Oakeshott on Corporations

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INTRODUCTION

Michael J. Oakeshott's work *On Human Conduct* (OHC) is a reflection on how humans engage with each other, and the character of human agency within those engagements. While beginning with the individual human agent in the first essay that makes up this work, Oakeshott is not a methodological individualist; instead the focus of the whole work is upon the different types of association humans have with each other, either theoretically and analytically in the first two essays of OHC or with a historical overview in the third essay, "On the Character of the Modern European State." Throughout the work, Oakeshott reflects upon the character of different types of associations and how they reflect human agency. Importantly, agents sometimes associate with others to pursue a common end or purpose; and at other times they associate to modify their various choices and actions according to common rules. The former he refers to as enterprise associations or examples of *universitas*; the latter he refers to variously as civil association, *societas*, or *respublica*. Each of these also offers more or less tempting visions of the state and the third essay examines the careers of each since the close of the medieval era. Yet, while he writes extensively about human associations, and he even occasionally discusses corporate agents, corporate associations, and corporate persons, he formally discusses corporations very little; that is to say, the modern business corporation receives little, almost no attention from Oakeshott. This essay will reflect on what Oakeshott has to say, especially in the third part of OHC about corporations and the implications and limits of Oakeshott's contention that corporations are best, perhaps only, understood, as enterprise associations, bearing the character of *universitas*. Further, the question that I will put to Oakeshott's theories is how we should understand corporations' engagements with each other or the rest of the members of the state. Even understood as *universitas*, can corporations engage as agents and as members of a *societas*, or even more, as *cives*, members of the *respublica*?

Corporations are, of course, a significant part of the life of the modern state. They are the primary form of economic organization, and they extend beyond that to familiar not-for-profit associations and corporations as well as public and semi-public corporations such as school boards and development authorities. Economic theorists explore the role and impact of corporations on commercial and financial life, business ethicists consider the social role of corporations, and legal theorists reflect on the very character of the corporation. Again, Oakeshott says very little about these explicitly, even while discussing so many forms of human association. Yet, he does, for instance, reflect how the medieval church, universities and guilds are the historical precedents for the enterprise association and *universitas*. Further, Oakeshott does make occasional observations about corporate agency and the corporate person. These infrequent references are tantalizing, because they imply a more comprehensive view of corporations within the modern state; however, they are so brief they we must look to his broader theory and its implications to understand

what Oakeshott might say about contemporary questions about corporations. Oakeshott writes much about the identities of agents, persons, and members of civil associations (*socii* and *societas*), yet very little about corporate persons or associations as institutions. Given the contemporary debates about political and social role of corporations traveling under titles like corporate citizenship and corporate social responsibility, we may ask of him, "can a corporation be a *civis* or a *socius*?" Can a corporation be part of a civil association or be understood as a citizen? Can a corporation be a member of a *societas* and have obligations beyond its corporate purpose? Can there be civil engagements between enterprise associations?

CORPORATIONS, *UNIVERSITAS* AND THE STATE

Perhaps the simplest place to start Oakeshott's discussion of corporations is with his definition, though this comes rather late in OHC. "A corporation," Oakeshott writes in the third essay, "is persons associated in respect of the pursuit of a common purpose, and it is specified not in terms of its 'constitution', but by the particular purpose jointly pursued" (OHC 286-87). To those familiar with Oakeshott's general critique of the idea of the state as a purposive association, it is no surprise to note that for him corporations are a poor model for understanding the character of the modern state, even though this model may be attractive to some. Put simply, a corporation is the premier example of an enterprise association, (*universitas*) and as such provides a model for the state that impairs the freedom in human agency as opposed to securing and enhancing it. This claim fits the patterns of Oakeshott's critique, and the explanation for it is straightforward on his terms.

The fundamental element to an enterprise association, and as reflected in *universitas,* its historical instantiation, is that human persons join together to create associations to seek common purposes or ends and sustain such associations to pursue these common goals. This type of association is distinguished from civil association, or *societas*, in which associates join together in the common recognition of a set of rules that modify their choices and actions. Enterprise association and *universitas* reflect one element of the freedom in human agency, which is the freedom to join with others to pursue their shared purpose, end or goal. "The 'freedom' inherent in purposive association is that of the choice to be associated" Oakeshott maintains, but he continues that the reverse is also true "and the consequent capacity to disassociate if the purpose or the management of its pursuit is disapproved" (OHC 316-17). Thus, freedom entails not only the choice to join with others to advance and seek a shared purpose but the ability to leave the association when that purpose or goal is no longer shared, or when an associate deems the association is no longer pursuing that end, or really for any reason whatsoever. Freedom is characterized both in the choice reflected by an agent in joining and also "by a choice to dissociate" (OHC 204). However, this reveals a fundamental problem of the state as *universitas*, because "where the association is a state" the capacity to dissociate "is excluded by the logic of its constitution" (OHC 317). To Oakeshott, unilateral exit or choice to disassociate from the state is simply out of keeping with a reading of the modern state because "a state, on any reading of its character, is a comprehensive, exclusive, and compulsory association" (OHC 242).

