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# Rationalism in Public Law

Graham Gee\* and Grégoire Webber\*\*

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## *Abstract*

Rationalism is ‘the stylistic criterion of all respectable politics’. So lamented political philosopher Michael Oakeshott in a series of essays published in the 1940s and 1950s. Rationalism, for Oakeshott, is shorthand for a propensity to prioritise the universal over the local, the uniform over the particular and, ultimately, principle over practice. It culminates in the triumph of abstract principles over practical knowledge in a manner that erodes our ability to engage in political activity. Although Oakeshott’s critique was made with the practice and study of politics in mind, it has a wider relevance. For rationalism, as we see it, has become the dominant style in public law. We draw upon Oakeshott’s critique to elucidate the risks associated with rationalism in public law and call for a renewed engagement with practical knowledge in the study of the constitution.

*Key words:* Public Law, Rationalism, Oakeshott, Traditions, Technical Knowledge and Practical Knowledge

## I. INTRODUCTION

For public lawyers, ours is an age of principle. This is most obvious in the attempt of many public lawyers to ground the British constitution on a set of fundamental and rationally justified principles, such as the rule of law, the separation of powers, and judicial independence. Today, the methodology of many public lawyers seems to involve expounding the meaning and content of a set of principles, evaluating prevailing practices in terms of those principles, and if necessary calling for the re-fashioning of practice around principle. The result is a push within the study of public law for a more rationalised, formalised, and institutionalised constitution. This search for principle could be read as evidence of the increasing sophistication and surefootedness of public lawyers; a reflection, in other words, of the maturing of public law as an academic pursuit, with public lawyers grappling with some of the longstanding shortcomings of a constitution renowned for a pragmatism born of a deep-seated anti-rationalism. It could also be read, however, as a reflection of a rationalistic propensity among public lawyers to prioritise the universal over the local, the uniform over the particular and, ultimately, principle over practice. This rationalistic propensity, it could be argued, culminates in public lawyers losing the ability to differentiate between the frailty of the constitution and the frailty of their own understanding of it.<sup>1</sup> We surmise that there is truth to both of these readings. Our present aim is to interrogate the rationalistic tendency discernible within the

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<sup>1</sup> See F. Mount, *The British Constitution Now* (London: Heinemann, 1992) 32.

search for principle in public law; that is to say, to explore what might be termed *rationalism in public law*.

To explore the phenomenon of rationalism in public law, we draw upon the work of Michael Oakeshott.<sup>2</sup> Public lawyers have grown accustomed to canvassing the works of political philosophers to cast light on the nature of public law, but they have largely neglected Oakeshott's oeuvre. We suspect that there are three main and partially overlapping reasons for this. First, Oakeshott's style is idiosyncratic and something of an acquired taste.<sup>3</sup> His prose is, for a start, distinctively 'English'. It is peppered with homely—critics would say homespun—metaphors drawn from the worlds of cricket, cookery, and Victorian England; metaphors that are unlikely to be to everyone's taste.<sup>4</sup> More significantly, Oakeshott defies several scholarly conventions. There is little refutation of the arguments of other political philosophers in his writings and few and far between are the logical puzzles and linguistic analyses emblematic of much contemporary political philosophy.<sup>5</sup> One consequence of this is that readers can sometimes struggle to situate Oakeshott's claims within the landscape of political philosophy, let alone to extrapolate to other disciplines, such as public law.<sup>6</sup> A further consequence is that the subtlety of his thought is not easily understood without a close examination of some of his individual essays, for he rarely enumerates his main claims, preferring to allow themes to flow uninterrupted into each other as if mirroring the cadence of a conversation. As one commentator puts it, Oakeshott's essays 'are like a palimpsest insofar as they seem to contain multiple layers in which many intriguing things are visible in fleeting and tantalizing glimpses'.<sup>7</sup>

A second reason for the relative neglect of Oakeshott's work by public lawyers is the commonplace characterisation of his thought as 'conservative'. We suspect that this leads some public lawyers to assume either that Oakeshott's writings are of interest only to those sharing this disposition or that all of his writings pursue a right-leaning agenda. Neither assumption holds true. For a start, Oakeshott is not so easily categorised and, indeed, he eschews labels such as conservative or liberal

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<sup>2</sup> Useful introductions to the political philosophy of Michael Oakeshott include W.H. Greenleaf, *Oakeshott's Philosophical Politics* (London: Longmans, 1966); P. Franco, *The Political Philosophy of Michael Oakeshott* (New Haven: Yale University Press, 1990); and T. Nardin, *The Philosophy of Michael Oakeshott* (University Park: Pennsylvania State University Press, 2001).

<sup>3</sup> See generally J.L. Auspitz, 'Michael Joseph Oakeshott (1901-1990)' in J. Norman (ed), *The Achievement of Michael Oakeshott* (London: Duckworth, 1993) 1, 9-10.

<sup>4</sup> See J. Horton, 'A Qualified Defence of Oakeshott's Politics of Scepticism' (2005) 4 *European Journal of Political Theory* 23, 24.

<sup>5</sup> Though seldom explicitly engaging with other writers in his principal works, Oakeshott did so relentlessly throughout his career via book reviews, publishing more than 160 reviews across almost 70 years, in both academic and non-academic publications. His book reviews for the period 1926-1951 are now consolidated in M. Oakeshott, *The Concept of a Philosophical Jurisprudence: Essays and Reviews 1926-51* (ed. L. O'Sullivan, Exeter: Imprint Academic, 2009).

<sup>6</sup> It has been suggested that a further consequence of this unique style is that, even within the realm of political philosophy, Oakeshott's work 'could never become the basis for a school or movement of any kind': N. O'Sullivan, 'In the Perspective of Western Thought' in J. Norman (ed), *The Achievement of Michael Oakeshott* (London: Duckworth, 1993) 101, 101. See also P. Kelly, 'The Oakeshottians' in M. Flinders, A. Gamble, C. Hay, and M. Kenny (eds.), *The Oxford Handbook of British Politics* (Oxford: OUP, 2009) 154.

<sup>7</sup> D. Candrera, 'Oakeshott and Plato: A Philosophical Conversation' in T. Fuller and C. Abel (eds), *The Intellectual Legacy of Michael Oakeshott* (Exeter: Imprint, 2005) 2, 3.

in most of his published works.<sup>8</sup> Though he is regularly labelled conservative, there are some who have characterised parts of his work as expounding a kind of liberalism as much as a kind of conservatism;<sup>9</sup> others have split the difference, suggesting that his is ‘a kind of conservative liberalism or liberal conservatism’.<sup>10</sup> In a similar vein, Oakeshott’s concern is rarely to justify any particular agenda, with some of his critiques applying as much to the political right as to the political left. His thought, in other words, is not doctrinaire. There is instead a richness and complexity to Oakeshott’s essays that make them an important resource for public lawyers, no matter our disposition or his.

Third, to the extent that public lawyers are familiar with Oakeshott’s writings, it is primarily through the work of Martin Loughlin.<sup>11</sup> Public lawyers owe a large debt to Loughlin for advertising the richness and relevance of Oakeshott’s writing. We acknowledge our special debt to Loughlin whose scholarship has long insisted on the growing rationalistic tendency in public law, drawing—as do we—on Oakeshott to substantiate his evaluation. What is unfortunate, in our view, is that public lawyers are likely most familiar with the connections that Loughlin mapped between Oakeshott, Dicey, and ‘conservative normativism’.<sup>12</sup> Not only do these connections reinforce the impression that Oakeshott’s political thought is relevant only to the extent that it casts light on a conservative disposition within public law scholarship, it also affiliates Oakeshott with ‘the impediments of Professor Dicey’s England’;<sup>13</sup> the very impediments that many public lawyers strive to upend.<sup>14</sup> We will return to the use that Loughlin makes of Oakeshott’s work, noting some of the ways in which we both build on and depart from it.

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<sup>8</sup> Oakeshott explains that ‘being conservative’ is a ‘disposition’ not a ‘doctrine’: ‘To be conservative, then, is to prefer the familiar to the unknown, to prefer the tried to the untried, fact to mystery, the actual to the possible, the limited to the unbounded, the near to the distant, the sufficient to the superabundant, the convenient to the perfect, present laughter to Utopian bliss’: ‘On Being Conservative’ in *Rationalism in Politics and other essays* (Indianapolis: Liberty Fund, 1991) 407, 408-409.

<sup>9</sup> See e.g. P. Franco, ‘Michael Oakeshott as a Liberal Theorist’ (1990) 18 *Political Theory* 411; and W.J. Coats, ‘Michael Oakeshott as Liberal Theorist’ (1985) 18 *Canadian Journal of Political Science* 773.

<sup>10</sup> R. Grant, *Oakeshott* (London: Claridge, 1990) 62. See further M. Cranston, ‘Michael Oakeshott’s Politics’ (1967) 28 *Encounter* 82 (describing, at 82, Oakeshott as ‘a traditionalist with few traditional beliefs, an “idealist”: who is more sceptical than many positivists, a lover of liberty who repudiates liberalism, an individualist who prefers Hegel to Locke, a philosopher who disapproves of *philosophisme*, a romantic perhaps ... and a marvellous stylist. Oakeshott’s voice is unique’).

<sup>11</sup> See e.g. *Public Law and Political Theory* (Oxford: Clarendon Press, 1992) 64-83 and *Legality and Locality: The Role of Law in Central-Local Government Relations* (Oxford: Clarendon Press, 1996) 369-378. See also the many references to Oakeshott’s work in *The Idea of Public Law* (Oxford: OUP, 2003) and *Foundations of Public Law* (Oxford: OUP, 2010).

<sup>12</sup> Loughlin, *Public Law and Political Theory*, *ibid*, 184-190. For Loughlin, ‘conservative normativism’ has been the dominant tradition within public law thought, and is underpinned by Dicey’s scholarship. It is associated with ‘such ideas as sovereignty, the universal rule of law, and a conception of the rule of law which places the judiciary beyond reproach’ (at 232).

<sup>13</sup> J.A.G. Griffith, ‘The Political Constitution’ (1979) 42 *MLR* 1, 5.

<sup>14</sup> It is worth noting that Oakeshott’s influence on public law thought, such as it is, can be traced not only in ‘conservative normativism’. There are also hints in ‘liberal normativism’, insofar as Oakeshott influenced Lon Fuller, who in turn influenced a number of prominent ‘liberal normativists’, including Ronald Dworkin, T.R.S. Allan, and David Dyzenhaus. On Oakeshott’s influence on Fuller, see J.W.F. Allison, ‘Legal Culture in Fuller’s Analysis of Adjudication’ in W.J. Witteveen & W. van der Burg (eds.), *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) 346, 358-363.

