

Rousseau on Fundamental Law

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How can we understand Rousseau's use of entrenched fundamental law? Given that absolute sovereignty is of paramount importance to Rousseau, and given that he rejects the possibility of binding the future, fundamental law might be viewed as a paradoxical restraint on the sovereign. However, through a consideration of their substantive form, and of the procedural mechanisms of enactment and abrogation, these laws are shown to serve an 'enabling' purpose. For Rousseau, fundamental law does not constrain the sovereign will, but is constitutive of the sovereign or transforms its operation with respect to morality and justice. Fundamental law should be understood to enhance the capacity of the sovereign; this reading also explains the most familiar limitation that does not take the form of a fundamental law, the double-generality requirement.

Rousseau is perhaps foremost a theorist of absolute sovereignty, as his best-known reference to 'fundamental law' emphasizes:

It is contrary to the nature of the body politic for the sovereign to impose upon itself a law it cannot break. ... There is not, nor can there be, any kind of fundamental law that is obligatory for the body of the people, not even the social contract (*On the Social Contract* [henceforth *SC*], I, vii, 54).

But this is not Rousseau's final word on fundamental law; not only does Rousseau term a variety of principles and provisions 'fundamental', he also appears to accept their procedural entrenchment. These conceptions appear both in his theoretical and in his practical works,¹ as in the following quote from *Considerations on the Government of Poland* [henceforth, *Poland*]:

Under the natural law of societies, unanimity was requisite to the formation of the body politic and of the fundamental laws necessary to its existence. ... But the unanimity required for the adoption of these laws should equally be required for their abrogation. ... The basic points to be established as fundamental laws should be carefully weighed and considered; and these points only should be subject to the liberum veto. This will make the constitution as firm and the laws as irrevocable as possible. For it is contrary to the nature of the body politic to be subject to irrevocable laws; but it is contrary neither to nature nor to reason to require that they should be revoked only with the same formalities that brought them into being. *That is the only chain with which we can bind the future* (*Poland*, p. 215, emphasis mine).

How can we understand this quotation in the light of Rousseau's attachment to absolute sovereignty, and of his rejection elsewhere of the possibility of 'binding the future'? Instead of understanding fundamental law as a 'limitation' on the sov-

ereign will, the best way to render Rousseau's project coherent is to use a modified enabling model of the type developed by Stephen Holmes. An enabling model is one in which limitations on the sovereign are either constitutive of the sovereign, or strengthen its ability to enact its will (Holmes, 1995, p. 163). In John Searle's language, constitutive rules 'create or define new forms of behavior' (Searle, 1997, p. 33), allowing a practice to occur for the first time and 'constitut[ing] an activity the existence of which is logically dependent on the rules' (Searle, 1997, p. 34). Constitutive rules may be distinguished from regulative rules, which 'regulate a pre-existing activity, an activity whose existence is logically independent of the rules' (Searle, 1997, p. 34). The rules of chess, as Searle and Holmes both note, are types of constitutive rules: in Searle's example, a rule of the form 'a checkmate is made when the king is attacked in such a way that no move will leave it unattacked', is constitutive in the sense that it permits the game 'chess' to be played (Searle, 1997, pp. 35–36). While we might move pieces around a board, without rules of the 'checkmate' form, we could not describe ourselves as playing chess.

In Holmes' view, constitutional rules may properly be understood as constitutive rules in the enabling sense: they form the possibility of action and should not be understood as restrictions on power. Holmes argues, further, that the sovereign strengthens himself by limiting his ability to command arbitrarily: 'By decreasing his power to command his subjects arbitrarily, he increases his capacity to achieve concrete goals' (Holmes, 1995, p. 115). Yet as the end of sovereignty, for Rousseau, is not the strength of the sovereign's will, but the *transformation* of the people with respect to morality and justice, laws enabling the sovereign must either be constitutive, or must enhance its transformative capacity.

After a discussion of prior conceptions of fundamental law and exegetical accounts of Rousseau on this question, Rousseau's account of the forms that fundamental law may take is then analyzed. Both 'political laws' and 'guiding principles' should be understood as constitutive, or at least regulative, of the sovereign. The procedures by which fundamental law is both enacted and abrogated are considered; the sovereignty-reinforcing consequences of good and enduring laws will likely result from difficult procedures. The enabling argument is then shown to extend to 'restrictions' that do not take the form of fundamental law via consideration of the double-generality requirement.

Fundamental Law and the Enabling Model

It is important to note that the apparent conflict between absolute sovereignty and fundamental law does not first manifest itself in Rousseau. Bodin's *Six Books of the Commonwealth* (1576) followed the coinage of the term 'fundamental law' by perhaps only three years;² thus, as Holmes demonstrates, theories of entrenched higher law and unlimited sovereignty coexisted from inception. According to Holmes, Bodin's king is both bound and unbound – while his sovereignty is absolute, he is restricted by constitutional rules. Bodin's account of 'constitutional law' in *Six Books of the Commonwealth* is a procedural account of restrictions, as in 'The constitutional laws of the realm, especially those that concern the king's estate

being, like the *salic law*, annexed and united to the Crown, cannot be infringed by the prince' (Bodin, 1967, p. 31). Moreover, as Holmes notes:

Like later constitutional theorists, he draws a sharp distinction between 'laws concerning ordinary police' and higher laws 'such as concern the very state itself.' The latter, unlike the former, should be exceptionally 'firm and immutable.' ... Such 'higher laws' are quite unlike the commands of a sovereign. Indeed, they are commands to which the sovereign must submit (Holmes, 1995, pp. 106–7).³

Rather than declaring Bodin incoherent, though, Holmes argues for a constitutionalist reading of Bodin, in which 'Bodin overcomes his own injunction against self-binding by claiming that constitutional precommitments, institutional constraints that cannot be waived on an *ad hoc* basis, are vehicles of royal freedom – strategies by which sovereigns may most effectively assert their authority' (Holmes, 1995, p. 152).