The distinction between purposive (enterprise) and non-purposive (civil) associations seems straightforward, and Oakeshott seems to imply that the different identities that reflect them, *universitas* and *societas,* are easy to see and understand, almost obvious to any observer. Yet he himself discusses how historically there has been a common and even understandable confusion about them. Oakeshott, for instance, observes that Marsilius of Padua uses the language of corporate or enterprise association as a way to discuss a princely realm (or state) and thus makes it sounds like he is discussing *universitas*, but what Marsilius expects in such a political realm is actually reflective of *societas*. "Thus, in spite of this parade of the language of corporate association, a realm for Marsilius turns out not to have the essential characteristic of a *universitas*. Unlike a gild [*sic*] of craftsmen, a school, a university, a monastic house or a military order, it [a realm] is not a many joined in the pursuit of a common satisfaction; and its ruler is not a manager. It is a 'multitude of men' formally associated in terms laws which they have made for themselves and which they have the authority to make in virtue of being incorporated to do so" (OHC 217-18). Marsilius

is just one of Oakeshott's examples of how the language and ideas of enterprise and corporate association, *societas* and *universitas* become easy to confuse and difficult to disentangle.

Similarly, Oakeshott observes an ambivalence in historical uses of the language of the contract theory of authorization. Initially he refers to Hobbes as an example of a theorist who understands the establishment of the authority of the state as a *societas*. "For example, the notion that civil authority derives from or may be explicated in terms of a compact or covenant is deliberately used by Hobbes in order to confirm that the association he is concerned with is a *societas*; the covenant here is to 'erect' and maintain 'sovereign' civil authority, not to unite the covenanters in pursuit of a common substantive enterprise" (OHC 232-33). Here Hobbes (like Marsilius) sees the establishment of a *societas* by means of creating a nonpurposive form of civil association. Here, contract and compact are what creates this character. Yet, Oakeshott also suggests, "But the idea of a compact or contract has also been used (and not less cogently) to describe the relation of a many united in a common enterprise and the person or persons they authorize to be the contingent manager of its pursuit" (OHC 233). No wonder Oakeshott asks, "Is a state to be understood in terms of *societas* or in terms of *universitas*, or is it an equivocal mixture of the two?" (OHC 231-32) The equivocation, however, seems not to be in the ideas of contrasting purposive and non-purposive associations. Instead, our language and thought about them get confused, while Oakeshott himself is, however, clear, that the corporation is purposive association at its core, while the state is not.

Fundamentally, then, Oakeshott's problem with the corporation as a model for the state is not that it reflects a capitalist form of organization or that it prizes efficiency or that it rewards private wealth accumulation over other public goods or that it reflects a neo-liberal mindset. In both Roman and medieval life, corporations preceded contemporary capitalism and even then, they reflected the character of *universitas*. Rather, central among the problems of all such examples for corporate association as a model for the state is the lack of exit. Again, Oakeshott maintains, "that when a state is understood as a purposive association, the analogy [to an enterprise] is fatally corrupted: association in terms of a common substantive purpose *must* spring from the choice of each associate to be thus joined with others, a choice which he must be able to revoke, and no modern European state has very been of this character" (OHC 319). However, again, it must be made clear that the problem is not with enterprise associations or corporations themselves. These associations can multiply and reflect the choice elements in human conduct. Whether it be a medieval guild, a modern publicly traded business corporation or a not-for profit hospital or even a church. All these share the features of *universitas*, whether organized to bring profit to their investors and payment to employees or to provide health to their clients or even salvation or comfort to souls.

A corporation then, any corporation, is an enterprise association which shares the purposive characteristics of *universitas*. We see above some of the problems that it creates as a model for the state. Yet, in the historical overview of the third essay of OHC Oakeshott's occasionally shares somewhat more ambivalence about the state as *universitas*. He notes that there is no history of the modern state that does not contain both *societas* and *universitas*. He can find historical examples that favor one over the other, but none is a pure expression. He does not argue that either is necessary for the other, or that they somehow complement each other. Instead, they live in a precarious relationship of mutual tension; "sweet enemies" he calls them (OHC 326). Yet, while he claims he attempts to restrain his judgment of these models, he makes clear in a variety of ways his negative view of the state as *universitas*; his discussion "reveals a state understood in terms of enterprise association to be a somewhat rickety moral construction, but that is a matter which I have refrained from exploring in order not to prejudice the investigation of its substantive character" (OHC 317). Readers of OHC can judge for themselves his level of restraint but he leaves little doubt about his critique of *universitas* as state.

