Introduction: The celestial voice

Few works of political philosophy are as famous or familiar as Jean-Jacques Rousseau's *Social Contract*. One of the most celebrated and complex of the great masterworks of the Western canon, Rousseau's diminutive treatise on statecraft has been the subject of extended studies and short primers on political philosophy for over two and a half centuries. First published in Amsterdam and Paris in 1762 as part of a broader study of political institutions, the *Social Contract* remains the most original and, arguably, radical defense of participatory democracy in the whole history of political thought. As one scholar comments, it is a groundbreaking work penned by a thinker who, more than anybody else, ought to be regarded as the "theorist *par excellence* of participation."[1]

Widely heralded as a brilliant yet gratuitously utopian book, this most well-known of Rousseau's writings is also considered to be his most fanciful: a fantastically idealistic treatise on the nature of legitimate government intended for an audience in which "the awful distance between the possible and the probable" is knowingly unbridgeable.[2] According to many readers, the political program of the *Social Contract* was always intended to be a work on the abstract principles of political obligation and never a manual on practical or feasible institutions in any concrete sense. As Jean Guéhenno commented some time ago, Rousseau was a political romantic who was "carried away by his dreams," sketching down his imaginings

[1] Carole Pateman, *Participation and Democratic Theory*, Cambridge: Cambridge University Press, 1970, 22.
[2] Judith N. Shklar, *Men and Citizens: A Study of Rousseau's Social Theory*, Cambridge and New York: Cambridge University Press, 1987 [1969], 2.

"with all the fanaticism of a priest and the fantasy of a backyard inventor."[3]

This judgment echoes that of a chorus of commentators dating back to Benjamin Constant and Edmund Burke who, two centuries earlier, characterized the Genevan's political theory as being, on the whole, "so inapplicable to real life" that "we never dream of drawing from them any rule for laws or conduct."[4] This early description, which seats Rousseau near the head of a long table of utopian dreamers stretching back to Thomas More and Plato, was voiced by many Anglo-American thinkers at the end of the eighteenth century and, afterward, by critics at the end of the nineteenth century. This said, unsurprisingly, during these years a sizable minority of readers always remained who judged Rousseau's political ideas and, more specifically, his "rules for laws" to be ingenious despite their apparent fancifulness. Within this readership during the last century, especially, authors such as Charles Vaughan, Robert Derathé and Ernst Cassirer have emphasized the rationalist features of Rousseau's political system in a way that prioritizes or elevates the status of law.[5] According to Cassirer, for example, the law serves in a very real sense as the "constituent principle" of Rousseau's legitimate state because it alone "confirms

[3] Jean Guéhenno, *Jean-Jacques Rousseau*, vol. II (1758–1778), ed. and trans. J. and D. Weightman, New York: Columbia University Press, 1966, 262.

[4] Edmund Burke, *Burke's Politics*, ed. R.S. Hoffman and Paul Levack, New York: Knopf, 1949, 389. Constant writes that Rousseau was "horrorstruck at the immense social power" he had created and "he did not know into whose hands to commit such monstrous force, and he could find no other protection against the danger inseparable from such sovereignty, than an expedient which made its exercise impossible." Benjamin Constant, *Political Writings*, trans. and ed. Biancamaria Fontana, Cambridge and London: Cambridge University Press, 1988, 178. For a more recent view of Rousseau's utopianism see Shklar, *Men and Citizens*, 14–15.

[5] C.E. Vaughan, *The Political Writings of Jean-Jacques Rousseau*, vol. I and II, Cambridge: Cambridge University Press, 1915; Alfred Cobban, *Rousseau and the Modern State*, London: Allen and Unwin, 1934; Robert Derathé, *Le Rationalisme de J.J. Rousseau*, Paris: 1948; Ernst Cassirer, *The Question of Jean-Jacques Rousseau*, trans. P. Gay, New York and New Haven: Yale University Press, 1963 [1954].

and justifies" its existence "spiritually" by making it possible for citizens to be free politically.[6]