Bodin, on Holmes's reading, offers an account of sovereignty which is simultaneously unbound, yet limited both by divine and natural law and by inabrogable constitutional rules. Like Bodin, Hobbes and Pufendorf grappled with a supreme sovereign, which could not be bound by contractual fundamental law (Thompson, 1986, pp. 1112–6); for Hobbes, fundamental law took a foundational, and inabrogable, form (Hobbes, 1985, p. 334),⁴ while Pufendorf accepted that there might be some limitation of sovereignty (Thompson, 1986, pp. 1115–6). Rousseau joins this noncontractual conception of fundamental law, yet he encounters the same conflict between absolute sovereignty and what appears to be binding fundamental law.⁵

Holmes argues, generally, that constitutional constraints should not be conceived of as stifling the sovereign's will. Rather, by allowing the sovereign either to act in ways (say, creating legislation) it would be unable to do without settled procedures, or by bolstering its ability to cope with everyday matters by removing certain options, the sovereign's ability to enact its will is actually greater with these 'constraints'.⁶ Again, the conception is slightly different in Rousseau, for whom the strength and efficacy of the sovereign is not an end in itself. While the enabling model is constitutive in Rousseau as in Bodin, the end of these 'limitations', both within and outside of the form of fundamental law, is to bring the sovereign, as it must be by definition, in line with morality and justice.

While the question of fundamental law has been underexamined in the vast scholarship on Rousseau, a few major exegetical works have addressed the point from distinct perspectives. Charles Hendel maintains 'the "fundamental laws", as they were called, are nothing but the settled expression of [the sovereign's] general will. ... Thus the doctrine of "fundamental laws" must be ushered out of court' (Hendel, 1934, p. 149). Moreover, Hendel claims, Rousseau's references to the term bordered on parody (Hendel, 1934, p. 149). For Hendel, then, there is no question: Rousseau admits no limitation on the sovereign will, and for him, the fundamental laws – if they are to be taken seriously – are merely an emanation of the will (Hendel, 1934, p. 186).

Yet Hendel does not adequately consider Rousseau's multiple and diverse accounts of fundamental law. The use of fundamental law was paradigmatic in this period, but Rousseau seems to integrate the concept into his framework without irony. Although Hendel's claim that fundamental law may not constrain the general will is certainly consistent with Rousseau's broader notion of sovereignty, it cannot account for the radical restriction on the abrogation of these laws, from which 'present consent' may be difficult to infer. Moreover, while Rousseau was certainly skeptical that fundamental laws could constrain a wayward sovereign (Hendel, 1934, p. 149), he did not expect them to do so: the success of the compact requires that 'all the characteristics of the general will are still in the majority' (*SC*, IV, ii, 111). Although the fundamental laws will serve both constitutive and transformative purposes, should the laws and customs fail to command the hearts of the citizens (*SC*, II, vii, 77) or should private wills win out over the general will, the fundamental laws will fail along with the compact as a whole.

In contrast to Hendel's dismissive approach to fundamental law, Robert Derathé argues that Rousseau appears to be of two minds on the degree to which the sovereign is bound: it seems that the sovereign is either limited by fundamental law or wholly unlimited (Derathé, 1995, p. 332). Derathé places the source of Rousseau's two arguments against the binding force of fundamental law squarely with Hobbes: first, that the sovereign cannot impose on itself a law that it lacks the power to change; and second, that past acts of the sovereign will do not bind. However, Derathé does recognize a crucial subtlety, derived from Jurieu and Burlamaqui: although sovereign power is absolute, this only proscribes constitutional limitations on enactment and abrogation. It is thus not paradoxical that the sovereign is bound by two fundamental laws: it may not act contrary to natural law, or in violation of the public utility.

Derathé offers a weakly constitutive account of these limitations for Rousseau: the attention to natural law and public utility gives legitimacy, and therefore durability if not generative form, to the sovereign's exercise of power (Derathé, 1995, pp. 344, 355). While, according to Derathé, the sovereign is always superior to the laws insofar as it has the power to change them, the true purpose of the law – 'sa fonction primordiale' (Derathé, 1995, p. 356) – is to place limitations on the sovereign and compel it to operate in keeping with the public good, to which the general will is necessarily directed. Yet Derathé emphasizes that the law is not a superior will, exerting independent causal force on the general will: the law emanates from the will while guiding it toward the public utility.