Because corporations and corporate associations are understood as enterprise associations and *universitas* by Oakeshott, we know he is skeptical of understanding the state as a corporation or using the corporation as a model for understanding the state. Yet, there is much more to be said about corporations because they are significant institutions within the state. So, how does Oakeshott understand corporations and their relations, with each other, to other constituents of the state, and to the state?

CORPORATIONS AND CORPORATE PERSONS

The previous section discussed a definition of the corporation that focused on its character as a purpose association. Yet Oakeshott also reviews several other important elements that both reveal a more complete theory about the corporation and highlight other reasons for its limitations as a model for the state. Before examining these, it is worth noting that Oakeshott does not directly engage with the long history of debates in the field of jurisprudence about the character of the corporation. Undertaking a work in political philosophy in OHC, Oakeshott engages with Hegel and Hobbes, Marsilius and Montesquieu among many others. However, he does not similarly situate his understanding of the corporation with Fredrich Maitland or H. L. A. Hart, Hans Kelsen or Harold Laski. Oakeshott has not committed an error, but nevertheless, his choice to sidestep the debates about whether corporations are real or fiction, legal persons or real persons, natural or artificial entities, do they pre-exist legal recognition or are they creations of the law. Oakeshott does have views on several of these topics, as discussed below; however, he does not place himself in the flow of the discussion of them even though he does imply a familiarity with the contours of such debates.

Oakeshott lands himself in the middle of these questions in an examination of *universitas* as a form of a corporate association. Having first examined the initial historical understandings of *societas*, he then takes up the early history of the *universitas*, which he finds in its Roman inception as a corporate form. Oakeshott explains initially: "Analogically, *universitas* is not difficult to understand. It is persons associated in a manner such as to constitute them a natural person; a partnership of persons which is itself a Person [sic], or in some important respects like a person" (OHC 203). This language is intriguing and confusing. Of course, it is notable that he begins with a discussion of the corporate person invoking the lineage of legal discussion mentioned above. Yet such an approach leaves open the study of the entity constructed when natural persons join together in a durable manner. Or perhaps not, as he immediately retreats from the claim saying that what is created through the partnership is rather "like a person." So, is such an association a natural person or merely an analogy to a natural person? Oakeshott himself recognizes this confusion by explaining "The difficulty comes in trying to make sense of it in terms of a relationship between persons said to compose a one of the same character as each of themselves" (Ibid.). However, Oakeshott does not try to "make sense" of it; instead, he retreats a second time, next suggesting "The paradox may, however, be avoided if we do not insist on the idea of corporate personality and are content to understand the partnership in terms of more commonplace and easily identifiable characteristics" (Ibid.). For those "commonplace" characteristics, he turns initially to "Roman jurists [and how they] understood *universitas*, the corporate mode of association they invented. They assigned it to the law of Persons; and although they never equated it to a person, some of the qualities recognized to belong only to persons were attributed to it…" (Ibid.). Oakeshott's examination then becomes a historical-legal approach that still reveals an underlying theory that generally views corporations as, created, artificial, legal persons with no real claim to having an independent personality; though this explanation is somewhat compromised by his initial claim that *universitas* "is persons associated in a manner such as to constitute them a natural person."

Oakeshott then, even though he initially uses the term "natural person" to characterize *universitas*, comes to reject the idea that such enterprise associations, including corporations, are real persons, instead eventually characterizing them as "*persona ficta*" (OHC 204). In doing so Oakeshott aligns himself more directly against the sort of argument stemming from Maitland and Laski among many others that sees corporations as real entities that are recognized by law. This is even clearer when Oakeshott details the formal elements of a corporation, beginning with its medieval roots. All the formal qualities stem from the claim: "It [a corporate aggregate] was the creature of an act of authority (e.g. a royal, a ducal, or a papal charter) which endowed it with certain power and franchises known as *privilegium universitatis*" (OHC 203). From this, other elements grew:, among these: that it must have a minimum number of members (three); that it creates a perpetual association; that it could be dissolved; that it could create rules for itself;