Similarly, later authors, such as John B. Noone Jr., Richard Fralin and Jeremy Waldron, call attention to the salience of law in Rousseau's political philosophy while noting the problematic nature of majority decisionmaking generally.[7] Waldron writes, for example, that "the clear consensus in the canon of legal and political thought" is "that the size of a legislative body is an obstacle, rather than an advantage, to rational decisionmaking" and, as such, this process results in "jurisprudential unease about legislation." Originating "in ancient prejudice that surfaced during the Enlightenment," according to Waldron, the source of this unease is that "legislation is not just deliberate, administrative, or political: it is, above all, in the modern world, the product of an *assembly* – the many, the multitude, the rabble (or their representatives)."[8] Large assemblies are perceived to be irrational and inherently demagogic because they are endowed with traits more characteristic of a rabble than of a selectively chosen self-legislating elite. By Giovanni Sartori's account this inability by the people to legislate in any coherent fashion is reinforced by suggestions and recommendations that are intended to ensure that Rousseau's sovereign assembly remains passively docile or "immobile."[9]

How much or how little "jurisprudential unease" is appropriate during lawmaking in Rousseau's state can be argued to be germane to any proper understanding of the political theory of the *Social Contract* and, more broadly, the larger tradition of democratic theory. Investigating this question of lawmaking by large majorities, specifically, this book examines how many of the most well-known

[6] Cassirer, *The Question of Jean-Jacques Rousseau*, 63.
[7] John B. Noone, *Rousseau's Social Contract*, Athens, GA: University of Georgia Press, 1980, 36–47; Richard Fralin, *Rousseau and Representation: a Study of the Development of his Concept of Political Institutions*, New York: Columbia University Press, 1978, 54; Jeremy Waldron, *The Dignity of Legislation*, Cambridge: Cambridge University Press, 1999, 31–32.
[8] Waldron, *The Dignity of Legislation*, 31–32.
[9] Giovanni Sartori, *The Theory of Democracy Revisited*, Part II, Chatham: Chatham House, 1987, 314.

republican features in Rousseau's political system are designed to augment, rather than to inhibit, the activity of those persons who are responsible for ratifying the laws. Although, it is indeed true that the Genevan believes that inside of a well-governed polity the laws ought to be relatively stable, it is also his belief that its process ought to be robust with final say over lawmaking residing with the people.

For the philosopher, popular sovereignty can be said to be less about the origin or locus of political authority than its dynamic exercise during legislation. In the *Social Contract*, Rousseau stresses that "it is not through the laws that the State subsists" but "through the legislative power" and that "the law of public order in assemblies is not so much to maintain the general will" as "it is to be sure that it is always questioned and that it always answers" (*CS*, III:xi, 188/424; IV:I, 199/438). Of this relationship, liberty requires that a citizenry be "always questioned" because its authority is less something to be maintained than something to be revealed continuously. Examining the rudiments of the mechanics behind this process, this book explores how what is "always questioned" is made to "always answer" in a way that is both compatible and complementary with republican government. Among other things, I investigate in this book the strengths and weaknesses associated with each of the discrete stages of drafting, ratifying and executing the laws in a bid to refute a burgeoning tradition of distinguished scholars who consider the political role of the people to be marginal. This influential group, which includes Judith N. Shklar, Richard Fralin and Arthur M. Melzer, among others, emphasizes the surreptitious de facto and *de jure* power of elites over the citizenry as the latter is reduced to expressing acclamation for a predetermined legislative agenda. As Steven Johnston remarks, "if Rousseau's texts are read carefully" one finds that "the prominence of law and politics recede" as citizens in his state are reduced to a mere "contrivance of power," an "artifice to be constructed more than an essence to be realized."[10]

[10] Steven Johnston, *Encountering Tragedy: Rousseau and the Project of Democratic Order*, Ithaca: Cornell University Press, 1999, 87, 118.

Challenging this dominant viewpoint, I argue in this book that the Genevan goes to great lengths in virtually every avenue of his political system to preserve and, critically, expand the political power of the people. I reveal Rousseau to be a hard-headed political scientist who carefully decompresses the complexities of republican institutions and constitutional government in an effort to enhance, rather than to debilitate, democratic liberty. Consistent with this goal, I illuminate the pragmatics behind the actualization and articulation of his political maxims above his more well-known abstract principles of political right or "universal justice." Focusing less on the audibility of the celestial voice of *la volonté générale* than its legal or political expression, my emphasis is on the institutional aspects of voting above will-formation.

Unlike the voluminous secondary literature on Rousseau's political theory, this book is predominantly about contemporary questions and problems of political science that were anticipated by Rousseau and, to a degree, spoken to by his political philosophy. In this study, each chapter explores a different element of his ideas about lawmaking, and statecraft more generally, that readers describe as opaque. Every chapter investigates a separate stage of his wider legislative process that readers consider obscure or confusing in the context of broader questions of democratic theory.