Like Derathé, Viroli claims that a sovereign acting in violation of the fundamental laws would lack legitimacy, but not form (Viroli, 1988, p. 165). Yet while Derathé emphasizes that the sovereign is incapable of being tyrannical or despotic (Derathé, 1995, p. 356), Viroli argues that for Rousseau a sovereign above civil law is simply a corruption of the true form. 'So long as the fundamental laws are in force, the sovereign body is obliged to respect them. Respect for the fundamental laws and the laws passed in harmony with these, are, according to Rousseau, the surest defence against tyranny', Viroli writes (1988, p. 165). When legitimacy erodes, in the sense that 'the despot no longer has sufficient power to impose his private interests on others' (Viroli, 1988, p. 166), the body politic will dissolve. Yet this is

distinct from arguing that the sovereign by definition is unable to act in violation of the fundamental law.

While the violation of the fundamental laws is the ultimate evidence of unfreedom, the laws do not restrict, but simply emanate from, the sovereign's will. As the sovereign is incapable constitutively of acting against the common good, the violation of these laws offers proof that the sovereign is no longer free and *is thus by definition no longer sovereign*, not that the sovereign has become despotic. The laws do not rein in the tyrannical impulses of the sovereign, while the sovereign chomps at the bit; should the sovereign retain these inclinations, the transformation is inadequate, and the sovereign is simply unfree.⁷

The advantage of the Holmesian 'enabling model', then, is that it permits us to take the binding force of fundamental law seriously, without requiring us to argue that the sovereign is to be understood as logically subordinate to the law. Although both substantive and procedural limitations on fundamental law initially appear inconsistent with Rousseau's defense of absolute sovereignty, the limitations can be demonstrated to be constitutive of the sovereign, not simply useful on grounds of the sovereign's legitimacy or ability to exercise coercive force.

The Substance of Fundamental Law

For Rousseau, fundamental laws fall into one of two general classes – political laws and guiding principles – although Rousseau is somewhat imprecise about his categorization.⁸ Fundamental political laws regulate 'the relationship of the whole to the whole, or of the sovereign to the State' (*SC*, II, xii, 76). In *Poland*, Rousseau refers to fundamental law as 'the fundamental laws necessary to [the body politic's] existence', and moreover distinguishes them from 'ordinary acts of legislation' (*Poland*, p. 214). Rousseau (1986) specifies as a fundamental law for Corsica the 'mixed democratic republic' (*Constitutional Project for Corsica* [henceforth *Corsica*], p. 285), which Rousseau deems appropriate because, as a rural state, it must be democratic, but as a large island, it cannot assemble the people. Thus, the people will meet in sections, with frequent change of administrators. Rousseau appends an explanation of why the 'firm establishment of this form of government will produce two great advantages' (*Corsica*, p. 286). 'First, by confining the work of administration to a small number only, it will permit the choice of enlightened men', Rousseau writes (*Corsica*, p. 286). Note here that the stress is not on the advantages of situating sovereign power in the people, but on the selection of those best skilled. Institutionally this is consistent with Rousseau's notion of government generally, and with his account of aristocracy in the *Social Contract*,⁹ but his concerns about the expertise of the citizens here become apparent, as they will in the consideration of procedural limitations. These political laws are constitutive, insofar as they create new political arrangements; in as much as they govern existing political relations, they are regulative.

Turning to fundamental laws as general principles, the two most salient are the principles of utility, or public good, and the principle of equality. Beginning with the former, the obligation of the sovereign to act in the interest of the public good is, again, typically cited as a limitation via fundamental law on the

sovereign's ability to act as it chooses (Derathé, 1995, p. 43; see also Shklar, 1969, p. 192; Viroli, 1988, pp. 128–9). This appears incontrovertible: in *Geneva Manuscript* [henceforth *Geneva*], Rousseau describes the morally transformative property of the social contract: natural unwillingness to harm oneself is converted, by the creation of a sovereign, into the fundamental law of utility.

Indeed, the first law, the only truly fundamental law that flows directly from the social compact, is that each man prefer the greatest good of all in all things. ... This is how the first concepts of the just and the unjust are formed in us, for law comes before justice and not justice before law; and if law cannot be unjust, it is not because justice is its basis, which might not always be true, but because it is contrary to nature for one to want to harm himself, which is true without exception. ... The true principles of the just and unjust must, therefore, be sought in the fundamental and universal law of the greatest good of all, and not in the private relations between one man and another, and there is no particular rule of justice that cannot be easily deduced from that first law (Geneva, pp. 190–1, emphasis mine).

Rousseau offers a broadly consistent account of the public good 'limitation' throughout, but most notably in the chapter on civil religion in *Social Contract*: 'The right that the social compact gives the sovereign over the subjects does not exceed, as I have said, the limits of public utility' (SC, IV, viii, 130).¹⁰ It is inappropriate to consider this fundamental law a true restriction on the ability of the sovereign to enact its will; the general will, by definition, is the greatest good for all, and thus public utility is merely a constitutive rule. But it is first important to consider a case in which Rousseau seems to deny that utility serves as a limitation, in *Social Contract*: 'Besides, in any event a people is always the master to change its laws – even the best laws; for if it wishes to do itself harm, who has the right to prevent it from doing so?' (SC, II, xii, 76) The concern for the public good, on this reading, is no constraint; Rousseau would appear to break with the natural right tradition here in his rejection of the prohibition on self-injury.