that it might appoint administrators; "membership could be relinquished by choice to dissociate"; it could own, buy and sell property; it "was immune from charges of crime"; however "it was subject to visitation and inspection by the authority which created it" (OHC 204). It is after the recognition of these elements that Oakeshott claims that it was of no "great impropriety … when an association of this character was spoken of as a *persona ficta*" (Ibid.). That is, because this list of elements that are distinctive to corporations reveals that the legal practice of calling it a person is only an analogy, and thus no real person could be harmed or offended by it being labeled *ficta*. Oakeshott does note that "some fanciful medieval writers were disposed to understand corporate associations as in terms of a corporate 'mind' or 'will,'" but he maintains that "a *universitas* was not a 'one' but a many united in respect to a common purpose" (OHC 215).

It is partially in the elaboration of the elements of corporate association that arise from Roman and medieval jurisprudence into modern law that Oakeshott finds the limits to the idea of a corporation as a state. As already noted, the ability for exit, "even if there must be certain formalities observed" is one of its abiding elements, and so also the idea of an "inspection by the authority that created it"; and a state is not recognizable as a state if it is "the creature of an already superior legal authority" (OHC 204). The observations that reveal a hint of ambivalence about the status of corporations as being real or natural further strongly resolve against a corporate model for the state. He goes as far as to propose: "The character of a state suggested by analogy to a corporate aggregate … is not a many persons transformed into one Person" (OHC 205). When even an enterprise association is created, it is not a new "natural" unified person, but an association connected by one shared purpose. Here then, Oakeshott's commitment to a theory of corporations as artificial entities contributes to the larger political argument against seeing them as a model for the state.

Thus, while Oakeshott tips briefly in the direction of the corporate person as a "natural person," he redirects his energy almost entirely to the *persona ficta*, artificial entity idea of the corporation. Further, although his discussion focuses mostly on the generation of the idea of the corporate association from Roman and medieval law, there is nothing about his characterizations of these purposive associations that distinguishes them in theory from the modern business corporation. If anything, the modern corporation is even more clearly a case of an enterprise association than the medieval church or merchant guild.

We have learned some basic elements of Oakeshott's understanding of corporations. First, they are premier examples of enterprise associations or *universitas*; that is, they are purposive associations that agents join to pursue some common, substantive end. As such, they have been tempting models for the state, but as *universitas*, corporations are a lesser model for the state in Oakeshott eyes. That said, corporate association is a wholly appropriate form of association for human agents to pursue specific ends. Oakeshott writes, "Of course, there is nothing in the character of such [human] persons to stand in the way of their joining with others of their kind in pursuing agreed common substantive purposes and thus becoming members of a variety of enterprise associations in which they have chosen to invest a portion of their energies…. Indeed, chosen corporate association is so far from conflicting with their character that they may be confidently expected to undertake it as a device for satisfying common wants" (OHC 242). Further, such corporate associations can be understood as persons in some fashion, on analogy with human persons. They are bearers of rights and responsibilities as determined by whomever creates or authorizes them; though, for Oakeshott, some rights and responsibilities seem more appropriate (buying, owning and selling property) than others (being criminally liable). Thus, it is convenient for the purposes of law to treat corporations as persons.

CORPORATE PERSONS IN *SOCIETAS?*

Oakeshott spends a significant amount of time in the third essay of *OHC*examining these elements of *universitas* and corporate associations and contrasting them with the elements of *societas*, on their own terms and as models for the state. Yet for all the time he devotes to these two models, there are important relations between and among them that he does not explore as thoroughly. As a simple example, for Oakeshott it is clear that human agents can be members of both civil and enterprise associations, they have the capacity to engage with some other agents as followers of agreed upon rules and laws and with other agents as fellow members in an association pursuing a common goal (and perhaps the same agents in different endeavors reflecting different characters). However, Oakeshott discusses associations themselves, they are either wholly *societas* or *universitas*; well almost wholly since as we saw above that the state, the most significant human association, is in tension between expectations that its members will see it as an expression of both *societas* and *universitas*. So, if human agents can have more than one identity and manner of engaging, and the state itself is the reflection of "a polarized conscience," might not those *persona ficta* modelled on human persons have variable identities as well? (OHC 320).