As all are aware, the relationship between lawmaking and statecraft is less transparent than appears from the Genevan's parsimonious remarks on the subject at the end of Book II of the *Social Contract*. In Book II:xi, he writes that "laws are, properly speaking, only the conditions of the civil association"[11] and "political laws, which constitute the form of Government, are the only ones relevant to my subject."[12] On the surface this statement about legislation as *constitutional* law, expressly, appears uncomplicated so long as what is conveyed by the term, "law," is construed as political law

[11] *Social Contract*, II:vi, 154/380.
[12] *Social Contract*, II:xii, 165/394.

exclusively. But for many readers this definition is considered to be overly rigid or narrow because it is possible for a citizenry to vote on constitutional legislation and, as Rousseau comments elsewhere, any civil and criminal laws that can be applied generally. Similar to the political laws, this second and more sweeping domain can be argued to be salient to the extent that it hints at a far more active role for the people in statecraft and civil and criminal lawmaking than is apparent.

Exploring Rousseau's concept of law in Chapter 1, the following chapter examines the issue of legislative initiative (or agenda-setting) and the role of representatives as the drafters of the laws in his mature state. In this section I argue that the theory of the *Social Contract* does not permit interference by representatives in any strong sense during the drafting of the laws but, rather, only afterward or during their execution. Significantly, I explore how Rousseau employs a series of subtle yet practical mechanisms to ensure that those who are responsible for ratifying the laws are never left at the behest of those who initiate them. Deconstructing these mechanisms' workings, I explain why the politically educative and self-reinforcing benefits of democratic participation need not be undermined by the presence of legislative experts during lawmaking and, critically, how such experts can serve a vital function within a "strong democracy" if checked appropriately.

Correspondingly, I investigate in Chapter 3 the most controversial and politically germane of stages in Rousseau's lawmaking process, voting or the ratifying of the laws. Explaining why voting in Rousseau's assembly should not be considered a predetermined act even when the lawgiver indeed proves to be successful at substituting a "partial and moral existence" for man's "physical and independent existence," I illustrate how such interference remains both organically and procedurally constrained in meaningful ways. Of these constraints, I examine in Chapter 4 how Rousseau demonstrates the chief danger to liberty to be not either lawgiving or what James Madison describes in *Federalist* No. 55 as assemblies

of "whatever characters composed" but, rather, assemblies of *poorly* composed character. Madison remarks famously that for "all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates; every Athenian assembly would still have been a mob."[13] With other debilitating vices, the size of an assembly, according to Madison, is what proves to be especially deleterious to popular rule by engendering disorder. Taking this argument at face value, this chapter examines why Rousseau still endorses popular decisionmaking by a large assembly despite the associated political dangers. Noting the many historical authors who associate deliberation in large legislatures with mob rule, I illuminate how Rousseau's political theory is unique in its efforts to evince the possibility of large numbers of people participating in lawmaking without their degenerating into a rabble.

Returning to the topic of Rousseau's utopianism, I explain why the prescribed strictures in the Genevan's constitutional plans for Poland and Corsica are less fancifully impractical than may appear. In Chapter 5, I argue that all of the strictures proposed in these later plans are intended to be examples of realizable political reform but, importantly, only within the constellation of Rousseau's wider social theory. I illustrate how the prescriptions for Poland and Corsica are grounded in a systematically consistent view of human nature that, despite its originality, is not entirely unpersuasive. I spotlight how each of these prescriptions reveals the author's desire for practicality and his willingness to satisfy this impulse by way of a systematic methodology that arises out of a distinct social psychology in which, among other things, sensual or emotional stimuli affect human behavior decisively.