To make our argument that the search for principle within public law expresses a rationalistic propensity, we focus primarily on two of Oakeshott's most celebrated essays. The first is 'Rationalism in Politics', originally published in 1947, and in which Oakeshott maps the contours of an intellectual propensity that he calls 'rationalism'.<sup>15</sup> This propensity, Oakeshott explains, can be discerned in most human activities, but it has an especially pernicious effect on politics. In this first essay, Oakeshott does not offer a comprehensive critique of rationalism, nor does he elaborate its pernicious effects on political life. Rather, his readers are offered a foretaste of concerns developed in a subsequent essay, 'Political Education'.<sup>16</sup> Oakeshott delivered this second essay as his inaugural lecture at the London School of Economics and Political Science in 1951, where he had succeeded to the chair in political science previously occupied by Harold Laski. For reasons that will become apparent, Oakeshott's inaugural lecture caused quite a stir at the LSE, and not least because he had assumed Laski's chair.<sup>17</sup> In this second essay, Oakeshott considers the consequences of rationalism on political life and presents a biting critique of the 'ideological' style of politics he associates with it. In neither essay does Oakeshott purport to engage explicitly with questions of law or the legal system.<sup>18</sup> The special burden of our paper is to offer a close reading of these two essays that illuminates their potential for revealing something significant about the study of public law in Britain.<sup>19</sup>

If the primary objective of our paper is, then, to take issue with the rationalistic tendency within the search for principle in public law, a secondary objective is to show how a close reading of Oakeshott's work can be a rich resource for public lawyers. We begin by considering in some detail Oakeshott's critique of rationalism and its effects on the practice and study of politics. Next, we explain why this critique of rationalism in politics can help us to identify and make sense of a similar propensity within public law. We identify a number of 'sites' where rationalism in public law is especially manifest and seek to show how each distorts

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<sup>15</sup> 'Rationalism in Politics' in *Rationalism in Politics and other essays* (Indianapolis: Liberty Fund, 1991) 5. This essay was first published in the Cambridge Journal and later included in a collection of essays entitled *Rationalism in Politics and Other Essays* (1962). The Liberty Fund reprinted this collection in 1991, adding a further six essays not included in the original collection.

<sup>16</sup> 'Political Education' in *Rationalism in Politics and other essays* (Indianapolis: Liberty Fund, 1991) 43.

<sup>17</sup> The difference between the scholarship of Oakeshott and Laski was stark. As Ralf Dahrendorf notes, 'Oakeshott was conversational, where Laski was forever the great orator; he was concerned with details where Laski preferred the great sweep; he dug deeply into the past ... where Laski could never get enough of the present, the day, almost the minute; and, of course, Oakeshott was a true and profound conservative thinker': R. Dahrendorf, *LSE: A History of the London School of Economics and Political Science* (Oxford: OUP, 1995) 368.

<sup>18</sup> Oakeshott's most obviously legal-oriented writings are to be found in his 'The Rule Law' [1983] in M. Oakeshott, *On History and Other Essays* (ed. T. Fuller, Indianapolis: Liberty Fund, 1999) 119, to which could be added his 'Introduction to *Leviathan*' in M. Oakeshott, *Hobbes on Civil Association* (Indianapolis: Liberty Fund, 1975) 1 and 'The New Bentham' in *Rationalism in Politics and other essays* (Indianapolis: Liberty Fund, 1991) 132. On Oakeshott's understandings of the rule of law and authority, see N.B. Reynolds, 'Grounding the Rule of Law' (1989) 1 *Ratio Juris* 2 and R. Friedman, 'Oakeshott on the Authority of Law' (1989) 1 *Ratio Juris* 27.

<sup>19</sup> Insofar as our objective is to sketch the rationalistic tendency within the *study* of public law, our focus is primarily (though not exclusively) on academic public lawyers. Plainly, it is not only academics who engage in the study of public law; judges, civil servants, and practitioners do so as well. But as we will see, the study of public law by academics is particularly susceptible to rationalism. As will also become clear, rationalism in the *study* of public law has important consequences for the *practice* of public law.

our understandings of the constitution. We argue that these various sites reinforce the progressive nature of rationalism, in the sense that the rationalistic propensity increases in intensity and scope over time, rendering public lawyers less and less adept at acquiring and imparting a working understanding of the constitution. We conclude by calling for a renewed engagement within the study of public law with the varied and varying practices of political and legal actors. As we see it, the rationalistic tendencies evident within the search for principle in public law risk developing an understanding of the constitution that focuses only on, and in turn exaggerates, certain features of our political and legal arrangements and, in this way, provides a false and misleading education in public law. Rationalism in public law is liable, we argue, to reduce the complexities and idiosyncrasies of our political and legal arrangements to little more than a *placeholder constitution*.

## II. RATIONALISM

In ‘Rationalism in Politics’, Oakeshott offers a critique of *rationalism*.<sup>20</sup> The target of his critique is neither reason nor rationality. Rational conduct, Oakeshott notes, ‘is something no man is required to be ashamed of’.<sup>21</sup> His target is instead ‘the Rationalist’, a personification<sup>22</sup> of the misuse of reason that is characteristic of the rationalistic propensity. No one writer (or group of writers) is singled out as the Rationalist(s).<sup>23</sup> This is important inasmuch as Oakeshott has been criticised for arguing against a ‘straw man’; that is to say, his account of rationalism is challenged as being one to which no serious person subscribes.<sup>24</sup> The challenge is misplaced. His concern is with a propensity that is only partially embraced—and, as we shall see, by its very nature can only ever be incompletely embraced—by any one person. The Rationalist is no one, and yet he is everyone. No one is ever the Rationalist, but each of us can recognise ourselves in his character and disposition from time to time. The Rationalist, in other words, exhibits a propensity that from one person to the next is more or less present—including, for some, even in the writing of Oakeshott himself.<sup>25</sup> So pervasive is this rationalistic propensity that, in Oakeshott’s view, it has ‘come to colour the ideas, not merely of one, but of all political persuasions, and to flow over every party line’.<sup>26</sup>

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<sup>20</sup> Oakeshott’s was not the only critique of rationalism in the 1940s and 1950s: see, generally, S.R. Letwin, ‘Rationalism, Principles and Politics’ (1952) 14 *Review of Politics* 367.

<sup>21</sup> Oakeshott, ‘Rational Conduct’ in *Rationalism in Politics and other essays* (Indianapolis: Liberty Fund, 1991) 99, 100.

<sup>22</sup> Throughout the text, we follow Oakeshott’s usage and employ the masculine pronouns ‘him’ and ‘his’ when referring to ‘the Rationalist’. This should not be taken to imply that rationalism in politics or, as we review below, in public law is a propensity displayed only by members of one sex.

<sup>23</sup> Oakeshott cites some writers as displaying rationalist tendencies—including Locke, Hayek and Marx—but none is singled out as exemplifying rationalism in quite the manner of the Rationalist.

<sup>24</sup> See e.g. D. Kettler, ‘The Cheerful Discourses of Michael Oakeshott’ (1964) 16 *World Politics* 483, 488; and J.R. Archer, ‘Oakeshott on Politics’ (1979) 41 *Journal of Politics* 150, 153-154.

<sup>25</sup> See e.g. N. Wood, ‘A Guide to the Classics: The Skepticism of Professor Oakeshott’ (1959) 21 *Journal of Politics* 646, 660; and D. Spitz, ‘A Rationalist Malgré Lui: The Perplexities of Being Michael Oakeshott’ (1976) 4 *Political Theory* 335, 341.

<sup>26</sup> Oakeshott, ‘Rationalism in Politics’, n 15 above, 5.

Distinguishing the rationalistic propensity is an unshakeable faith in the power of reason to identify exact, complete, and orderly solutions to the practical problems that arise in the real world. Reasoning by reference to and in terms of a set of abstract principles, the Rationalist prioritises well-reasoned and well-ordered, even if untried, solutions over the tried and tested, but often untidy established ways of doing things. From the Rationalist's vantage point, established practices must be brought before the altar of reason and are to be left in place only if justified by reason. In this, the Rationalist dismisses the contingencies of the real world that might lead him to question untested solutions suggested by abstract reasoning. As Oakeshott sees it, the Rationalist's belief in the power of reason culminates in its misuse. The Rationalist's error is not that he recognises the authority of reason, but that he recognises no authority except that of reason and, even then, as will become clear, only by equating reason with a special kind of technique.<sup>27</sup>

From Oakeshott's perspective, the 'hidden spring' beneath the Rationalist's error is a distinction between two broad species of knowledge: *technical knowledge* and *practical knowledge*.<sup>28</sup> Technical knowledge can be formulated into a set of more or less precise rules, principles, and maxims that are capable of being learned by rote.<sup>29</sup> Since technical knowledge is capable of being formulated into more or less precise rules, it tends to be associated with a semblance of order, certainty, and completeness. Though skill and insight are often required to formulate technical knowledge into rules, principles and maxims, it is a species of knowledge that can often be found in and (subject to an important qualification below) learned from books.<sup>30</sup> It is the knowledge found, for example, in instruction manuals, cookery books, and legal textbooks.

Practical knowledge, by contrast, is not susceptible to precise formulation. It comprises sensibilities, dispositions, understandings, intuitions and judgments—or, in more everyday parlance, skills, talents, and knacks—that typically find expression in the customary way of doing things.<sup>31</sup> Practical knowledge is neither taught nor learned, only imparted and acquired, and often seems imprecise, uncertain, and incomplete as a result. As Oakeshott puts it, practical knowledge 'exists only in practice' and can be acquired 'only by continuous contact with one who is perpetually practising it'.<sup>32</sup> The subtle skill and craft of the cook is Oakeshott's most famous illustration of practical knowledge. The cook's practical knowledge cannot be reduced to the text of a cookery book. It can be acquired only through experience—and, in particular, through an apprenticeship in which the craft of cooking is learnt from and transmitted between cooks. In the kitchen, the junior cook learns not only technique from the more experienced cook, but

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<sup>27</sup> *ibid.*, 6.

<sup>28</sup> *ibid.*, 11. There are oft-noted overlaps between the distinction Oakeshott draws and that drawn by Gilbert Ryle between 'knowing how' and 'knowing that': G. Ryle, 'Knowing How and Knowing That' (1945-46) 46 *Proceedings of the Aristotelian Society* 1.