Consider Oakeshott's understanding of church institutions as examples of *universitas*. Oakeshott comments on various stages of the development of the Catholic church and other churches throughout the history of Europe. For all their variety, all of those are reasonably consistent with his observation, "The Christian Church [sic] was understood to represent the continuing presence of Christ on upon earth, and persons in respect to belonging to it constituted a mystical corporation, a *universitas*, devoted to the worship of God and the performance of his will, and united in common enjoyment of his gifts and consolation of Grace" (OHC 220). Oakeshott focuses on the Catholic church and later Lutheran and Calvinist institutions, yet all sustain the feature of them being *universitas*, corporations organized for a common religious purpose. Without disputing this claim, we can ask whether different churches, even those of different faiths, can engage with each other civilly, as members of a civil association, sharing only the willingness to abide by common rules, not agreeing to pursue a common or shared end, for surely they might disagree about that, but agreeing in how to act in pursuing their different faith goals. For example, such *universitas* associations could recognize common rules regarding how to act toward members of different congregations or faiths. That is, these enterprise associations, marked as *universitas*, would create a *societas* based in the common recognition of rules. If churches, then also guilds, hospitals, other non-for-profit corporations even universities would seem capable of sustaining this complex character: *universitas* to their own associates and *societas* to other such organizations associations.

Now, what about modern industrial or commercial corporations? These seem to be prime examples of *universitas* associations, that is, literally for-profit enterprises. Oakeshott discusses these very little with the exception of corporations who have attempted to exert something like the governance of the state. He examines both the East India Company and the Hudson Bay Company to assure that they were not true examples of a state, but quasi state-like corporate associations. Thus "the 'government' dispensed by the East India Company was that of traders in the interests of their enterprise"; similarly, the Hudson Bay Company exercised its executive, judicial, and legislative authority … in the interests of the trading enterprise" (OHC 271). These rare examples of a discussion of trading companies are one more elaboration of the problem of seeing the state as *universitas* or corporate association. However, can such corporations engage with each other in terms of *societas*?

On its face this seems almost absurd if we follow Oakeshott's schema. His understanding of human conduct as elaborated in the first essay of OHC and throughout the remainder of the book clearly reflects human agents, not corporate persons. The expansive discussion of civil association in the second essay reveals how this unique type of association can allow a distinct form of human agency to flourish. It seems clear that Oakeshott is discussing human persons when discussing the agents that make up enterprise and civil associations. Yet, what counts as an agent is not necessarily so prescriptive. Oakeshott claims: "What is postulated of an agent is not 'free will' but intelligence. Conduct is specified as actions and utterance,

wise or foolish, which have reasons, adequate or inadequate, but not causes" (OHC 235). This passage comes after one in which Oakeshott works to pry agency from many distracting discussions that range from finding agency in "biological or other urges" and complications over the concept of "free will" (Ibid.). If it is perhaps too much to suggest that a corporation can be an agent, it is perhaps not too much to speculate that it might "have intelligence" or at least that it could undertake "Conduct specified as actions and utterance, wise or foolish, which have reasons, adequate or inadequate, but not causes."

With this openness about agency in mind, we return to Oakeshott's central claims in the third essay, that OHC is, among other things, an exploration of "that strand of modern European thought in which a state has been understood as an associations of persons (*cives*) in terms of law recognized as a system of prescriptive conditions (*respublica*)…" (OHC 243). This formal version of civil association requires "[p]ersons understanding themselves and understood in terms of this disposition postulate a state understood in terms of *societas*. If they are to be *cives* they must be *socii*; that is joined in the acknowledgement of the authority of a practice and not in respect of a common substantive purpose" (OHC 242). We have seen that the legal concept of person can be equivocal, and agency as intelligent conduct can share this ambivalence; then while not assuring it, nothing in this discussion rejects the idea that corporate persons could be included in the formative agents of *societas*. Put differently, Oakeshott undertakes no discussion one way or the other regarding corporations as *socii* or *cives*.

Again, Oakeshott's focus is on the human persons that make up civil associations, and thus *societas* and *respublica*, in adopting the identities of *socii* and *cives*; yet his ideas about these identities would seem to require that corporations be fitted into them as well. In his discussion of the earliest formations of the modern European state, for example, he writes, "Each was a many composed of persons recognized in terms of their legal status, of communities of varying antiquity and dimensions….and of corporations enjoying rights and 'liberties' and subject to obligations" (OHC 212). We can see that corporations, from the beginning, have been included in the membership of the state, and, of course, we know further that these are enterprise associations. To state the obvious, corporations exist within the state, embedded and pursuing their substantive purpose as examples of *universitas*. But they are also associations that must follow the law, not unlike *cives*. Not only must they follow the law, but they interact with other corporate associations; and while sometimes this may be to pursue their substantive purpose, Oakeshott has shown us no reason that they could not in theory engage with others as *socii*, members of a *societas*. In this way, the analogy to the natural person that Oakeshott reveals earlier sustains itself here. Just as human agents can identify as members of *universitas* associations at some moments and *societas* in others, so might corporate persons. They could not do so in ways that would change their substantive purpose, but as with other *cives*, they can join to sustain an agreement to follow rules.