In the last chapter, I take up one of the most understudied or underexplored topics of all within the long history of debate on Rousseau's political thought: adjudication or the *judging* of the laws

[13] James Madison, Alexander Hamilton and John Jay, *The Federalist*, Philadelphia: The Franklin Library 1977 [1788], No. 58, 424–425.

in the *Social Contract*. Of this activity, according to a number of interpreters, judging is said not to exist in any substantive sense because all types of legislative interference in sovereign decision-making inevitably divide and usurp the unity of the general will. This said, Maurizio Viroli asserts that among other important institutional checks, "courts represent the specifically constitutional means whereby political order is to be preserved."[14] Earlier, Alfred Cobban is even more certain that "there is to be a separate class of judges" chosen "for their general merit from the whole body of citizens, rather than the modern practice of recruiting them exclusively among the class of legal experts."[15] In this last chapter, I argue that Rousseau does not permit judicial mediation of any sovereign law but he does believe that civil and criminal *decrees* ought to be interpreted by courts. A lesser form of law to be issued or enacted by the government, decrees demand that courts, among other things, scrutinize their applicability to particular or individual cases.

Also in this chapter, I discuss what happens when the laws fail. In a justly-ordered state any temporary suspension of the sovereign power can be shown to result from a myriad of different causes without any one necessarily leading to its ultimate demise. When the laws must be suspended and how a citizenry is to regain legislative control is an important question in view of the actual history of constitutional dictatorship in republican Rome. One obvious answer to this question is that if a polity were truly well-ordered then any dictator that would arise would follow the example of republican-minded Cincinnatus and place love of *patrie* first and voluntarily depart. But this may be an overly idealistic assumption. Controversially, Rousseau believes that the greatest danger is the people's reluctance to choose a dictator when necessary. Examining the logic behind his argument for dictatorship in Chapter IV:vi of the *Social Contract* within the context of the later history of republican Rome, I argue

[14] Maurizio Viroli, *Jean Jacques Rousseau and the Well-Ordered Society*, trans. Derek Hanson, Cambridge: Cambridge University Press, 1988, 214.
[15] Cobban, *Rousseau and the Modern State*, 81–82.

that any temporary suspension of the laws in Rousseau's state should not be regarded as posing as lethal a threat to liberty as some may construe to be the case. I examine and weigh the Genevan's rationale for choosing a dictator over other alternatives and the merits of this choice relative to other options during a military or constitutional emergency.

Taken together, each of these chapters seeks to highlight Rousseau's bearing as a legislator and political craftsman. As a contribution to the wider body of literature on the *Social Contract*, I reveal how his thoughts on lawmaking are not anchored solely to his detailed and lengthy ruminations on the merits of the wise and illustrious lawgivers of old. The activity of realizing the general will in the *Social Contract* can be viewed holistically in the sense of encompassing disparate aspects of a remarkably systematic legislative process. Surprisingly, some of the most unusually original elements of this process emerge only after the laws are drafted and the lawgiver departs from the scene. What happens to the laws procedurally at every stage of lawmaking is fundamental to understanding how liberty is given concrete expression in the institutions of the *Social Contract*. More pointedly, what happens across each of these stages illustrates Rousseau's astuteness or even brilliance as a constitutionalist in a way that burnishes his reputation as one of the greatest political minds of the modern world.

1 Rousseau's concept of law

Liberty in the *Social Contract* is achieved not by the stability or continuity of the laws but by what Jean Starobinski describes as the political contextualization of *la transparence*: the ability or inability of a community to free itself from the arbitrary preferences of its members politically.[1] In a legitimate state it is the possibility of this transparency, specifically, that gives substance to liberty to the extent that what individuals prefer is not guided by any capricious wants or desires but by the rationalized will of the community as a whole. Each prefers the good of all without preferring the good of each during the consideration of his or her own private interests. Fundamentally different from other expressions of dependency in society, it is by way of the reciprocity and coercive nature of the laws, according to Rousseau, that this relationship is universalized and elevated into something other than an alternative form of *l'obstacle*. It is owing to the laws that liberty is no longer arbitrary but grounded in justice.

Asking "what is a law after all?" in reply to this question the philosopher emphasizes the generality of the popular vote as a means to achieving *la transparence.* When "an entire people enacts something concerning the entire people, it considers only itself" and "the subject matter of the enactment is general like the will that enacts. It is this act that I call a law" (*CS*, II:vi, 153/379). Expressly,

[1] "The *Social Contract* postulates a simultaneous alienation of wills, in which each person ultimately receives back from the collectivity whatever he voluntarily cedes to it." By both willing the law and obeying it as a unity, "each man sees and loves himself in others, for the greater unity of all." Jean Starobinski, *Jean-Jacques Rousseau: Transparency and Obstruction*, trans. Arthur Goldhammer, intro. Robert J. Morrissey, Chicago and London: The University of Chicago Press, 1988 [1971], 97.