesn’t dissolve itself. Or, more interestingly, it can be formed through this relationship of legality and statecraft – *lex* and *jus* – and their debate through the moral sphere. This is ‘*A*’ constitution, which is the historically contingent, practically accessible manner of constituting a governing sovereign authority to rule a specific territory and people. This concept of the constitution is inherently reliant on a strong moral discourse, a demanding state of affairs for its *cives*, to adapt to emergent challenges, preventing the emergence of the Schmittian raw sovereign *universitas*, or a stagnation into the procedural, rule-led, inflexible *societas* attributed to positivism.

⁸³ Oakeshott (no 15) 446, 455.

⁸⁴ Terry Nardin, ‘Michael Oakeshott.’ (*Stanford Encyclopaedia of Philosophy* 2020).

Here Oakeshott's initial 'austere' proclamations come to light, forming the skeletal element of the wider idea of 'a constitution' as a process: a self-generating, self-correcting form of political authority and constituent power. The concept operates through an attitude towards political conduct, one that acknowledges the foundational *lex naturalis* of government during the debate of *jus*, and therefore commits to a 'civil' discourse to resolve these disputes. To speak any further of a 'constitution' is then to do so regarding a particular *respublica*, invoking complex moral, legal and political questions about what is 'right' against elements of prudence, history and practice in that *civitas*.

Of course, as Loughlin recognises, this throws up a thorny question. Whose society is 'the' society in discussion here? The 'Oxbridge Common Room', or the 'ruling class', perhaps?⁸⁵ Are we not in danger of succumbing to a form of patrician's disdain for the popular 'mass', by suggesting a certain sort of person *should* rule? Oakeshott has been accused of this by his most ardent critics, even labelled part of the 'intransigent right' alongside Hayek and Schmitt.⁸⁶ Perhaps, once again, Loughlin misses the mark here, associating Oakeshott too much with the conservative traditionalism of Burke. Oakeshott is not prescribing which particular sort of society should or should not rule; he is merely acknowledging that the complex web of understandings, that make up the constitutional arrangements of this or that state, is rooted in a prior historical understanding of what that constitution essentially is. As Oakeshott put it, 'Selves are not rational abstractions, they are historic personalities... and there is no other way for a human personality to make the most of himself than by learning to recognise himself in the mirror of this inheritance'.⁸⁷ This is not a valuative claim, but a statement of the society as we find it. To change the constitution, we must first understand it as it is.

This point can be clarified further by apprehending the relationship sovereignty has with the rule of law in Oakeshott's work. Although he often shuns the discussion of sovereignty, for Oakeshott it merely denotes the

⁸⁵ Loughlin (no 2) 82.

⁸⁶ See Perry Anderson's famous essay, 'The Intransigent Right at the End of the Century' (1992) 14 *The London Review of Books* 18.

⁸⁷ Michael Oakeshott, *The Voice of Liberal Learning* (Liberty Fund Press 2001) 41.

acknowledgement of the *right* the government has, alone, regarding the authority to make law. Crucially, that it is ‘unfettered by any superior authority’ when doing so.⁸⁸ While a sovereign’s ‘practical power’, *potentia*, is always limited in some sense by things it can or cannot do, the *potestas* or ‘right to hold office’ denoting if it is or is not sovereign is either true or false.⁸⁹ However, sovereignty is not the unfettered power to do what one likes, as parliamentary sovereignty has come to be seen in some circles in contemporary Britain. Rather, it is the *acknowledgement* that that power exists, and that its authority is legitimate only in the legislative function. Hence, while the absolute power to make or repeal law is located in the legislative office, sovereignty itself is maintained and strengthened through a complex relationship of interlocking parts - the *jus* of individual *lex*, the prevailing *respublica* and moral attitudes of *societas* or *universitas*, moral discourse and trust – that comprise *civitas*.⁹⁰

This description of sovereignty links it with the rule of law in the constitution, rooting the concept’s operation in ‘argumentative moral discourse’. The ‘rule of law’ denotes a ‘moral association exclusively in terms of the recognition of the authority of known, non-instrumental rules... which impose obligations to subscribe to adverbial conditions in the performance of the self-chosen actions of all who fall within their jurisdiction’.⁹¹ However, the stability and authority of the constitution therefore relies on strengthening the trust between *cives* and the sovereign ruler, rather than tradition and precedent, through discourse designed to reinforce this concept of the rule of law. This is an important point, severing Oakeshott from Burke or Dicey by disavowing the idea that tradition provides the stability of the constitution.⁹² Instead, Oakeshott locates stability in the attitude of a people to the idea of the constitution itself, and the kind of moral discussion this propagates. The ‘society’ Loughlin asks to specify is nothing necessarily in particular, being in constant discussion, review, and alteration. Only an attitude to interpreting the constitution consistent with this contingent past can preserve its integrity as a concept.

⁸⁸ Oakeshott (no 15) 386.