CORPORATE ASSOCIATIONS AS *CIVES?*

We come again to the questions, can corporations engage with each other in terms of *societas*? can corporations be *cives* in *respublica*? In asking such questions we are beyond the text of OHC, but the text points us in directions that might help us understand activities of corporations that have been the source of controversy.

Above I speculated about an example of churches engaging with each other as members of civil association, *societas*, for example choosing together to abide by common rules such as of how to act toward members of different congregations or faiths. Such rules would not change the purpose of any church, though it might create considerations to bear in mind when pursuing those ends and limit or foreclose means of doing so. It is not difficult to imagine the same for industrial, commercial or other such business corporations. Again, human persons join both enterprise associations and civil associations, the first to pursue common purposes, the second "in the continuous acknowledgement of the authority of rules of conduct indifferent to the pursuit or the achievement of any purpose" (OHC 201). Corporations signing a purchase contract or joining a conglomerate to extend their reach or increase access to markets would be a

clear instance of their pursuing a common substantive purpose, thus corporations acting in their enterprise capacity. However, a pair or group of such corporations could also join together "not to act in concert but to acknowledge the authority of certain conditions in acting" (Ibid.). In this case they would abide by common rules, by which they will modify their behavior while pursuing whatever substantive end unites the corporation.

This is not difficult to imagine. Consider corporations entering a pact in which they agree to "support and respect the protection of internationally proclaimed human rights; and …make sure that they are not complicit in human rights abuses." Such a compact is not an agreement to promote a shared purpose instead, such a pact would reflect the idea of *societas* above, "to acknowledge the authority of certain conditions in acting." This type of compact might achieve the end of security or stability of the populations in states where corporations do business, but the matter at stake is not establishing what purpose a corporation will pursue, but under what conditions it will do so. This, indeed, is a justification that Oakeshott accepts for a state as *societas* to "impos[e] civil conditions upon industrial enterprises (similar to those designed to prevent fraud or the pollution of the atmosphere)" to increase the ability to enjoy civil association (OHC 305, note). The examples above are not fictional, instead they state the first two principles of the UN Global Compact. One can hardly imagine an institution that might be more anathema to Oakeshott than a United Nations program, but hold that aside for the moment. At first, the challenge here may sound like whether business corporations could join an association that is contrary to or dividing their common purpose. For Oakeshott, that would be a *felo de se*, the existence of the *universitas* or corporate association is to pursue a common purpose; entering into an association that would undermine that purpose would seem not possible. It may also be considered that in joining such a *societas*, a corporation would just be pursuing another means of achieving the common purpose; but that depends upon the character of the rules that make up the *societas*, which themselves are designed to be independent of any given purpose. Whatever outcomes might be hoped for in joining a civil association are uncertain and evanescent, but the actual conditions to be subscribed to are what make the *societas* give it presence over time. In this essay, Oakeshott has given us the language to understand the corporate person here acting as does a natural person, engaging simultaneously in both enterprise and civil associations for different reasons.

CORPORATIONS: *CIVES* IN *RESPUBLICA?*

Corporate associations, of course, are among the "persons" that are subject to the state's laws. It seems obvious that "corporations enjoying rights and 'liberties' and subject to obligations" is a regular part of the experience within the modern state. But how has Oakeshott helped us understand these associations, not only as opportunities for human agents to create and join to pursue their varying substantive purposes, but as persons themselves, institutions within the state that exercise "rights" and are "subject to obligations?" I suggested above that like human persons, corporations may have character of both *universitas*, as they carry out the shared purpose of their associates but also *societas*, as they also engage in non-purposive relations with other corporate associations. Again, to use his Latinate terms, a corporation can be a *socius*, a member of a *societas*, a civil association, joining with other such members in which the choice to be associated reflects a shared willingness to abide by rules that indifferent to the substantive purpose of any particular corporation. Put differently, and perhaps surprisingly, corporations can be engaged in a "moral relationship," for fundamentally, that is what Oakeshott claims *societas* to be (OHC 202). Thus we must be careful not to confuse what Oakeshott says about the state (mis)understood as an enterprise association, or *universitas*, and how enterprise associations may interact within the state.