It is a mistake to read Rousseau in this way, given his general endorsement of the utilitarian principle, as in *Social Contract*: 'It follows that the general will ... always tends toward the public utility. ... One always wants what is good for oneself, but one does not always see it' (SC, II, iii, 61). But how can we make sense of this quotation permitting self-injury, then? The context of the quotation assists us: it is immediately preceded by a discussion of the possibility of changing fundamental political laws. Although, as the procedural constraints indicate, Rousseau clearly permits a degree of entrenchment, he is explicitly not an advocate of constitutionalism read as limited legislative sovereignty: the people ultimately are free to alter their laws, even good law. Rousseau worries in this section that to render law inabrogable might consign the people to live under bad law: 'If the established order is bad, why should one accept, as fundamental, laws that prevent it from being good?' (SC, II, xii, 76).

What would a change of good law entail? A sovereign act, by definition, is for the public good:

What really is an act of sovereignty then? It is not a convention between a superior and an inferior, but a convention between the body and each of its members. A convention that is legitimate because it has the *Social Contract* as its basis; equitable, because it is common to all; *useful, because it can have no other object than the general good*; and solid, because it has the public force and the supreme power as guarantee (SC, II, iv, 63, emphasis mine).

It is wrong to consider the fundamental law of public utility a limitation on the sovereign. Rather, it is constitutive of the notion of sovereignty – as deriving from natural right – that it be directed to the public good. Rousseau, in fact, seems to make this claim in the following paragraph, addressing the relationship between limitations such as equity and public good and the absolute nature of sovereignty:

It is apparent from this that the sovereign power, albeit entirely sacred, and entirely inviolable, *does not and cannot exceed the limits of the general conventions*, and that every man can fully dispose of the part of his goods and freedom that has been left to him by these conventions (SC, II, iv, 63, emphasis mine).

The sovereign, properly understood, is *constitutively incapable* of willing what is wrong; the fundamental law of utility is an enabling rule designed only to direct the general will to morality and justice, and is thus in no important sense a limitation. Just as Rousseau acknowledges when the majority is no longer able to discern the general will, ‘there is no longer any freedom regardless of the side one takes’ (SC, IV, ii, 111), if the sovereign is capable of self-harm, not only does it cease to oblige, but by definition, it no longer exists. To will what is at odds with the public utility is incoherent, for Rousseau: it is not a matter of the corruption of the sovereign, but the immediate disintegration of the sovereign as so constituted.

The fundamental law of equality may be explained similarly. In its application in the constitutional writings – both in *Considerations on the Government of Poland* and in *Constitutional Project for Corsica* – the concept manifests itself in a pragmatic sense. First, in *Poland*, Rousseau describes how a citizen would rise through the equestrian order (i.e. nobility). ‘Since equality among noblemen is a fundamental law of Poland, the career of public service in that country ought always to begin with subordinate positions; that is the spirit of the constitution’ (*Poland*, p. 245). Likewise, in *Corsica*: ‘The fundamental law of your new constitution must be equality. Everything must be related to it, including even authority, which is established to defend it’ (*Corsica*, p. 289). Under the fundamental principle of equality, moreover, Rousseau adds that, therefore, ‘fiefs, allegiances, quit-rents and feudal rights hitherto abolished shall therefore *remain abolished forever*’ (*Poland*, p. 214), as they would conflict with the fundamental law.

Shklar’s general account of equality in Rousseau hints at the constitutive reading: ‘The people is sovereign only as long as it can and does prevent institutionalized inequality’ (Shklar, 1969, p. 91). It is clear that she views generality as a limitation on the sovereign (Shklar, 1969, p. 191), and, in that the expression of that generality is civic equality in universally applicable rules, she may have similarly

understood equality as a restriction. But the quote above suggests that sovereignty, by definition, requires the preservation of equality. Instead, the fundamental law of equality ought to be read not as restriction, but as a constitutive principle enabling sovereign action *by definition*.

Procedural Limitations via Fundamental Law

Rousseau's fundamental laws – the utility and equality provisions, political relations – provide either a constituent or a regulative constraint on the sovereign will, and thus are better considered enabling limitations than restrictions, *per se*. Now, let us turn to procedural constraints, which are separable into two categories: those on the means by which fundamental law is enacted, and those on the method of abrogation.

Enactment

The enactment of fundamental law is procedurally difficult. The social compact, which Rousseau terms a fundamental law, requires unanimity for enactment.¹¹ Rousseau demands unanimity here on consensual grounds: 'For civil association is the most voluntary act in the world. Since every man is born free and master of himself, no one, under any pretext whatever, can subject him without his consent' (*SC*, IV, ii, 110). After the creation of the contract, residency implies tacit consent, but express consent is necessary at inception, and unanimity serves only to secure that.¹² Additionally, Rousseau endorses the use of qualified majorities: 'The difference of a single vote breaks a tie; a single opponent destroys unanimity. But between unanimity and a tie there are several qualified majorities, at any of which the proportion can be established, according to the condition and needs of the body politic. ... The more important and serious the deliberations, the closer the winning opinion should be to unanimity' (*SC*, IV, ii, 111).

The majority decision rule has received some exegetical attention, on the grounds that it seems to conflate the general will with the majority will (Shklar, 1969, p. 190).¹³ The argument is typically that the decision is merely the imposition of the majority's will on the minority (following the interpretive tradition of considering Rousseau to be a totalitarian), or that 'Rousseau's assumptions merely reflect the conventional wisdom of the day' (Miller, 1984, p. 235, footnote 10). This objection sidesteps the gravity of Rousseau's requirement that 'all the characteristics of the general will are still in the majority. When they cease to be, there is no longer any freedom regardless of the side one takes' (*SC*, IV, ii, 111). However, there is a ground on which the qualified majority provision can be viewed as conflicting with Rousseau's account of the general will. That is: if law is not a true expression of the general will, it does not oblige; but if it is an enactment of the general will, the number of votes in the majority ought to be irrelevant. By counting votes, the general will seems, inadvertently, to have slipped into the will of all, calculating the private interests of its members to reach the appropriate decision.