<sup>29</sup> Oakeshott, 'Rationalism in Politics', n 15 above, 14.

<sup>30</sup> As Robert Grant puts it, technical knowledge 'can be put into and got out of books': *Oakeshott* (London: Claridge Press, 1990) 48.

<sup>31</sup> See K. Minogue, 'Modes and Modesty' in J. Norman (ed), *The Achievement of Michael Oakeshott* (London: Duckworth, 1993) 43, 52.

<sup>32</sup> Oakeshott, 'Rationalism in Politics', n 15 above, 15.

acquires a set of sensibilities, skills and judgments as well, often ‘without it ever having been precisely imparted’, and ‘without being able to say precisely what it is’.<sup>33</sup> On Oakeshott’s understanding, the technique learned by the cook can be said to be secondary, not only in relation to the craft of cooking, but also in the sense that it cannot be ‘put into practice’ without the practical knowledge needed to understand and employ it.

Oakeshott’s claim is that both technical knowledge and practical knowledge are involved in most human activities. As Oakeshott explains, ‘nobody supposes that the knowledge that belongs to the good cook is confined to what is or may be written down in the cookery book’; technique and practical knowledge ‘combine to make skill in cookery wherever it exists’.<sup>34</sup> Whenever people are engaged in art, science, or politics, it is never enough merely to have learned the relevant rules (technical knowledge); they must also know how and when to apply those rules, and when to depart from them (practical knowledge).<sup>35</sup> No matter how explicit, formal, and comprehensive a set of rules purports to be, whosoever seeks to apply rules inevitably calls upon a kind of practical knowledge that cannot be found in or learned from a rulebook.<sup>36</sup> The Rationalist, in Oakeshott’s account, misses this. He treats technical knowledge as if it were the only useful type of knowledge involved in every human activity; in other words, he treats technical knowledge as self-complete, failing to appreciate that ‘learning a technique does not consist in getting rid of pure ignorance but in reforming knowledge which is already there’.<sup>37</sup>

The Rationalist’s attachment to technical knowledge and his willingness to divorce it from practical knowledge are easily explained. Technical knowledge is the only knowledge that satisfies the Rationalist’s ‘search for order and distinctness’ and ‘the standard of certainty which the Rationalist has chosen’.<sup>38</sup> As Oakeshott views it, this attraction to order, certainty, neatness and completeness is matched by, and partly the product of, the Rationalist’s ‘irritable nervousness in the face of everything topical and transitory’.<sup>39</sup> For the Rationalist, ‘nothing is of value merely because it exists (and certainly not because it has existed for many generations), familiarity has no worth, and nothing is to be left standing for want of scrutiny’.<sup>40</sup> Everything must be tested and, at the end of the day, justified in terms of reason. The Rationalist’s disposition is to bring ‘the social, political, legal and institutional inheritance of his society before the tribunal of his intellect’, with an inclination

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<sup>33</sup> *ibid*, 15.

<sup>34</sup> *ibid*, 12-13. In a similar vein, he explains that ‘it would be excessively liberal to call a man a Christian who was wholly ignorant of the technical side of Christianity, who knew nothing of creed or formulary, but it would be even more absurd to maintain that even the readiest knowledge of creed and catechism ever constituted the whole of the knowledge that belongs to a Christian’ (at 13).

<sup>35</sup> In a later work, Oakeshott puts it in these terms: ‘It is only in fantasy that ... to understand [a practice] is to know one’s way around a rule-book’: *On Human Conduct* (Oxford: Clarendon Press, 1975) 91.

<sup>36</sup> As Oakeshott puts it: ‘a pianist requires artistry as well as technique, a chess-player style and insight into the game as well as a knowledge of the moves, and a scientist acquires (among other things) the sort of judgment which tells him when his technique is leading him astray and the connoisseurship which enables him to distinguish the profitable from the unprofitable directions to explore’: ‘Rationalism in Politics’, n 15 above, 15.

<sup>37</sup> *ibid*, 17.

<sup>38</sup> *ibid*, 6, 16.

<sup>39</sup> *ibid*, 7.

<sup>40</sup> *ibid*, 8.



always to prefer ‘the invention of a new device to making use of a current and well-trying expedient’.<sup>41</sup> In short, the Rationalist’s impulse is to reform. When considering how to reform, the Rationalist maintains that universally applicable and uniform solutions are always the best solutions. There is never a place for ‘a best in the circumstances’, only a place for ‘the best’, since ‘the function of reason is precisely to surmount circumstances’.<sup>42</sup>

Though critical of the rationalistic disposition, Oakeshott’s account is not wholly unsympathetic. The Rationalist is motivated by a deeply held, if sadly misdirected desire to improve upon his inheritance. However, in the pursuit of improvements, the Rationalist displays ‘no aptitude for that close and detailed appreciation of what actually presents itself’ and, in this, demonstrates how he lacks the ‘power of accepting the mysteries and uncertainties of experience’.<sup>43</sup> It seems little wonder, then, that the Rationalist finds no real value in practical knowledge. The only true type of knowledge is that which can be clearly, precisely, and explicitly articulated in a set of rules, principles, and maxims. By neglecting the importance of practical knowledge, and by assuming that all knowledge is necessarily technical, the Rationalist’s first error is to mistake a part for the whole. He then compounds this error by seeking to reduce ‘the tangle and variety of experience to a set of principles’ that can then be justified or criticised ‘upon rational grounds’. The Rationalist displays no appreciation for ‘the cumulation of experience, only of the readiness of experience when it has been converted into a formula’.<sup>44</sup> In this, he fails to grasp how, in purporting to reduce practical knowledge to a set of rules and, subsequently, seeking to develop a knack and feel for how to follow the resulting rulebook, he is necessarily, even if unselfconsciously, acquiring and employing practical knowledge.

For Oakeshott, the rationalist tendency to reduce practical knowledge to technical knowledge is a feature discernible, to varying degrees, in every human activity. But as will become clear, Oakeshott regards this propensity as having special relevance to, and an especially pernicious effect on, politics. For when searching for perfect, universal, and rational solutions to the succession of crises that, from the rationalistic vantage point, constitute political life,<sup>45</sup> the Rationalist treats his preferred set of principles, maxims, and rules as an ‘ideology’. In other words, the Rationalist’s belief in the sovereignty of reason translates into the sovereignty of ideology.<sup>46</sup> This notion of ‘ideology’ links Oakeshott’s two essays ‘Rationalism in Politics’ and ‘Political Education’ for, though he nowhere says so explicitly, the consequence of rationalism in politics is that the Rationalist treats *principles as ideology* in ways that pervert not only political activity, but also the place and role of principles in understanding it.

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<sup>41</sup> *ibid*, 8.

<sup>42</sup> *ibid*, 10.

<sup>43</sup> *ibid*, 6.

<sup>44</sup> *ibid*, 6.

<sup>45</sup> *ibid*, 10.

<sup>46</sup> *ibid*, 27.

### III. RATIONALISM IN POLITICS

In 'Political Education', Oakeshott suggests that an ideology comprises an abstract principle (or a set of abstract principles) 'which has been independently premeditated'.<sup>47</sup> The chief characteristic of an ideology is that it treats principles as ends to be pursued. Equating rationalistic politics with ideological politics, Oakeshott argues that the Rationalist's approach to the practice and study of politics is first to discover the meaning of a given principle and then to design political and social arrangements in line with that meaning.<sup>48</sup> At its simplest, the rationalistic style supposes that we are unable to engage in political activity until we have answered questions such as: What is liberty? What is justice? What is democracy?<sup>49</sup> In this style of politics, we are drawn to want to do *the liberal thing*, *the just thing* or *the democratic thing* and so orient our study of politics to determining the meaning of these principles. For Oakeshott, this style of politics is ideological in two ways.

First, it supposes that words like 'liberty', 'justice', and 'democracy' have settled meanings that can be premeditated in advance of political activity.<sup>50</sup> This approach divorces the principle 'liberty' from those activities that are described as 'liberal', the principle 'justice' from 'just' activities, and the principle 'democracy' from the activities described as 'democratic'. Significantly, it supposes that the principle is prior to the activity, rather than indebted to and embedded in it. Second, this approach to making sense of political activity is liable to generate an 'intellectual dilemma', whereby we find that our favoured principles sometimes pull in one direction while practical judgment pulls in another.<sup>51</sup> Oakeshott gives the example of the liberal who, in the name of 'liberalism', abhors censorship and yet 'occasions arise when his practical judgment tells him that what is being said is too dangerous to be tolerated'.<sup>52</sup> Disposed to compromise principle for practical judgment, the liberal 'feels guilty' and 'looks to himself like a traitor'. He cannot reassure himself that he has 'done the right thing' and, instead, blames the world for frustrating his efforts to be a liberal.<sup>53</sup> His commitment to the principle precludes him from revising it on account of experience, for his principle has but a one way relationship to practice: to guide it. In this way, political ideology treats principles as ideas that exist in advance of, and independently from, the concrete activities to which they relate.

For Oakeshott, the Rationalist views his task as deploying premeditated principles to make (or re-make) the arrangements of a political community.<sup>54</sup> The Rationalist does this without concern for how those arrangements are currently 'attended

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<sup>47</sup> Oakeshott, 'Political Education', note 16 above, 48. A similar theme animates Oakeshott's essay 'Conduct and Ideology in Politics', first published c.1955 and reprinted in *What is History? and other essays* (Exeter: Imprint, 2004) 245.

<sup>48</sup> Oakeshott, 'Political Education', *ibid*, 48.

<sup>49</sup> Oakeshott, 'Conduct and Ideology', note 47 above, 245.

<sup>50</sup> *ibid*, 250.

<sup>51</sup> *ibid*, 245-246.

<sup>52</sup> *ibid*, 246.

<sup>53</sup> *ibid*, 246, 247.