⁸⁹ *ibid* 195.

⁹⁰ *ibid* 386.

⁹¹ Oakeshott (no 1) 148.

⁹² See Loughlin (no 2) 83.

As such, a constitution is an *understanding* a people has of the right of its rulers to rule, and the kind of discourse this creates in the polity. While it can be altered through considerations of outcomes, its fundamental concern is the legitimate location of authority found in the legislative. This legitimate right to rule – an activity ‘necessary and unique to civil association’ – hinges on this ‘character’ of the authority’s composition.⁹³ This is a belief, developed by debating the *jus* of declared *lex* through moral discourse not with respect to tradition *per se*, but to an experienced past. Critically, as this language of political deliberation is constructed historically, trying to understand it externally to a given civilisation is not so much wrong as it is irrelevant. Tradition does not determine whether a declared law is right or wrong, but it may influence the manner in which such issues will be debated.⁹⁴ Therefore, Oakeshott thinks precedent for judges is not binding *lex*, but an indicative tool for administering the punishments of a particular *lex*. As Gerencser notes, Oakeshott consistently supports the case for judicial decisions to be both particularistic and non-binding.⁹⁵ Earlier decisions may ‘provide insight’ into current matters, but they are not binding precedents that create obligations. This would grant judges power to create obligations outside of *lex*, the sole source of valid authority in the *respublica*.⁹⁶ Only the legislative office holds the power to produce *lex* as it considers the non-instrumental character of the law, not its particular applications.

This decoupling from traditional ‘conservatism’ explains why Oakeshott doesn’t prescribe an ideal of the constitution, leaving ample room for the emergence of culturally and religiously diverse variants of association that are not copies to be ‘struck off’ from one another.⁹⁷ As noted, this is accomplished by blending Lon Fuller’s thought with a form of legal positivism, arguing there *is* a sort of ‘law’ beyond the ‘Basic Law of the Rechtsstaat’, but that this is not in any true sense law. It is merely maxims that ‘proscribe conduct designed to dissolve the entire association’; the true *jus* inherent in all ‘genuine’ *lex*, setting it apart from command and managerial instruction.⁹⁸ These are unequivocal foundations upon

⁹³ Oakeshott (no 10) 141.

⁹⁴ A far-cry from Hayek, despite his noted similarities to Oakeshott in Muller’s essay ‘Hayek’s Model Constitution’ in Poole & Dyzenhaus, *Law, Liberty and State* (Cambridge University Press 2017) 261-280.

⁹⁵ Gerencser (no 2) 330.

⁹⁶ *ibid.*

⁹⁷ Oakeshott (no 10) 198.

⁹⁸ Oakeshott (no 1) 173-175.

which various sorts of authority structures may find themselves constituted, forming 'A' concept of the constitution in continuous, contingent moral discussion with itself. However, these structures are necessarily built upon an ideal of 'The' constitution inherent to the sort of association 'ruling' is concerned with.

An understanding of the constitution along these lines can help clarify several key points during times where constitutions are under increasing strain, both from anti-constitutional and authoritarian thinkers on one side, and the over-judicialization of politics on the other. Oakeshott's constitutional theory reaffirms the centrality of strong political and moral discourse to the preservation of constitutional arrangements. It would, perhaps to the dismay of many lawyers, find some common ground with former Supreme Court Justice Lord Sumption's Reith Lectures here, on the relationship between politics and the law.⁹⁹ Sumption's lectures, which are deliberately controversial, defend the limited role of law – particularly human rights law - in securing basic liberties. His point, rather like Oakeshott's, is that many values are best deliberated and upheld politically rather than through law, which is in his view a rather limited instrument for generating widespread agreement on contingent and controversial issues. He places great stock, like Oakeshott, in the power of engaged, civil, moral discussion to generate lasting consensus within a polity, rather than relying on law to restrain politics. By consciously defining both law and politics as vital, but rather limited engagements, Oakeshott affords neither the expansive reach that many seek to give them in much contemporary discourse. His constitutional theory recalls us to their relative insignificance in human affairs, affording them a proper but particular place in the conversation of mankind. And, whilst Oakeshott is among the strongest of defenders of both the rule of law and parliamentary sovereignty, he is careful to never champion their use for causes he thinks it is beyond their remit to solve, such as 'self-realisation' or 'human excellence' as already alluded to. For those achievements, he thinks, there are other forms of discourse that are

⁹⁹ For the transcribed version of the lectures, see Jonathan Sumption, *Trials of the State. Law and the Decline of Politics* (Profile Books 2020). The lectures amount to neither an academic defence of the political constitution, to use J.A.G. Griffiths famous phrase, nor a denigration of law's utility in solving difficult problems. They are meant to begin a conversation about the legitimate limits of legal and political power, asking for more citizens to engage proactively in political discourse to that end. Treating them as anything more specific or scholarly than this, in my mind, diminishes their essential worth to contemporary constitutional discourse.