Given the risk of incoherence, why would Rousseau endorse a qualified majority? Three possible answers arise: first, to ensure consent; second, to satisfy epistemic criteria; and third, to stabilize the legislative process.

On the first, we might well think that, just as the social compact required unanimous, and express, consent to oblige, fundamental law ought to be subject to the same, or nearly equal, decision rule. However, the requirement of express consent disappears after the acceptance of the original contract; after this point, tacit consent by residency suffices (*SC*, IV, ii, 110). Moreover, Rousseau addresses this point in his response to the question: ‘How can the opponents be free yet subject to laws to which they have not consented?’ Rousseau replies ‘that the question is badly put. The citizen consents to all the laws, even those passed against his will’, and goes on to discuss the form taken by the vote, that is, whether or not the piece of legislation conforms to the general will.

The other two solutions are both more plausible and more important. On epistemic criteria: Rousseau, as is well known, tends to worry about the ability of the body politic to discern the true general will and enact good legislation, and the skill of the multitude to govern. There is the familiar phrase: ‘The general will is always right, but the judgment that guides it is not always enlightened’ (*SC*, II, vii, 67). The role of the legislator is to bring about this transformation, by making private wills conform to the public will, and the body politic ‘must be taught to know what it wants’ (*SC*, II, vi, 67). Additionally, note that Rousseau’s endorsement of elective aristocracy (but not his critique of democracy) is on the grounds that ‘it is the best and most natural order for the wisest to govern the multitude, as long as it is certain that they govern for its benefit and not for their own’ (*SC*, III, v, 86).

We should read the call for qualified majority in the same way: perhaps Rousseau fears that on a matter of great significance, calling for the enactment of a fundamental law, the true will may be mistaken (Rousseau, 1986, p. xxxiii). Evidence on a connection between Condorcet’s jury theorem and Rousseau’s theory of voting speaks to this point (Estlund *et al.*, 1989, p. 1336).¹⁴ The jury theorem holds that if voters are selecting between two options – one correct and one incorrect – and the average probability of each voter selecting the correct answer is greater than 0.5, the probability that the answer chosen by the majority will be correct increases to certainty as the size of the group increases (Estlund *et al.*, 1989, p. 1322). Keeping the size of the group constant, as the percentage of individuals voting in favor of a piece of legislation increases, assuming that the average competence is greater than 0.5,¹⁵ the probability that the group decision is correct also increases (Grofman and Feld, 1988, p. 571). Rousseau’s call for a supermajority on the enactment of fundamental law is then plausibly explained by reference to epistemic concerns.

The final consideration under the heading of enactment is the stability of the law, which is intimately connected to the problem of abrogation. A quote from *Poland* clarifies the relationship between the two:

Under the natural law of societies, unanimity was requisite to the formation of the body politic and of the fundamental laws necessary to its existence. ... But the unanimity required for the adoption of these laws should equally be required for their abrogation. ... *The basic points to be established as fundamental laws should be carefully weighed and considered; and these points only should be subject to the liberum veto. This will make the con-*

stitution as firm and the laws as irrevocable as possible (*Poland*, p. 215, emphasis mine).

Focus first on the enactment side of this passage. Rousseau's endorsement of the *liberum veto* – that is, a unanimity requirement for the passage of legislation, dating to the early sixteenth century¹⁶ – is on 'firmness' grounds. But consider how enactment via unanimity, leaving aside abrogation for the moment, might induce stability. On the one hand, these laws are to receive private and individual deliberation. Rousseau reiterates in *Poland* his suggestion that 'votes taken collectively and in the mass always proceed less directly toward the common interest than do those which are taken seriously' (*Poland*, p. 204), because of the risk of factions. On the other hand, accountability concerns move consideration into the public realm: 'Furthermore it is better for each deputy to have to answer individually before the dietine, in order that no one may be able to hide behind others, that the innocent and guilty may not be confused, and that distributive justice may be better done' (*Poland*, p. 204). Moreover, Rousseau advocates legislative responsibility for thwarting unanimity in an especially draconian form, in response to the *liberum veto*'s current status in Poland as an 'instrument of oppression' (*Poland*, p. 213): 'In the case of a nearly unanimous resolution, therefore, if a single opponent retained the right of veto, I should want him to answer for it with his life, not only to his constituents in the subsequent dietine, but thereafter to the whole of the nation whose misfortune he had been' (*Poland*, p. 216). He continues, suggesting the vetoer should either receive public honors for life, or death. Thus, deliberation should take place privately, but the representative should capitulate if he finds that he is in the vast minority in a public vote (*Poland*, 205).¹⁷ Since enactment of fundamental law, in this context, is literally a matter of life and death – because they are subject to the *liberum veto* – the seriousness of the enactment process might well induce stability.