<sup>54</sup> Oakeshott 'Political Education', note 16 above, 56.

to'.<sup>55</sup> His ideology is, or so he thinks, without debt to how others before him have attended to the arrangements of his community.<sup>56</sup> Seeing only the 'blank sheet of infinite possibility', the Rationalist overlooks how he is situated within an existing set of arrangements and fails to appreciate how, at any point in time, 'the arrangements which are enjoyed always far exceed those which are recognized to stand in need of attention'.<sup>57</sup>

How might political principles be otherwise understood? Oakeshott resituates the starting point for understanding a principle: rather than begin with an abstract *idea*, Oakeshott begins with a concrete manner of *activity*.<sup>58</sup> Just as technical knowledge summarises practical knowledge, so principles are, for Oakeshott, 'short-hand expressions of what we know to be exceedingly intricate manners of behaviour'.<sup>59</sup> In Oakeshott's understanding, concrete politics precedes abstract principle: 'political activity comes first and a political ideology follows after'.<sup>60</sup> Drawing on his favourite example of cooking, Oakeshott explains how a cookery book 'is not an independently generated beginning from which cooking can spring; it is nothing more than an abstract of somebody's knowledge of how to cook; it is the stepchild, not the parent of the activity'.<sup>61</sup> In the same way that the cookery book presupposes somebody who already knows something about how to cook and at the end of the day is an abridgment of the craft of cookery, so a principle should be understood not as some premeditated beginning, but rather as abstract and generalised knowledge of a concrete political activity.<sup>62</sup>

Political ideology is, on this understanding, an abbreviation of an activity that is already a feature of political life. Yet, the special danger with a political ideology is how it encourages us to view a set of abstract principles as complete and self-contained guides to political activity. For the Rationalist, because an ideology is 'a body of principles not itself in debt to the activity of attending to the arrangements of a society, it is [thought] able to determine and guide the direction of that activity'.<sup>63</sup> In this way, the truth that ideologies can only ever be shorthand summaries of much richer, more complex and finely grained activities becomes obscured.<sup>64</sup> It is thus that Oakeshott invites us to reflect on how the French

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<sup>55</sup> In 'Political Education', Oakeshott defines politics as 'the activity of *attending* to the general arrangements of a collection of people': *ibid*, 56 (emphasis added). This use of 'attending' is intended to signal that politics is an activity that occurs within an already existing political realm that is given definition by prevailing institutions and practices. This leads Oakeshott to view politics as 'the art of the statesman... not the rationalism of the social engineer': M. Oakeshott, 'Scientific Politics' (1947-48) 1 *Cambridge Journal* 347, 355.

<sup>56</sup> Oakeshott 'Political Education', note 16 above, 49.

<sup>57</sup> *ibid*, 45.

<sup>58</sup> Oakeshott, 'Conduct and Ideology', note 46 above, 250-251.

<sup>59</sup> *ibid*, 251.

<sup>60</sup> Oakeshott, 'Political Education', note 16 above, 51. See also M. Oakeshott, 'Introduction', *Lectures in the History of Political Thought* (ed. T. Nardin and L. O'Sullivan, Exeter: Imprint Academic, 2006) 31, 34 where he observes that '[we] begin...with an experience, the experience of political life and political activity. Without this there can be no political thought'.

<sup>61</sup> Oakeshott, 'Political Education', *ibid*, 52.

<sup>62</sup> *ibid*, 52.

<sup>63</sup> *ibid*, 51.

<sup>64</sup> *ibid*, 54-55. A political ideology is 'a traditional manner of attending to the arrangements of a society which has been abridged into a doctrine of ends to be pursued', with 'the abridgment (together with the necessary technical knowledge) being erroneously regarded as the solid guide relied upon'.

Declaration on the Rights of Man and of the Citizen of 1789 and John Locke's *Second Treatise of Government* are often understood to be statements of principle 'ready and waiting to be put into practice for the first time', as if they were a 'preface to political activity'.<sup>65</sup> On the contrary, suggests Oakeshott, they have 'all the marks of a postscript' rooted in actual political experience. The 'pedigree of every political ideology', Oakeshott observes, 'shows it to be the creature, not of premeditation *in advance of* political activity, but of *meditation upon* a manner of politics'.<sup>66</sup> Oakeshott's lesson, then, is that political ideologies (and the principles that find expression in them) do not 'provide the whole of the knowledge used in political activity'.<sup>67</sup> This does not deny that a political ideology can, nonetheless, be useful to abbreviate a complex activity: the 'distorting mirror of an ideology will reveal important hidden passages in a tradition, as a caricature reveals the potentialities of a face'.<sup>68</sup> But the risk with the ideological style of politics is that it implies that knowledge of a chosen ideology or set of principles can take the place of an understanding of, and an education in, what Oakeshott terms 'traditions of behaviour'.<sup>69</sup>

To understand traditions of behaviour, it is not possible to rely merely on a set of abstract principles. As Oakeshott explains, there is always 'something of a mystery about how a tradition of political behaviour is learned, and perhaps the only certainty is that there is no point at which learning it can properly be said to begin' or to end.<sup>70</sup> Political education requires that we observe and engage with those who are already involved in the traditions of political behaviour. To be clear, this process of observing and, in time, understanding a tradition of behaviour does not require suspension of judgment, avoidance of criticism, or eschewal of the desire to improve and correct. An apprenticeship in political activity entails participation in a tradition of behaviour, but it does not preclude the criticism or reform of that tradition.<sup>71</sup> Indeed, as Oakeshott sees it, participation in a tradition requires critical reflection upon it. In the changing circumstances of political life, the decision whether to carry on a tradition in some novel context requires reflecting upon that tradition and deciding whether to carry it on or to transform it. This bears emphasis: nowhere does Oakeshott suggest that criticism or reform of prevailing traditions is impossible; his point is merely that criticism and reform must begin

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<sup>65</sup> *ibid.*, 53.

<sup>66</sup> *ibid.*, 53, 51 (emphasis added).

<sup>67</sup> *ibid.*, 58.

<sup>68</sup> *ibid.*, 58.

<sup>69</sup> Since some readers might rankle at Oakeshott's use of the word 'traditions', it is worth noting that in later writings Oakeshott substituted 'practices' for 'traditions of behaviour'. See generally S. Sojinem, *From 'a Necessary Evil' to the Art of Contingency: Michael Oakeshott's Conception of Political Activity* (Exeter: Imprint Academic, 2005) 126.

<sup>70</sup> Oakeshott, 'Political Education', note 16 above, 62.

<sup>71</sup> Some might object that this is undiluted conservatism. However, for the argument that '[i]t is a grave misunderstanding to assume that emphasis on the essential factor of tradition which enters into all understanding implies an uncritical acceptance of tradition and socio-political conservatism', see generally H. Gadamer, 'The Problem of Historical Consciousness' in P. Rabinow and W. Sullivan (eds.), *Interpretative Social Science: A Second Look* (Berkeley: University of California Press, 1979) 103, 108.

with an understanding of the tradition. Differently put: criticism of a tradition comes from within the tradition itself.<sup>72</sup>

It is important to emphasise what Oakeshott does *not* suggest about traditions of behaviour. For Oakeshott, a tradition is ‘not a fixed and inflexible manner of doing things’.<sup>73</sup> His is not a Burkean traditionalism that assumes that traditions are coherent and settled and reflect some natural evolution.<sup>74</sup> Rather, for Oakeshott, traditions are contingent, uncertain, incoherent and contradictory, with a political community required to reflect on and choose between rival and opposing understandings of a tradition.<sup>75</sup> How, then, should a political community choose between competing understandings? Oakeshott’s response is to note that there is no one principle that can guide a political community; consideration must instead be given to a variety of contingent and circumstantial considerations. In all of this, what is noteworthy is that Oakeshott’s account of tradition does not seek to safeguard an established way of doing things and thereby to frustrate change and protect the status quo. Nor is his a determinism that relieves the community from choosing between rival courses of action.<sup>76</sup> Traditions are instead best understood as ‘a flow of sympathy’ intimated in practices, customs, conventions, institutions and laws diffused between past, present and future, with politics being ‘the exploration of that sympathy’.<sup>77</sup> We are always learning a tradition and, because a tradition is carried on until it is not, there is a participatory quality at the heart of traditions of behaviour.

Oakeshott’s central concern is to suggest that the more ‘we understand our own political tradition, the more readily its whole resources are available to us’, and the less likely we are to embrace the illusion that the abridgment of a tradition into a set of principles is a sufficient guide to political activity.<sup>78</sup> The risk of ideological politics is that the complexities of a tradition of behaviour will be ‘squeezed out in the process’ of abridging that tradition into a principle.<sup>79</sup> The resulting tragedy is not only that the Rationalist misguidedly thinks that technical knowledge, political principles, and ideologies are sufficient for the practice of politics, but also that the Rationalist is unable to remedy his predicament. For the rationalistic style of politics is *progressive*, in the sense that the Rationalist over time becomes less and

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<sup>72</sup> See Franco, n 2 above, 137.

<sup>73</sup> Oakeshott, ‘Political Education’, note 16 above, 59.

<sup>74</sup> The epistemological claims about the relationship between technical knowledge and practical knowledge underpinning Oakeshott’s critique of rationalism are perhaps the most striking contrast with Burke. See P. Franco, *Michael Oakeshott: An Introduction* (New Haven: Yale University Press, 2004) 83-85.

<sup>75</sup> From an Oakeshottian perspective, traditions are the starting point of political activity, not a destination for, as MacIntyre observes, ‘[t]raditions, when vital, embody continuities of conflict’: A. MacIntyre, *After Virtue: A Study in Moral Theory* (3<sup>rd</sup> edn, London: Duckworth, 2007) 222.

<sup>76</sup> As Oakeshott notes, a tradition of behaviour ‘is not a groove within which we are destined to grind out our helpless and unsatisfying lives’: Oakeshott, ‘Political Education’, note 16 above, 58.

<sup>77</sup> *ibid.*, 58. To critics who characterised his account of traditions of behaviour as mysticism, Oakeshott replied that it was ‘an exceedingly matter-of-fact description of the characteristics of any tradition’, and cites the common law and the British constitution as examples: *ibid.*, 61, footnote 8.

<sup>78</sup> *ibid.*, 66.

<sup>79</sup> *ibid.*, 55. Related to this, Mackenzie notes that a further danger in the process of abridging a tradition: the Rationalist may ‘try to give the abridgment a completeness which is impossible, filling it out with something other than political experience’. See W.J.M. Mackenzie, ‘Political Theory and Political Education’ (1955-56) 9 *Universities Quarterly* 351, 358.

less adept at observing and understanding tradition—and, in turn, acquiring and imparting practical knowledge. As Oakeshott notes, the Rationalist not only ‘neglect[s] the kind of knowledge which would save him, he begins by destroying it’.<sup>80</sup> Admittedly, the Rationalist could be educated out of his rationalism, but this would require that he immerse himself in, and appreciate the importance of, practical knowledge of traditions of behaviour; the very things he is loath to do. For having initially articulated an account of principles based on his understanding of traditions, the Rationalist ultimately divorces his principles from the underlying traditions, and in time forgets how to make sense of the traditions themselves. All the Rationalist is left with is a shorthand summary that, in his hands, is converted into an ideology.<sup>81</sup> Our concern is that something similar can be said of principles in the hands of public lawyers.