We then take this a step further, and ask are corporations *cives*? Again, Oakeshott uses this term to refer to the persons in a state understood as *societas*, which he calls *respublica*. Can corporations be the "persons (*cives*) [associated] in terms of law recognized as a system of prescription conditions (*respublica*) indifferent (not merely impartial) to the satisfaction of substantive wants?" Are they citizens of the state understood in this fashion? Oakeshott discusses *cives* like *socii*, as human agents that create associations,

and he does not use this language to characterize aggregate persons, whether corporate associations or civil associations. Yet, corporate persons must be in Oakeshott's understanding of the state as *respublica* since he himself understands *respublica* to allow agents to pursuing their substantive interests, including by "becoming members of a variety of enterprise associations."

We return first Oakeshott's understanding of "corporations enjoying rights and 'liberties' and subject to obligations." Oakeshott is explicit about some elements of the list of these obligations and liberties, those are different in some regards, and the total is shorter than for human persons. Corporate associations are formed explicitly for a purpose, and while they have the capacity for non-purposive commitments, those are secondary. That purpose then also becomes its primary legal obligation. Oakeshott reviews a series of common rights and privileges of corporations, then notes "The corresponding obligation was that of adhering to its registered purpose (particularly in use of its funds) and to observe the special conditions of incorporation, if any" (OHC 215). This is a rather short list of obligations, and absent is much attention to any other following of law, recalling that previously we saw that Oakeshott claimed that a corporate association "(though not its members) was immune from charges of crime" (OHC 204). Here is not the place to engage in debate about corporate criminal liability, except perhaps to note that Oakeshott observes the following abilities of the corporate person: "It might own property, buy, sell, enter into agreements with others, employ servants, and otherwise act as if it were a person" (Ibid.). Any entity that can do these things, and also that has "the right to sue and be sued as an association" might also be capable of fraud, delinquency of payment, false representation as a corporation among other legal failures that reflect criminal liability (OHC 215). An entity that can "sue and be sued" further opens a vista of legal complications of civil liability that Oakeshott does not discuss.

These latter are the types of rights and obligations ("to sue and be sued") that overlap with those held by human persons and *cives*, but then there are those rights are unique to corporations. "The usual privileges of corporate status were the right to perpetual succession, … the right to make rules for itself, … the right to identify its corporate decisions with a common seal" (Ibid.). These are reminders that the idea of a corporate person is, for Oakeshott, a *persona ficta*, an analogy to the natural persons but not to be confused with them; corporate persons' rights and obligations may overlap those of natural persons and yet maybe be both broader and narrower. However, when we look at what a *cives* might expect in *respublica*, are they notably distinct?

Oakeshott does not provide a simple list of civic obligations and rights for a *cives* that we can compare to corporate liberties and obligations; however, he does offer statements about their expectations. "*Cives* and subjects are recognized and recognize themselves to be related in respect of their acknowledgement of the authority of a system of *lex* composed of conditions to be subscribed to in self-chosen conduct, conditions which are indifferent to the satisfactions sought in the actions and utterances they qualify" (OHC 263). Fitting corporate persons in that sentence may be awkward, especially in concepts like recognition and conduct that may seem uniquely human; however, Oakeshott has also suggested that a corporation is "persons associated in reaching joint conclusions which are decisions to speak or to act in relation to a common purpose," which seems more easily to fit into a decision to recognize and to choose and then to undertake a wide variety of actions in pursuit of its common purpose (OHC 214).

What of politics? Within a *respublica* we might expect *cives* to be the agents who undertake politics; can these activities be these of corporations? Once more, the language Oakeshott uses indicates the purview of all activities of *cives*, including politics, to be those of human persons. Yet, again, he does not exclude corporate persons even in the somewhat diminished conception of politics within *respublica*. Oakeshott is careful to be clear that in *societas*, obligation to follow the rules is not based upon their desirability or approval of the conditions they create and impose but only upon whether they are proper rules; and thus he also often seems to exclude debate about the desirability or approval of rules. But this is not the case. The rules of *societas* are not written in the heavens or etched in stone; instead, they are human creations and thus are subject to alteration. "Rules eligible to be deliberately altered are rules eligible to be approved or disapproved"; and "politics" is what he calls "[t]hinking and speaking about *lex* in respect of