Given these procedural limitations on enactment, does the general argument that restraints should be read as enabling the sovereign hold? The two plausible reasons for requiring a qualified majority, or unanimity, for enactment are the correctness of legislation and the stability of the laws. Unifying these rationales, and so appealing to the longevity of good fundamental law, it becomes apparent that an enabling model is in fact accurate. Rousseau argues that legislation should be a rare act (*SC*, IV, i), and making enactment procedurally difficult may discourage regular demands for new laws. Additionally, assemblies are periodic, and do not remain convened: 'it is unimaginable that the people remain constantly assembled to attend to public affairs' (*SC*, III, iv, 85). The rejection of ongoing assemblies, and on the same grounds, of the democratic form of government, is their instability: 'there is no government so subject to civil wars and internal agitations as the democratic or popular one, because there is none that tends so strongly and constantly to change its form, nor that demands more vigilance and courage to be maintained in its own form' (*SC*, III, iv, 85). Thus, procedural difficulty, as it supports Rousseau's commitment to the infrequency of legislation (both fundamental and ordinary), is sovereignty-reinforcing. By keeping popular assemblies to a minimum (periodic – that is, 'on a designated day' – and on an as-needed basis to cope with extraordinary contingencies (*SC*, III, xiii, 100)), Rousseau wishes to secure the sovereign and prevent it from developing an increasingly complex system of laws. After all,

when ‘all the mechanisms of the State are vigorous and simple, its maxims are clear and luminous, it has no tangled, contradictory interests; the common good is clearly apparent everywhere, and requires only good sense to be perceived’ (*SC*, IV, i, 108). The difficulty of enacting legislation in general, and especially fundamental law, serves as a check on the sovereign, but only to allow the sovereign to endure peacefully, and to permit it to be morally transformed.

Abrogation

How may we account for entrenched fundamental law in the context of absolute sovereignty? Substantive limitations can be accommodated by reference to an enabling model, and a procedurally burdensome amendment process can similarly stabilize and transform Rousseau’s sovereign. Recall the radical entrenchment of fundamental law:

For it is contrary to the nature of the body politic to be subject to irrevocable laws; but it is contrary neither to nature nor to reason to require that they should be revoked only with the same formalities that brought them into being. That is the only chain with which we can bind the future (*Poland*, p. 215).

The unanimity requirement for enactment is mirrored in the amendment formula, which is intended to ‘strengthen the constitution’ (*Poland*, p. 215). Rousseau again reiterates the absolute freedom of the sovereign to alter the laws, but given the penalty of death for refusing to join the unanimous body wishing to enact legislation determined to be good, advocating change deemed unwarranted may be similarly risky, and induce even greater stability (likely at the cost of excessive rigidity).

It is the final sentence, though, that is perhaps even more striking. Sovereignty in Rousseau is typically considered ‘nontemporal’, to use Tracy Strong’s language (Strong, 1994, p. 91). This argument comes from the many places in which Rousseau reiterates the absolute impossibility of binding the will for the future, such as: ‘The sovereign may well say, ‘I currently want what a particular man wants, or at least what he says he wants’. But he cannot say, ‘What that man will want tomorrow, I shall still want’, since it is absurd for the will to tie itself down for the future’ (*SC*, II, i, 59). This concern is demonstrated institutionally, also, via the questions posed at the periodic assemblies: ‘Does it please the sovereign to preserve the present form of government’, and ‘Does it please the people to leave the administration in the hands of those who are currently responsible for it’ (*SC*, III, xviii, 107). Rousseau’s deep concern that the sovereign not be bound by earlier decisions – including, even, to retain the social compact – is shown clearly in such passages.

However, a satisfactory explanation must take account of both Rousseau’s willingness to bind the future in any way, and his explicit rejection of any such constraints. A possible solution is in Rousseau’s affection for ancient law, because of the depth of its penetration into the hearts of men, as Shklar importantly notes (Shklar, 1969, p. 156). While not explicitly entrenched procedurally, good law given to a society, which has been morally prepared to receive it by the Legislator, will endure (Shklar, 1969, p. 156). But even a less nostalgic argument, which does not depend on appeal to the Legislator, bolsters the observation:

Yesterday's law does not obligate today, but tacit consent is presumed from silence, and the sovereign is assumed to confirm constantly the laws it does not repeal while having the power to do so. Everything the sovereign has once declared it wants, it always wants unless it revoked the declaration. Why then is so much respect accorded to ancient laws? Because of their very age. People must believe that only the excellence of these ancient expressions of will could have preserved them for so long. If the sovereign had not constantly recognized them as salutary, it would have revoked them a thousand times over (*SC*, III, xi, 99).

The argument here is complex. Rousseau begins with his typical rejection of the notion that an act may bind the future, but then shifts his focus to an explication of how positive law, which has a particular origin in time, can continue to obligate. His argument is that law endures through ongoing reinforcement of support: by failing to amend the law, the sovereign offers its tacit consent. Note here that this is only plausible if the amendment procedure is not too cumbersome. If unanimity is required to abrogate the law, it may be impossible to infer tacit consent from failure to amend. Rousseau may recognize this, though, in his next sentences, in which he describes how law perpetuates itself. While the sovereign is technically capable of changing any law, procedural constraints may make it practically impossible to do so, and the law therefore endures. However, over time, the sovereign takes the preservation of the law as a reflection of its quality, rather than as merely a result of logistical difficulties, and this belief in the goodness of the law renders the law even more deeply entrenched. Given Rousseau's concern for good law, and his deep concern that the sovereign may fail to recognize it, as we saw above, entrenchment and conservatism with respect to legal change may be the safest bet.