#### IV. PRACTICAL KNOWLEDGE AND PUBLIC LAW

Although Oakeshott offers his critique of rationalism with politics in mind, it has a much wider relevance. Our contention is that a rationalistic propensity similar to that which Oakeshott discerns in politics is an aspect of, and a partial explanation for, the many efforts of public lawyers to modernise, formalise and, in the final analysis, rationalise the British constitution. This phenomenon—which, echoing Oakeshott, we label *rationalism in public law*—cannot be encapsulated in anything as concise and neat as a definition (and, indeed, to reduce an intellectual propensity to a definition would be rationalistic). It is possible, however, to sketch the broad contours of a rationalistic propensity among public lawyers. This sketch, we readily acknowledge, abridges a complex tradition and it bears special mention that our concern with rationalism in public law is neither with all public lawyers nor with all public law. Like Oakeshott’s Rationalist, no one public lawyer exhibits a rationalist propensity in every respect, yet each of us can recognise how it manifests itself in our thinking from time to time, and for some more often than others. This propensity prioritises technical knowledge over practical knowledge in ways that reveal a ‘principle first, practice second’ approach to the study of the constitution. Our objective is to explain why this misconceives the relationship between principles and constitutional activity and culminates in a distorted conception of ‘principles as ideology’ in public law. Our starting point, however, is to explain why practical knowledge has, or ought to have, a special significance for public lawyers.

In one very basic sense, practical knowledge undergirds the study of all legal disciplines, perhaps especially so in the common law. Every common lawyer must develop a knack for reading cases and interpreting statutes. Discerning the ratio of cases and identifying the important obiter dicta in lengthy concurring judgments takes skill. Employing precedent creatively involves a feel for how far established and emerging legal norms can be stretched. Knowing when and how to interpret statutory terms in light of the purposes of a statute as whole requires judgment. The subtle craft of reading cases, employing precedent, and interpreting statutes is, in other words, the practical knowledge that underlies and informs the

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<sup>80</sup> Oakeshott, ‘Political Education’, note 16 above, 37.

<sup>81</sup> Oakeshott, ‘Conduct and Ideology’, note 47 above, 254.

common law method. As Loughlin observes, there is a real sense in which ‘the common law habit of thinking is, at root, a form of practical knowledge’,<sup>82</sup> where rules and principles of the common law are ‘not the well-spring of knowledge but are to be understood as cribs which may be used effectively only by someone who has been educated in the traditions of the common law’.<sup>83</sup>

Though indispensable for every common lawyer, practical knowledge can be said to hold a special significance for public lawyers, for not only must public lawyers immerse themselves in the culture of the common law, they must also develop a good grasp of the practices, conventions, customs, institutions, and long-standing relationships that give Britain’s customary constitution its distinctive character. To simplify for the purposes of exposition, public law could be said to combine practical knowledge of the common law with practical knowledge of the traditions of parliamentary government.<sup>84</sup> Like the common law, there is a strong strand of anti-rationalism running throughout Britain’s parliamentary government, with its confusing customs, overlapping personnel and functions and its irregular working practices. In his account of *The English Constitution*, Bagehot would write that the British have not so much made as ‘stumbled on’ a constitution, a constitution that, from the design point of view, is ‘full of every species of incidental defect’ and ‘of the worst workmanship in all out-of-the-way matters of any constitution in the world’. He would add that notwithstanding these flaws, the constitution ‘can work more simply and easily, and better than any instrument of government that has yet been tried’.<sup>85</sup>

In drawing special attention to practical knowledge in public law, ours is not the rehearsed point that conventions enjoy an especially prominent place within our constitutional arrangements. Public lawyers readily acknowledge that legal rules must be read in light of and by reference to conventional practices, and that such conventions are often more important than and substantially qualify the operation of legal rules. Nor is our point merely that a historical perspective is important when studying a constitution that has evolved not from a rationally designed template, but as a result of political experience.<sup>86</sup> Most would accept that the study of public law must be sensitive to a historical understanding of practice. Our point is instead that to know and understand the British constitution requires a type of knowledge that captures its blurred edges, abstruseness, and idiosyncrasies. Stated otherwise: knowledge and understanding of the constitution does not lend itself to

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<sup>82</sup> As Loughlin puts it, ‘the common law habit of thinking is, at root, a form of practical knowledge: *Legality and Locality*, note 11 above, 375. The importance of practical knowledge leads Loughlin to characterise the common law method as ‘anti-rationalist’: ‘Tinkering with the Constitution’ (1988) 51 MLR 531, 536.

<sup>83</sup> M. Loughlin, ‘Rights Discourse and Public Law Thought in the UK’ in G.W. Anderson (ed.), *Rights and Democracy: Essays in UK-Canadian Constitutionalism* (London: Blackstone Press, 1999) 193, [194/195].

<sup>84</sup> As Oakeshott notes, ‘the institutions of parliamentary government sprang from the least rationalistic period of our politics...[and] were connected, not with the promotion of a rationalist order of society, but (in conjunction with the common law) with the limitation of the exercise of political power’: Oakeshott, ‘Scientific Politics’, note 56 above, 357.

<sup>85</sup> W. Bagehot, *The English Constitution* [1867] (ed P. Smith, Cambridge: CUP, 2001) 8 (emphasis omitted).

<sup>86</sup> There remains much truth to Maitland’s observation that ‘the more we study our constitution, whether in the present or the past, the less do we find it conform to any such plan as a philosopher might invent in his study’: F.W. Maitland, *The Constitutional History of England* (Cambridge: CUP, 1908) 197.

the sort of precise formulations associated with technical knowledge.<sup>87</sup> It requires the practical knowledge that finds expression in a nebulous set of sensibilities, impulses, and intuitions; knowledge that is essential for making sense of a constitution that is, in important respects and to an unusual degree, ‘a summation of political experience expressed through forms, processes, traditions and developments and substantiated by longevity, continuity, assimilation and adaptation’.<sup>88</sup>

There remains an important role for technical knowledge in public law, together with the rules, principles and maxims associated with it. But it is a secondary role. The role is necessarily secondary inasmuch as practical knowledge is required to understand and deploy the rules, principles and maxims that are the expression of technical knowledge. To illustrate this, consider what Adam Tomkins calls the ‘simple—and beautiful—rule’<sup>89</sup> that the government of the day can continue in office only for so long as it retains the confidence of the House of Commons. Though this rule may seem simple on the pages of a book, its workings are subtle and complex in ways that cannot be captured by any neat and simple formulation. As Geoffrey Marshall noted, the rule that the government resigns when it loses the confidence of the Commons must be augmented by the words ‘except when it remains in office’.<sup>90</sup> Similarly, it might be suggested that there is a rule according to which ‘ministers speak and vote together’, except, of course, ‘when they cannot agree to do so’, just as the rule that ‘ministers offer their individual resignations if serious errors are made in their Departments’ must be qualified with ‘except when they retain their posts or are given peerages’.<sup>91</sup> Exceptions to such rules cannot be reduced to simple formulae; they resist appeals to simplicity and not least because exceptions vary over time and sometimes eventually upend the general rule. It follows that when analysing whether a minister should resign for a serious departmental failure or whether the government of the day should fall for lack of confidence, public lawyers must not only know the rule and its exceptions, but also have a feel for how the two interact in the concrete circumstances of the constitution. The ‘simple and beautiful rule’ is best understood by public lawyers who attend to and have a good grasp of the practices and traditions of behaviour summarised by it. Or differently put: the claim about the continued importance of ministerial responsibility central to so much of the scholarship of Adam Tomkins is perhaps least well understood when presented as a rule in the opening pages of *Our Republican Constitution* and best understood when considered in the context of

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<sup>87</sup> As Bagehot observes, those who look ‘at the living reality [of the constitution] will wonder at the contrast to the paper description’ for they ‘will see in the life much which is not in the books’ and, at the same time, will not find ‘in the rough practice’ many of the ‘refinements’ of theory: Bagehot, note 85 above, 5.

<sup>88</sup> M. Foley, *The Politics of the British Constitution* (Manchester: Manchester UP, 1999) 1.

<sup>89</sup> A. Tomkins, *Our Republican Constitution* (Oxford: Hart, 2005) 1.

<sup>90</sup> G. Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford: Clarendon Press, 1984) 54.

<sup>91</sup> *ibid.*, 54.



his detailed and careful examination of practices which strengthen parliamentary mechanisms of accountability in his book entitled *Public Law*.<sup>92</sup>

Our claim, then, is that there is an important sense in which practical knowledge enjoys, or ought to enjoy, primacy over technical knowledge in the study of public law. At the core of rationalism in public law is the reversal of this relationship: a rationalistic propensity leads public lawyers to subjugate practical knowledge to technical knowledge.<sup>93</sup> This propensity is perhaps most obvious when public lawyers seek to convert practical knowledge into, to replace it by, or to act in the pursuit of a set of principles. It is most obvious, in other words, in the search for principle within public law. There are, as we see it, three main and related ‘sites’ where rationalism in public law is readily, even if not unambiguously, discernible.

## V. THREE SITES OF RATIONALISM IN PUBLIC LAW

A first site of rationalism in public law is the classroom and lecture theatre—or, more generally, pedagogy in public law. The grip of the textbook tradition remains strong within public law teaching. This tradition depicts law as a coherent, unified and orderly body of rules grounded in, and logically derived from, a set of general principles.<sup>94</sup> With an emphasis on elucidating and systematising a set of principles, teaching within the textbook tradition privileges simplicity of exposition and, as a result, downplays aberrations and exceptions, even where the results verge on the dogmatic.<sup>95</sup> Presenting legal rules as logical deductions from underlying principles, the textbook tradition relegates the importance of history and politics, and instead envisages law as a kind of scientific or, in Oakeshott’s terminology, technical knowledge. Having sidelined both history and politics to a greater or lesser degree,<sup>96</sup> teaching within the textbook tradition selects, abridges, and abstracts from the miscellany of public law to identify certain principles, among them democracy, political equality and the rule of law. The result is an emphasis on order, precision, and certainty, all at the cost of habit, custom, and tradition. Some synthesising and simplification is necessary if seeking to impart an understanding of aspects of the constitution to students. However, the teaching of public law within the textbook tradition frequently fails to acknowledge that the materials being taught are mere abridgements of more complex political and legal traditions. Our concern is that if statutes, cases, and administrative decisions become examples and illustrations of principles, rather than being acknowledged, at least in part, as their foundations and grounds, the relationship of principle to practice becomes unidirectional and hierarchical, with the workings of the constitution relegated to secondary status.