the desirability what it prescribes …" (OHC 263). There is nothing in this discussion of politics that would of necessity exclude corporate persons from such discussions. Further, while Oakeshott accepts the possibility of circumscription of the activity of all *cives*, noting that politics, "like every activity of *cives*, may be subject to civil conditions, but in civil association *lex* cannot either proscribe or permit it" (Ibid.). The idea of politics, "thinking and speaking about lex," reflects a central deliberative understanding, and it may be a conditioned form of interaction in *societas*, but what does he mean that "*lex* cannot either proscribe or permit it?" Does he mean that *lex* could not have the authority to do so, or that it is unable to "proscribe or permit" the basic exercise of human conduct of deliberation? Oakeshott's text is not clear, but the same questions then attend for corporate persons as *cives*. Oakeshott does not undertake the question of whether corporate persons can think, but as we saw above, they are (or can be) deliberative entities; recall that he characterizes corporations as "persons associated in reaching joint conclusions which are decisions to speak or to act in relation to a common purpose." While awkward to conceive of corporations as "thinking," it is not difficult to imagine them deliberating upon what ways to speak and act. In the passage above, this is focused upon the "common purpose" but there is no reason Oakeshott gives why such could not also discussion the desirability of what the rules prescribe. In these central ways, in an Oakeshottian *respublica*, then a corporate person might be first a *socius* and then a *civis*, unexpected as that might be.

CORPORATIONS AND THE CHARACTER OF THE MODERN STATE

Throughout the twentieth and twenty-first centuries corporations have become ever more visible institutions not only within the economy but in the social and political world of the modern state. Some have advocated for them to play a greater role in providing social goods and providing leadership about pressing matters like the environment, while others have seen these sorts of activities by corporations as cynical attempts to misdirect the public from corporate malfeasance and still others have seen such engagements as missteps by corporations that distract from their core purpose. Finally, the impress of corporations on politics raises concerns for many about the ability of the state to reflect the concerns of its human citizens independent of the interests of corporations. When we ask whether in OHC, Michael Oakeshott provides ways to help sort through these conundrums, we do not find easy answers. Corporations are prime examples of enterprise associations and are thus well-suited to pursue their central common purpose; however, they are a problematic model for the state, and Oakeshott is critical of the idea of the state as an industrial enterprise, as well as attempts to use the state to serve corporate ends. Oakeshott's conceptions of civil association might seem to exclude corporations, but quite the opposite; civil association is what allows its associates to pursue their interests and desires, including in a corporate form, and this then means that corporations are themselves rules-recognizing members of the civil association. Corporations not only must follow the rules (*lex*) of the state as civil association (*respublica*) but provisionally maybe be deliberative partners like the human agents (*cives*) that make it up.

For Oakeshott, would corporations have social responsibilities to supplement any public goods provided by the state? Enterprise associations are distinct by their sole focus on their core purpose and such activities might divert from that; but who is to be the judge of whether a corporation is pursuing or distracted from its purpose? In the first instance, it is those to make up the enterprise who are to judge whether it is managed in a way that they find serves their interest; yet the state, as authorizer of the corporations retains the right to visit and inspect them and perhaps assess the corporation's obligation to adhere to its "registered purpose." The state as civil association would not have the authority to compel a corporation to a purpose that conflicts with its core purpose any more than it can compel a *civis* to an unchosen purpose. Yet Oakeshott does drop a small note indicating the state can create conditions that corporations must adhere to that might appear to serve a substantive end. In a note to the text, late in OHC, while discussing the eighteenth and nineteenth century demands for an enterprise state, Oakeshott observes: "great disparities of wealth were an impediment (though not a bar) to the enjoyment of civil association; and this

hindrance could and should be reduced by imposing civil conditions upon industrial enterprises (similar to those designed to prevent fraud or the pollution of the atmosphere)" (OHC 305, note).

Oakeshott surprises again. Preventing fraud or the pollution of the atmosphere are not substantive ends of the state in this view, but civil conditions that require industrial enterprises to conduct their activities modified by rules that mitigate fraud and pollution in the choices and activities they undertake. Further, models for conditions that can be civilly imposed on industrial enterprises to "reduce" "great disparities of wealth." Oakeshott does not expect business corporations to be eleemosynary institutions, but the civil conditions created in *respublica* can create rules that modify how they act in ways that protect the state itself.

Oakeshott is bracing in his clarity of the distinctions between civil and enterprise association and what they offer. Yet, *societas* and *universitas* are both "components of the ambivalent character of the state and the office of its government" (OHC 323). The corporation fits into this understanding of the state, reflecting its character as an enterprise association; but even as a *universitas* in a *respublica*, it may share in some of the characteristics of a *societas*. Perhaps this muddies the very clarity of the distinction he offers. In his closing sentence Oakeshott indicates that we might expect this because *societas* and *universitas* are "each a historical response to the ordeal of consciousness, which have emerged among the associates who compose the still-puzzling associations called modern European states and settled themselves there in ever changing proportions" (OHC 326). The corporation, as well, is one more "still-puzzling association" within these associations called the modern state.

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