Moreover, in the absence of support from 'the hearts of the citizens', and the force of habit, the law cannot endure; Rousseau highlights as 'the most important of all' the mores, customs, and opinions which serve as an 'unshakable keystone' (*SC*, II, vii, 77). Procedural entrenchment can have force only so long as the laws command the respect and affection of the citizens; in the absence of these feelings, the law cannot bind, and certainly cannot transform morally. In this sense, again, law ought not to be read as a limitation: rather, as supported by the hearts of the citizens, fundamental law serves to constitute and shape the sovereign.

Rousseau, while repeatedly insisting that the sovereign's ability to change law remain unfettered, places an extraordinary procedural burden, unanimity, on those who would attempt to alter fundamental law (including, presumably, the social compact). One might argue that this derives simply from Rousseau's deep concern about the effects of the liberum veto in Poland, but as Rousseau repeatedly assures us that the principles underlying his constitutional project cohere to those in the *Social Contract*,¹⁸ we must take these prescriptions seriously. Thus, the question again arises of how to render consistent Rousseau's rejection of self-binding with the radical procedural entrenchment of fundamental laws.

The model which least distorts Rousseau's intentions is that of sovereign-reinforcement, *especially* in Poland. In a fragmented state, prone toward dissolution (*Poland*, p. 160), a cumbersome amendment process quells wrangling over funda-

mental laws, and offers a framework for true civic and moral freedom.¹⁹ As Shklar writes, 'To Rousseau, it did not appear that genuine authority limits freedom. ... Personal authority is not merely compatible with freedom; it creates the latter. In its healing form, in ordering the disrupted passions, it is psychologically liberating. In ordering the environment it allows men to retain an integrated self and to preserve their independence' (Shklar, 1969, p. 162). However, this model is applicable to any Rousseauian political community. Although the process of enactment and abrogation of fundamental law – defined here, as above, as those laws and principles necessary to the existence of the body politic²⁰ – is extremely difficult, these procedures are much less cumbersome for ordinary acts. Fundamental law provides a structure for the creation of ordinary legislation,²¹ and thus the exercise of sovereignty.

An enabling model best explains both the substance of and the procedures governing fundamental law. But how does it account for limitations that take a form other than that of fundamental law?

Double-generality and the Enabling Model

Other than fundamental law, two forms of restraint on the sovereignty of the body politic are typically cited: the generality requirement for law and natural right. Natural right is not addressed here, because its relationship to positive law is somewhat unclear, and as its interpretation is necessarily left to the sovereign, its relevance as a true limitation, aside from utility, is unclear. Instead, let us turn briefly to generality, and determine if the enabling model has broader applications for limitations on the sovereign beyond its application to fundamental law. Generality is simply a 'formal' constraint, in that it demands that law take a particular form, and while in this sense is properly considered a metarule, is not considered by Rousseau to be a constitutive 'fundamental law'. In any case, for the heuristic to be truly valuable, the enabling model should work not only for restrictions that Rousseau terms fundamental laws, but for constraints that do not, and it does explain the generality metarule.

In his examination of Bodin, Holmes offers a pragmatic argument for how the requirement that laws take a general object might strengthen the sovereign: 'General laws are much less time-consuming and yield greater return per unit of effort than particular proclamations or decrees' (Holmes, 1995, p. 115). Rousseau's account of the double-generality of law (law as general in its object and in its source) is also explained by reference to an enabling model, but on morally transformative, not pragmatic, grounds.

As is well known, the law must be general both in object and in source: the people as a whole enact laws that will apply equally to every person in the body politic. 'One sees that since the law combines the universality of the will and that of the object, what any man, whoever he may be, orders on his own authority is not a law. Whatever is ordered even by the sovereign concerning a particular object is not a law either, but rather a decree; nor is it an act of sovereignty, but of magistracy' (*SC*, II, vi, 66–7). That is, as Shklar notes, 'For all its sacred inviolability the

sovereign may not burden one subject more than another, nor deprive anyone of any liberties and goods except those freely ceded to the civil order in the *Social Contract*' (Shklar, 1969, p. 191). In that law is an expression of the sovereign's general will, any restraint on what that will might be, including the form that it might take, ought to be considered a constraint on the people's sovereignty.

The double-generality requirement may also be viewed as an essential component in the exercise of sovereignty. As the discussion of utility demonstrated, laws, as emanations of the general will, must not harm the people as a whole, nor single any individual out for particular burdens or burden the people as a whole in singling out any individual for particular benefits. Moreover, 'the sovereign, formed solely by the private individuals composing it, does not and cannot have any interest contrary to theirs' (*SC*, I, viii, 55), and, 'What really is an act of sovereignty then? It is not a convention between a superior and an inferior, but a convention between the body and each of its members. A convention that is legitimate because it has the *Social Contract* as a basis; equitable because it is common to all' (*SC*, II, iv, 63). Sovereignty is constituted by the notion of generality, and defined by the impossibility of harming any member of the body politic. In what way, then, can we properly consider generality of law a limitation on the sovereign, if it allows it to express that which is constitutive of it? Rather, we should consider the generality requirement another example of an 'enabling rule', and only in a trivial sense is generality a constraint. Instead, double-generality serves both to define sovereignty and to transform the general will morally through its demand that law must be both equitable and in the interest of the people as a whole.