far better suited to these goals than the narrow domains of politics and the law: languages in which we must come to immerse ourselves in the course of our intellectual adventuring.¹⁰⁰

~ VI ~

Conclusions

The Concept of the Constitution

With this dense, interlocking politico-legal relationship established, we can sketch a framework of the Oakeshottian concept of the constitution revolving around the ‘authenticity’ of the law. All true *lex* has inherent *jus*, termed ‘*lex naturalis*’, which prevents civil association from being dissolved. Laws can only be declared properly unjust if they do not conform to these principles. These ‘natural laws’ are not inviolable ‘rights’, but the very conditions which specify if a given law is indeed authoritative, and therefore authentically valid, law. However, laws also have *external jus*, measured against the prevailing *respublica*: the public concern of the present citizen-body. Moral discourse over individual *lex* is conducted by the authorised, sovereign legislature, and debates here determine how congruent individual *lex* are with this *respublica*. This discourse is bounded by two concepts: *societas*, denoting the non-purposive state, and *universitas*, denoting the purpose-driven state. Neither is intrinsically ‘more desirable’ than the other, and both are essential elements of the modern state. Problems arise when one of these modes comes to dominate citizens’ attitudes toward the activity of governing a state. They are, however, the poles of moral association, poles between which it can, and to varying degrees will, swing. The ‘prevailing wind’ of the day, blowing from one of these poles, calibrates the moral discourse of citizens, seeking an internal balance to the constitution between *societas* and *universitas*. And, while there is plenty of scope for individual *lex* to be morally incompatible with the prevailing *respublica*, these *lex* would not be said to be unjust. Such laws may have conformed exactly to *lex naturalis*, but found unfit for a particular, historically contingent public concern of a people. Such a law would be legally valid while having its external *jus* out of coherence with the public attitude of the day. And, until such

¹⁰⁰ See Oakeshott (no 87), particularly the essays ‘Learning and Teaching’ and ‘A Place of Learning’, for discussions of this kind. Pages 27-34 of ‘A Place of Learning’ contain the essential thrust of the argument.

time its moral component was debated politically and removed as *lex* by the legislature of that particular state, it would remain a valid and authoritative law.

This framework reconciles the Augustinian maxim *lex iniusta non est lex* (an unjust law is not law at all) with the normative accounts given by positivist thinkers such as Kelsen.¹⁰¹ Law is granted 'authenticity' through the beliefs held about authority, which concern both *lex naturalis* and the *jus* of *lex* against the *respublica*. The constitution is expressed by the dialectical relationship of trust between the ruler and the ruled, and an attitude of civility toward moral discourse. Hence it can be the case that, for Oakeshott, 'utility, justice or rationality' have nothing to do with the conditions of *respublica*. And while they may be said, like 'peace', to characterise it, they are not its purpose.¹⁰² While such laws, through continuous popular confirmation, may come to bear the appearance of 'natural law', they are in fact always artifice.

That Oakeshott's position bears some resemblance to that of Trevor Allan's is perhaps unsurprising, if not uninteresting. Similarities exist between the two, particularly regarding the idea that a constitution can only be understood internally, or that attempts to describe it 'positivistically' miss that legality is connected to legitimacy, as *jus* is to *lex*. An investigation of these two thinkers, or Allan's American counterpart Gerald Postema, would no doubt prove fruitful to contemporary debates in constitutional theory. However, Oakeshott reminds us that Allan's is a mere 'legal' perspective toward understanding the constitution, and to think of it as a mere legal creation is inherently impoverished. Rather, the concept of the constitution exists as a delicate balance between various 'languages' – the legal, the political, the constitutional, the historical, and so on – each in tension with one another. Understanding these languages and their historical contingencies is the first step in unpacking the richness of constitutional discourse. Yet the ability to determine which one is relevant to an issue of constitutional importance marks a mere 'speaker' of these languages out from a 'master' of them.

Despite an interesting congruence between Oakeshott and Allan's work, this article shall refrain from expanding further. It has sought only to provide an

¹⁰¹ St. Augustine, *On the Free Choice of the Will* (Cambridge University Press 2010) 10 [§1.5.11.33].

¹⁰² Loughlin (no 2) 73; Oakeshott (no 1) 161.

opening to Oakeshott's thought, unpicking his understanding of the constitution for further research. His concept of the constitution resides in preserving a civil manner toward political conduct, rather than the sort of laws and restrictions on authority as such. In placing this civil attitude to conversation and interpretation as the core of his constitutional theory, he hopes to preserve the spirit of the voyage rather than the ship of state itself. Whether Oakeshott's demanding constitutional theory is viable in practice remains to be seen. However, this article is ill-equipped to answer such questions. For philosophical essays are but overtures to new conversations, inviting the reader to reconsider their own viewpoints, rather than affirming those presented as fact.