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<sup>92</sup> Tomkins, *Our Republican Constitution*, note 88 above, 1 and A. Tomkins, *Public Law* (Oxford: Clarendon Press, 2003) 131-169.

<sup>93</sup> We are grateful to the reviewer who pointed out that our critique of rationalism in public law has echoes in other fields, including transitional justice. See e.g. K. McEvoy, ‘Beyond Legalism: Towards a Thicker Understanding of Transitional Justice’ (2007) 34 *Journal of Law and Society* 411.

<sup>94</sup> See D. Sugarman, ‘Legal Theory, the Common Law Mind and the Making of the Textbook Tradition’ in W. Twining (ed.), *Legal Theory and Common Law* (Oxford: Blackwell, 1986) 26, 26.

<sup>95</sup> See D. Sugarman, ‘A Hatred of Disorder: Legal Science, Liberalism and Imperialism’ in P. Fitzpatrick (ed.), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto Press, 1991) 34, 37.

<sup>96</sup> See M. Loughlin, ‘The Pathways of Public Law Scholarship’ in G.P. Wilson (ed.), *The Frontiers of Legal Scholarship* (London: Chancery, 1995) 163, 164.

Pedagogy in public law follows the path initiated by one of the founding fathers of the textbook tradition, A.V. Dicey.<sup>97</sup> The study of the constitution, as Dicey saw it, required a ‘search for the guidance of first principles’.<sup>98</sup> In purporting to make sense of the constitution via a set of legal principles—parliamentary sovereignty, the rule of law, and conventions—Dicey elevated law and its claims to reason, order and certainty over politics and history.<sup>99</sup> In doing so, Dicey envisaged the relationship between law and politics ‘the wrong way around’<sup>100</sup> and purported to expound a set of fundamental legal principles at the very heart of a customary constitution. He cautioned students of the British constitution to ‘remember that antiquarianism is not law’ because such an historical account ‘throws from a legal point of view no light upon’ the constitution at all.<sup>101</sup> Students of public law were not to concern themselves with history; their task was instead to attend to the nature and content of the constitution through the articulation of its basic legal principles. Encouraging a vision of the constitution as rational and ordered, Dicey summarised the task of the English professor of law as ‘to state what are the laws which form part of the constitution, to arrange them in their order, to explain their meaning, and to exhibit where possible their logical connection’.<sup>102</sup> The result was that Dicey’s overly neat division of the constitution into three foundational principles was ultimately ‘rendered static by his relegation of the historical view and consequent focus on constitutional form’.<sup>103</sup>

In light of this elevation of a set of legal principles abstracted from historical and political context, Dicey is perhaps best understood as a ‘simplifier’<sup>104</sup>—or, as we would put it, a ‘rationaliser’—of Britain’s customary constitution. It is true that Dicey’s work combines elements of rationalism and anti-rationalism, the latter finding strongest expression in his rejection of codified constitutions.<sup>105</sup> To the extent, however, that his seminal work exaggerated a small number of features of the prevailing political and legal arrangements in ways that distorted the ability of his readers to make sense of constitutional traditions, Dicey might be said to have contributed to the rationalisation of Britain’s constitution. It is for this reason

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<sup>97</sup> For an alternative reading of Dicey suggesting that the formalist, analytical and scientific approach of the textbook tradition is inaccurate insofar as Dicey sought to integrate that approach within a legal theory that also embraced comparative, historical and normative approaches, see M. D. Walters, ‘Dicey on Writing *The Law of the Constitution*’ (2012) 32 OJLS 21.

<sup>98</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (8<sup>th</sup> edn, London: Macmillan, 1915) 33.

<sup>99</sup> At first blush, it might be thought curious that Dicey classified constitutional conventions as a principle, at least insofar as conventions would seem to have a close relationship with practical knowledge. It is less surprising, however, when it is recalled that to the extent that Dicey equated conventions with rules which gave rational meaning to otherwise more complex and uncertain practices, he treated them as more akin to technical knowledge than practical knowledge: *ibid* 33. For the suggestion that Dicey viewed principles as different from rules, inasmuch as he conceived of the former as generalisations that lack such precision as to be applicable with confidence to novel questions of law, but instead indicate the broad direction to which rules tend: see Walters, note 97 above, 34-35.

<sup>100</sup> Loughlin, ‘The Pathways of Public Law Scholarship’, note 96 above, 163.

<sup>101</sup> Dicey, note 98 above, 14.

<sup>102</sup> *ibid*, 3-4.

<sup>103</sup> J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge: CUP, 2007) 9.

<sup>104</sup> Mount, note 1 above, 39.

<sup>105</sup> On the inconsistent strands to Dicey’s work, as well as an account of his various contributions to the development of legal education, see D. Sugarman, ‘The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science’ (1983) 46 MLR 102.

that, as foreshadowed above, we consider it unhelpful to associate Dicey and Oakeshott as closely as Loughlin does. True, there are overlapping themes in their writings. It is plain, for example, that Dicey is moved by a profound concern for the value of practical experience as expressed in the common law.<sup>106</sup> They also both exhibit a patriotic pride in the workings of the constitution.<sup>107</sup> All that said, by associating Dicey so closely with Oakeshott, Loughlin's pairing of these two thinkers within a style of public law ('conservative normativism') obscures the extent to which a rationalistic tendency within Dicey's writing distorts, in ways Oakeshott predicted, an understanding of the constitution that has dominated, and to a greater or lesser extent continues to dominate, public law. It is true that Loughlin notes that Dicey's account of the principles of the constitution is best read as no more than a 'crib', or abridgment, of more complex constitutional traditions of behaviour.<sup>108</sup> We agree. What bears emphasis, however, is that Dicey did not himself present his account in this way, and nor has it been taken as a 'crib' by successive generations of public lawyers—for these reasons, the connection Loughlin maps between Dicey and Oakeshott is likely to obscure the potential for Oakeshott's work to shed some light on the contemporary state of public law.

A second site of rationalism is the theoretical turn in the study of public law. That theorising in public law is more explicit and extensive than ever before is plain for all to see.<sup>109</sup> Old theories are being reformulated in novel ways,<sup>110</sup> while theories once thought to have little or no relevance now receive book-length treatments,<sup>111</sup> all accompanied by a growing literature on the role of theory itself in public law.<sup>112</sup> In claiming that this theoretical turn is a site of rationalism, we should not be taken to suggest that all theorising is the product of a rationalistic propensity, nor should we be taken to claim that even if a theory rationalises it is necessarily rationalistic. Our claim is instead that this turn to theory encourages public lawyers to abstract from and relegate to secondary status the practices of the constitution. In making this claim, we deliberately avoid associating the theories of any one public lawyer, or any given style of public law thought, with rationalism. To repeat Oakeshott's insight: there is a rationalistic propensity more or less displayed by all of us. As we see it, there is a tendency for many public lawyers to

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<sup>106</sup> See T. Prosser, 'Journey without Maps?' [1992] *Public Law* 346.

<sup>107</sup> For Oakeshott, the British parliamentary system 'was the most civilised and the most effective method ever invented': 'Contemporary British Politics' (1947-48) 1 *Cambridge Journal* 474. On this shared feature of the work of Dicey and Oakeshott, see J. Stapleton, 'Dicey and His Legacy' (1995) 16 *History of Political Thought* 234, 247-248.

<sup>108</sup> Loughlin, 'Tinkering with the Constitution', note 82 above, 539.

<sup>109</sup> Public law is no longer distinguished by an 'anti-theoretical bias': C. Harlow, 'Changing the Mindset: The Place of Theory in English Administrative Law' (1994) 14 *OJLS* 419, 419. See generally P.M.W. McAuslan, 'Administrative Law and Administrative Theory: The Dismal Performance of Administrative Lawyers' (1978) 9 *Cambrian Law Review* 40.

<sup>110</sup> See, e.g., S. Lakin, 'Debunking the Idea of Parliamentary Sovereignty: the Controlling Factor of Legality in the British Constitution' (2008) 28 *OJLS* 709; C.J.S. Knight, 'Bi-Polar Sovereignty Revisited' (2009) 68 *CLJ* 361; and A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford: Hart, 2009).

<sup>111</sup> See, e.g., E. Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford: OUP, 2009).

<sup>112</sup> See, e.g., P. Cane, 'Theory and Values in Public Law' in P.P. Craig and R. Rawlings (eds.), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford: OUP, 2003) 3; and M. Loughlin, 'Theory and Values in Public Law: An Interpretation' [2005] *Public Law* 48.

perform a ‘two step’ that initially divorces theory from practice before using theory to measure, critique, and justify the reform of practice. There is a tendency, in other words, to conceive of theory as existing independently from and in advance of the practices to which it relates; as if, for example, a more reflective understanding of ideas such as the separation of powers, the rule of law, democracy, and political equality exists wholly separate from understandings of longstanding legal and political practice.

Consider, for example, the claims made on behalf of two important schools of constitutional thought: legal and political constitutionalism. The principal claims are familiar: for proponents of the political constitution, political processes and institutions should be primary in holding those who exercise political power to account; for defenders of the legal constitution, judicial review and the common law, together with calls for a written constitution, are the true bulwarks against abuse of political office. Both legal and political constitutionalists make descriptive claims, arguing that a true reading of Britain’s constitutional arrangements reveals them to be predominantly legal, not political (or vice versa). Yet, both regularly interchange claims of ‘is’ with ‘ought’, blending description and prescription in ways that overreach at times and at others conceal those aspects of the constitution that do not fit neatly into one or another frame of analysis. For these reasons among others, the claims of legal and political constitutionalism are sometimes best understood as drawing on select practices of the constitution only then to measure, critique, and advocate the reform of inconsistent practices. In so doing, the tendency is to acknowledge only selectively the debt of the stylised account of the constitution to constitutional practice; at its extremes, the tendency is to appeal to abstract ‘republican theory’ or the ‘liberal rule of law’ in a manner that denies the debt, as theories, of legal and political constitutionalism to the complex and contingent practices both seek to reform—practices not themselves susceptible to the order, neatness, and simplifying claims of any one theory of the constitution.<sup>113</sup>

Here, we see the combination of two mistakes. The first mistake is to lose sight of the fact that theorising does not begin with discerning what is implied by an abstract idea (for example, about the ‘separation’ of government institutions or the ‘independence’ of judges). It begins instead with reflection on characteristics, behaviour and patterns that are observed in practice (for example, about the blend of coordinated and confused powers and personnel within the institutional architecture of government or about the puzzle in which judges always remain a part of the governmental apparatus whilst at the same time enjoying a degree of independence from other governmental actors). The mistake, then, is the failure to recognise that theorising, in Oakeshott’s words, ‘begins with something in some degree already understood’.<sup>114</sup> A second mistake is to assume that theory should inevitably be used to reshape practice. Where a gap exists between theory and practice, the impulse of the rationalist lawyer is to reform practice so that it is more closely aligned with theory. Rationalistic theorising, in short, appeals to

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<sup>113</sup> See further G. Gee and G. Webber, ‘What is a Political Constitution?’ (2010) 30 OJLS 273.

<sup>114</sup> M. Oakeshott, ‘What is Political Theory?’ in *What is History and other Essays* (Exeter: Imprint Academic, 2004) 391, 392.

theory as a technique to measure practice and, ultimately, to justify reform, which brings us to a third site of rationalism in public law: constitutional reform.

Rationalistic constitutional reform typically exhibits three characteristics. First, it ‘rationalises’, by remaking the prevailing legal and political arrangements to cohere with reason, order and logic. Second, it ‘formalises’, by converting conventional understandings into structured, systematic codes, concordats, and statutory duties, together with the standing risk that the codification of practice may come at the expense of an understanding of those practices.<sup>115</sup> Third, it ‘institutionalises’, by incorporating rules, procedures and practices into formal, structured and regularised schemes, which sometimes take a very concrete form via the creation of new institutions. To be clear, we are not suggesting that all reform is rationalistic, or that any given reform is necessarily wholly so. Rather, our suggestion is that the recent wave of ‘modernising’ reforms to the constitution carries with it a discernible rationalistic propensity as seen not only in the practices that are felt to be in need of rationalisation, formalisation and institutionalisation, but also in the justifications offered in support of the decision to reform in such a way. For at the heart of rationalistic reform lies the vindication of constitutional principle. The result of combining these three characteristics with the pursuit of principle is to reduce reform to a rationalist exercise in manufacturing technical knowledge.

The Constitutional Reform Act 2005 reflects many aspects of rationalistic reform. It rationalises the historic office of Lord Chancellor by removing its legislative and judicial roles and significantly curtailing its involvement in judicial selection. At the same time, it formalises the office’s special responsibility for safeguarding judicial independence via a new statutory duty.<sup>116</sup> It also institutionalises the constitutional position of Britain’s most senior judges by creating a new Supreme Court. Above all, the rationales underlying the reforms resound with rationalism, insofar as they purport to align practice with principle. It was generally accepted that the Lord Chancellor had not, for much of twentieth century, abused the overlapping roles or disregarded his duty to defend judicial independence. It was instead understood that these overlapping functions within a single historic office facilitated the good workings of the constitution by acting as a conduit that nurtured an understanding within and between the different actors.<sup>117</sup> However, despite this, the principles of the separation of powers and judicial independence were cited to justify reforming the role of Lord Chancellor,<sup>118</sup> even though the workings of the constitution were not widely impugned, and even if one consequence was that ministers and judges

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<sup>115</sup> Consider how the Cabinet Secretary stated in the preface to the Cabinet Manual (1st edn, Cabinet Office, 2011) that the Manual is to be read as a record of ‘rules and practices, but is not intended to be the source of any rule’ (iv). That prescription may not hold for long.

<sup>116</sup> Constitutional Reform Act 2005, s 3.

<sup>117</sup> See generally R. Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor’s Office* (Oxford: OUP, 1993); and D. Woodhouse, *The Office of Lord Chancellor* (Oxford: Hart, 2001).

<sup>118</sup> See Department of Constitutional Affairs, *Constitutional Reform: Reforming the Office of Lord Chancellor*, CP 13/03 (September 2003); and *Constitutional Reform: a New Way of Appointing Judges*, CP 10/03 (July 2003) paras 22-23.

would be less informed of the constraints under which the other acts.<sup>119</sup> Similarly, it was widely accepted that the location of the highest court within Parliament did not undermine the independence or impartiality of Britain's top judges. It was also accepted that the working of the constitution had, by the close of the twentieth century, and then for the most part, successfully channelled the Law Lords away from the general business of the House and, in turn, other peers away from the judicial business of the appellate committee. Yet, despite this, the case for a UK Supreme Court was justified as a vindication of principle.<sup>120</sup> The separation of powers and judicial independence were again used to identify an end to be pursued—here, the formal relocation of the top court away from the Palace of Westminster to the other side of Parliament Square. Vindication of principle, in other words, seemed to be taken as sufficient reason to reform. Critically, most of the references to 'the separation of powers' or 'judicial independence' displayed little or no debt to the prevailing traditions of a constitution that, in practice, had enjoyed considerable success in realising the independence of its judges.

For sure, there were other dynamics driving these reforms beyond the vindication of principle, such as concerns about the compatibility of the then existing arrangements with Article 6 of the European Convention on Human Rights. This concern about Article 6 hints, however, at another aspect of rationalism: namely, a tendency to prioritise the universal (i.e. abstract notions of the separation of powers and due process) over the local (i.e. the overlapping functions and personnel that has traditionally distinguished the Westminster model of government). As others have noted, many of the recent reforms to the constitution could be read as an attempt to 'Europeanise' Britain's political system, with reliance on formal, universal legal rules and procedures that pay insufficient attention to the unique blends of social, political and historical context in local constitutions a feature of this phenomenon of 'Europeanisation'.<sup>121</sup> In this context, Oakeshott's lament that 'what went away as the concrete rights of an Englishman have returned home as the abstract Rights of Man' has special resonance; he would add that 'they have returned to confound our politics and to corrupt our minds'.<sup>122</sup>

It might be argued that the Constitutional Reform Act is best read as an extension of the principles of the separation of powers and of judicial independence that were already implicit in Britain's constitutional traditions, rather than as an

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<sup>119</sup> On this last point, see D. Oliver, 'Constitutionalism and the Abolition of the Office of Lord Chancellor' (2004) 57 *Parliamentary Affairs* 754; and R. Smith, 'Constitutional Reform, the Lord Chancellor and Human Rights: The Battle of Form and Substance' (2005) 32 *Journal of Law and Society* 187.

<sup>120</sup> See Department for Constitutional Affairs, *Constitutional Reform: a Supreme Court for the United Kingdom*, CP 1/03 (July 2003) para 1.

<sup>121</sup> See generally B. O'Leary, 'What Should Public Lawyers Do?' (1992) 12 *OJLS* 404, 413. For Loughlin, the European Union is 'an expression of hyper-Rationalism that runs directly counter to the traditions of British constitutional practice': *The British Constitution: A Very Short Introduction* (Oxford: OUP, forthcoming 2013).

<sup>122</sup> Oakeshott, 'Contemporary British Politics', note 107 above, 490. Writing in the late 1940s, Oakeshott's reference was not to the European Convention but to the various sites where the 'common law rights and duties of Englishmen were transplanted throughout the civilized world' and where, '[b]ecause they were not the fruit of [local] experience, it was forgotten that they were the fruit of the experience of the British people.'

unnecessary rationalisation of abstract principles insufficiently attentive to those traditions. To put this in more Oakeshottian terms, the reformers could perhaps be said to have pursued what was intimated in constitutional traditions of behaviour that had, for a long time, if in a rather eccentric fashion, demarcated and defended the independence of the judiciary and some distinctively British understanding of the separation of powers. The reforms might therefore be said to have begun with a sound understanding of, and in turn sought to secure change consistent with, an existing tradition of behaviour. We concede that this is a possible reading of the Act. Our reading, however, is that the motivation for the reforms was more rationalistic than this recognises. For when responding to a gap between principle and practice, the reformers seemed to assume that the principles must necessarily be more coherent than the practices; as if the technical knowledge expressed in the abstract principles of the separation of powers and the independence of the judiciary could take the place of the practical knowledge of the activities to which they relate. The reformers seemed to neglect, in part (not in whole), Oakeshott's insight that principle is an abridgement of practice.

These are not the only sites of rationalism in public law, and nor are the reforms instituted by the Constitutional Reform Act the only examples that resonate with the rationalistic propensity. But these three sites of rationalism in public law are prevalent and, in important respects, reinforcing. Plainly, the pedagogy of public law influences how public lawyers think about and employ theory and approaches to theory influence how public lawyers evaluate whether and how to reform. The cycle continues as more rationalistic approaches to reform inform the prominence given to principles in the pedagogy of public law, and so forth. The golden thread is that each site of rationalism in public law reinforces all of the others insofar as each prioritises principle over practice—or, as Oakeshott would put it, technical knowledge over practical knowledge—without at the same time emphasising how the former is an abridgement and summary of the latter. Each site conspires, in other words, to reverse the relationship of principle to practice, by elevating the former above the latter. This helps explain the progressive nature of rationalism: the rationalistic propensity in public law becomes more intense and all-embracing over time as the rationalist lawyer becomes less and less adept at using practical knowledge when teaching, theorising, and reforming. Without acknowledging the debt that principle owes practice, and by supposing that knowledge of only some of the constitution is sufficient for knowledge of all of it, the progressive character of rationalism culminates in what we term a placeholder constitution.

## **VI. POLITICAL EDUCATION AND PUBLIC LAW**

By 'placeholder constitution', we have in mind an account of the constitution that is not tethered to any one real world constitution. It trades on a universal idea of 'constitutionalism' and the political and legal principles implied by it, as if there is one idea of the constitution that is the same everywhere. Rationalism in public law treats constitutions as all deriving from one principled constitution, with the task of public lawyers to implement the placeholder constitution by redesigning real world constitutions in its image. In short, the placeholder constitution is reliant on

technical knowledge divorced from the practical knowledge required to make sense of it.

By speaking and thinking in abstraction of constitutional activity, the practices and relationships that animate what is partially captured by appeals to principle are lost from view. It becomes possible to speak and think about constitutional principle without working out what claim is being made out, why it is being made, and on the basis of which assumptions. The placeholder constitution is a ready supply of words, where those words are summarised to the point of telling us nothing of any real value. Equipped with ready phrases—‘the rule of law’, ‘the separation of powers’, ‘accountability’—rationalism in public law remains unsure how to act. For being constructed with independently premeditated principles the meaning of which is construed separately from the practices to which they relate, the placeholder constitution in the end consists of ‘gumming together long strips of words which have already been set in order by someone else’.<sup>123</sup> Identifying the ends that every constitution should serve, the meaning and content of principles are posited in advance of and independently from the historically situated arrangements of legal and political systems. As a result, appeals to principle are employed without full awareness of their meaning, a meaning that can be grasped only by attending to the practices and workings at the heart of a real world constitution’s traditions of behaviour. The placeholder constitution is not, for that reason alone, prevented from giving an air of certainty, order, precision, and even dignity as compared to the messy, often perplexing and sometimes sordid business of law and politics in real world constitutions.

Susceptible to the rationalist mindset, public lawyers are liable to lose sight of the practical knowledge necessary to evaluate the workings of the constitution and how any one principle is realised and realisable within it. In our view, this rationalist tendency must be resisted and corrected by a renewed engagement with practical knowledge in public law or, put otherwise, by exploring the relationship between political education and public law.<sup>124</sup> Political education, we suggest, is not the pursuit of self-sufficient and self-complete knowledge. It invites reflection and study in the traditional practices of the constitution, distinguished by its many intangible relationships: the prime minister to the cabinet, cabinet to the Commons, the Commons to the Lords, the Queen to them all, the committees to their chamber, the opposition to the government, the frontbenches to the backbenches, the courts to the Queen-in-Parliament, the secretaries of state to the permanent under-secretaries of state, the courts to them both, all of which and more may be said to be ‘more easily felt than analysed’.<sup>125</sup> It is, of course, possible

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<sup>123</sup> The phrase is from G. Orwell, ‘Politics and the English Language’ (1948), wherein he laments the increasing willingness of English speakers and writers to employ ready *phrases* rather than interrogating which *words* communicate one’s meaning. The same might increasingly be said of the grammar of public law.

<sup>124</sup> The phrase ‘political education’, as Oakeshott notes, ‘has acquired a sinister meaning’ and ‘is associated with that softening of the mind by force, by alarm or by the hypnotism of the endless repetition of what was scarcely worth saying’. On Oakeshott’s account, however, political education is not programmatic, but rather signals ‘an understanding of political activity which includes a recognition of the sort of education it involves’: Oakeshott, ‘Political Education’, note 16 above, 44-46.

<sup>125</sup> W.I. Jennings, *The British Constitution* (5th edn, Cambridge: CUP, 1971) 113.



to capture aspects of these relationships via principles, rules and maxims. We can suggest, in blunt terms, that the Queen appoints the prime minister and that the prime minister advises Her Majesty on the appointment of ministers; we can say that government ministers are liable to have their decisions reviewed in court but that courts are not empowered to set aside Acts of Parliament. These propositions give the appearance of certainty and order and may well be settled enough to warrant the appearance. But this should not be taken to deny how they build on practical knowledge of the relationships on which they rest and, as a result, are best understood by one who is familiar with those relationships and least well understood by one who is not. The public lawyer understands these relationships best when he ‘starts not with the postulation of formal and universal principles . . . but within an inquiry into the mundane practices’ of the constitution at work.<sup>126</sup> Political education in public law seeks to bring to life the truth that the principles, rules and maxims of the constitution appear certain and complete only inasmuch as they build on and reformulate knowledge which is already there. The study of public law should be oriented, in sum, to the practices, manners of activity, and traditions of behaviour that give it shape.

This orientation to public law invites a quality of humility, in at least three ways. First, studying the practical workings of the constitution cautions against making strong claims that conceal the tentativeness of the constitution and its adaptability to change. There are many examples of definitive-sounding claims being advanced one year only to be retracted the next. Consider, for example, Graeme Moodie’s claim in 1971 that although the Westminster Parliament possessed the right to legislate for Northern Ireland, despite the devolution of power to Stormont, this ‘was unlikely to happen’.<sup>127</sup> The very next year the Stormont Parliament was abolished. In turn, consider Tom Hickman’s observations in 2005 about what could be implied about the nature and content of Britain’s constitution given that, two years earlier, the constitution had been ‘formally accorded a government department: the Department of Constitutional Affairs’.<sup>128</sup> By 2007, the department had been refashioned into a Ministry of Justice.

Second, while it is certainly possible to acquire practical knowledge of the constitution without being a member of the governing institutions, we should take care to test our understandings and theories against those who know those institutions best.<sup>129</sup> Many of the workings of the constitution are not visible to outsiders and, even where they are, often take the form of the rough and tumble of day-to-day politics that ‘offend most of our rational and all of our artistic sensibilities’.<sup>130</sup> Certain events or actions may acquire special significance within the realm of public law scholarship, yet might not hold the same significance

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<sup>126</sup> M. Loughlin, ‘Towards a Republican Revival?’ (2006) 26 OJLS 425, 436.

<sup>127</sup> *The Government of Great Britain* (London: Meuthen, 1971) 20.

<sup>128</sup> ‘In Defence of the Legal Constitution’ (2005) 55 *University of Toronto Law Journal* 981, 981.

<sup>129</sup> See J.A.G. Griffith, *Parliamentary Scrutiny of Government Bills* (London: George Allen & Unwin, 1974) 9: ‘to write about an institution without having been a member of it is a dangerous business and it is essential to check both one’s facts and one’s feelings against the experience of another who knows it well from the inside.’

<sup>130</sup> M. Oakeshott, *The Politics of Faith and the Politics of Scepticism* (New Haven: Yale University Press, 1996) 19.

within the nitty-gritty of the real world constitution; likewise, certain readily observable practices may conceal more important, but unseen and unpublicised constitutional traditions. It is telling, for example, that the management of the business of the House between government and opposition is carried out ‘behind the Speaker’s chair’, without formal minuting and without the public recording of Hansard. The attendance of members in the chamber, the order and amount of speaking time, the need for and timing of divisions, the pairing of members who must be absent from divisions, and so forth are all agreed by the government and opposition whips in what, *for them*, are termed ‘the usual channels’ even if, from the perspective of the observer, these ‘channels’ may be unknown or altogether unusual. For the observer, government and opposition are in regular disagreement, but this public persona is facilitated by the ready agreement of both when no one is watching.

Third, the degree of constitutional change at any point in time should not be overstated. Without doubt, some reforms are far-reaching, but, as within all traditions of behaviour, constitutional change can be appreciated only against a constant of continuity. A rationalistic fixation with reform encourages us to exaggerate the re-making of constitutional arrangements even though, at any point in time, ‘the new [will be] an insignificant proportion of the whole’.<sup>131</sup>

In calling for greater engagement with the practices of the constitution, we do not seek to correct the mistake of dismissing practical knowledge by, in turn, denying the important place of technical knowledge. Rather, we seek to emphasise how the miscellaneous assemblage of practices and relationships that make up Britain’s constitution makes ‘little sense unless interpreted in the light of innumerable political understandings’, with the result that the practices of the constitution are primary and the principles, rules, and maxims of the constitution derivative and secondary.<sup>132</sup> Consider how he who understands the ‘rule’ that the prime minister advises the Queen on the appointment of her ministers can misrepresent the relationship of the prime minister to cabinet. He will be tempted to think that the prime minister really is *primus inter pares* and that his choice of ministers is bounded only by the maxim that ministers should be appointed from both Houses, and primarily from the Commons. But one who appreciates how the appearance of certitude is warranted will know that the relationship of the prime minister to the cabinet is reciprocal and how, whilst a prime minister makes a minister one at a time, many a minister acting together can unmake a prime minister. He will know that a prime minister leads his cabinet—as he leads Commons and country—only where they will go and how a prime minister’s authority is not of his making. The student of the constitution’s traditions of behaviour will know, also, that a prime minister’s choice in his ministry is ‘far less than it seems to be when . . . looked at from a distance’.<sup>133</sup>

To see this, the public lawyer appeals to the relationship of the prime minister and his cabinet to Commons and party and public and knows that one misunderstands

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<sup>131</sup> Oakeshott, ‘Political Education’, note 16 above, 45.

<sup>132</sup> Loughlin ‘Rights Discourse and Public Law Thought’, note 83 above, 195.

<sup>133</sup> Bagehot, n 85 above, 10.

the constitution when one attends to part of it only. He knows, also, of the welcome advantages of ambiguity, illustrated by the need to feel one's way through the confidence of the chamber and the grounds for the resignation of ministers.<sup>134</sup> In this, he knows that the strength of the constitution may lie in part in what the Rationalist would identify as ambiguity in need of correction. But that ambiguity is not open-ended; it is situated. Practical knowledge of a tradition of behaviour is 'unavoidably knowledge of its detail: to know only the gist is to know nothing' for all of the reasons that technical knowledge can only abridge, and not capture the exploration of sympathy within the workings of the British constitution.<sup>135</sup>

## CONCLUSION

In interrogating the rationalistic tendency within public law, we have sought to highlight how rationalism distorts our understandings of Britain's constitution. Drawing on the work and thought of Oakeshott to articulate the importance of a public law education acquired in the enjoyment of a tradition, our aim has been to situate practical knowledge as an inescapable part of our public law learning. We do not argue that Oakeshott's critique of rationalism is the only pathway into a renewed engagement with practical knowledge in the study of the constitution.<sup>136</sup> Nor do we suggest that all public lawyers require intimate practical experience with the constitution before contributing to public law thought. Rather, we argue that each and all should be sensitive to the place of practical knowledge in shaping their understanding of the constitution. It might be argued that society, and by extension the constitution, is today too complex and heterogeneous to bear an understanding emphasising tradition. If true, it is not altogether clear why the simplifying appeal of rationalism would be the alternative; more fundamentally, however, the understanding of tradition on which we draw envisages traditions of behaviour as uncertain and contested, coherent and incoherent; in short, as a 'flow of sympathy' diffused between past, present and future. In this way, our invitation is to situate our public law education within the concrete practices of the constitution. Our hope is that, in doing so, we will be able to do without the illusion that in public law, as in politics, 'the abridgement of a tradition is itself a sufficient guide' to education.<sup>137</sup>

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<sup>134</sup> For e.g., the Ministerial Code (Cabinet Office, May 2010) makes no attempt to outline the grounds for the resignation of a minister, save for specifying that 'Ministers who knowingly mislead Parliament will be expected to offer their resignation to the Prime Minister' (at 1). Rather, the Code recalls practice by outlining how 'Ministers only remain in office for so long as they retain the confidence of the Prime Minister', who is identified as 'the ultimate judge of the standards of behaviour expected of a Minister and the appropriate consequences of a breach of those standards' (at 2).

<sup>135</sup> Oakeshott, 'Political Education', n 16 above, 61.

<sup>136</sup> Socio-legal scholarship and the case study method, for example, offer complementary pathways to the study of practical knowledge.

<sup>137</sup> Oakeshott, 'Political Education', n 16 above, 66.