Conclusion

Rousseau appears to recognize fundamental law as restraining the sovereign both with respect to substance (natural law, equity) and to procedure (qualified majorities). However, the absolute quality of sovereignty is of paramount importance to Rousseau. To argue that the sovereign is inalienably bound by these rules would be to claim that the sovereign is logically subordinate, but to suggest that the sovereign can abrogate them at will fails to account for the force that Rousseau wishes to give fundamental law.

A modified 'enabling model' permits us to read these limitations as both constitutive and morally transformative. The strength of this model is that it simultaneously takes these rules seriously while reaffirming the unbounded nature of sovereignty. It also allows us to explain norms that do not take the form of fundamental law, but are often viewed as restrictions on the sovereign will, such as the double-generality requirement.

While Rousseau entrenches fundamental law, he does not do so absolutely. Certainly, Rousseau wants to take several topics off the table – founding principles, rules of procedure, the generality provision – but he repeatedly insists that they are ultimately subject to modification. However, fundamental law enables the sovereign to act justly and morally, and to alter it is a risky endeavor. Despite legal protection, every element of the political community, including the social compact,

is inherently fragile (Shklar, 1969, p. 211), and of this, Rousseau was painfully aware.

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Notes

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- 1 Because Rousseau is broadly consistent throughout his practical and theoretical writings, and since the practical works explicitly direct readers to the theoretical writings for elaboration of principles (as at *Considerations on the Government of Poland* [henceforth *Poland*] pp. 195, 204–5), I will refer to both without differentiation.
- 2 That is, by Theodorus Beza, in his *Du droit des magistrats*, which Thompson believes is the first usage. See Thompson, 1986, pp. 1103–28, especially p. 1105.
- 3 See also Bodin, 1967, p. 31.
- 4 See also Thompson, 1986, pp. 1114–15.
- 5 Thompson (1986, pp. 1126–7) argues that Rousseau's subordination of fundamental law to the sovereign 'demolished' the history of fundamental law, which had been dominated by foundational and contractual metaphors. While Thompson may be correct on this point – Rousseau uses neither of these metaphors – the 'subordination' account misses the tension in Rousseau's account.
- 6 Holmes (1995), both 'The Constitution of Sovereignty in Jean Bodin' and 'Precommitment and the Paradox of Democracy'. In the latter, Holmes rejects the notion that Rousseau permitted any constraint on the sovereign via fundamental law. Thus, I take his reading of Bodin as my model, not his reading of Rousseau.
- 7 This is not to say that the persons constituting the sovereign will not have private, particular wills; it is simply to say that the people, qua sovereign, ought to be directed at the general good (of which the fundamental laws are a manifestation).
- 8 In *Constitutional Project for Corsica*, especially, Rousseau begins to designate certain policies as 'fundamental rules', including increasing the population as a means of strengthening the nation; encouraging agriculture as a means of feeding the people; and physically training soldiers, thereby ensuring external independence. I do not perceive these as limitations on the sovereign, but simply as constitutional provisions in a Montesquieuan vein. For an examination of Montesquieu's conception of constitution, see Valensise (1988, S22–57, especially S28) and Baker (1990, pp. 254–5). Briefly, Montesquieu's notion of constitution is the nature, composition, and order of a nation or people, and his fundamental laws, which derive from that nature, regulate the exercise of political power.
- 9 'In short, it is the best and most natural order for the wisest to govern the multitude, as long as it is certain that they govern for its benefit and not for their own' (*SC*, III, v, 86).
- 10 Derathé (1995, p. 344) again directs us to Burlamaqui: 'La nature de la chose ne permet pas que l'on étende le pouvoir absolu au delà des bornes de l'utilité publique'.
- 11 At *SC*, IV, ii, 110. Additionally, a brief quotation from *Des Loix* on why the compact is a law may prove helpful, as translated by Viroli (1988, p. 164): 'Going back to the origins of political right, we find that before there were leaders, by the very nature of things, laws must have existed. At least one was necessary to establish the public confederation, a second would have been needed to set up some kind of government and these two suppose the existence of various intermediary laws of which the most solemn and sacred was the one through which each citizen pledged to obey all the other'.
- 12 Additionally, John Noone argues that 'in order to obviate an infinite regress, the basic procedural rules must [also] be accepted unanimously' (Noone, 1970, p. 698). The decision rule, by default, must

- be accepted unanimously, because otherwise, in the absence of a prior decision rule to determine what number of votes is necessary for passage, no decision can be rendered.
- 13 Derathé (1995, p. 360) criticizes Duguit on a similar point.
- 14 Following Estlund *et al.* (1989, which in turn cites Baker, 1990), it is important to note the direction of the causal arrow on the influence of Rousseau on Condorcet. While Rousseau might have known of Condorcet's work via D'Alembert, this could not have been until after the appearance of both the *Social Contract* and *Political Economy*.
- 15 As Waldron importantly notes (Estlund *et al.*, 1989, p. 1323), this is questionable, given Rousseau's suspicion about the unenlightened state of the people, especially in populous nations. Thus, rather than enlarging the population (which he only considers in his constitutional writings, and then only after shifting to an endorsement of representation), I hold it constant, and I maintain that after the founding process, the people should be sufficiently enlightened to identify the general will; otherwise, as Rousseau notes, 'there is no longer any freedom regardless of the side one takes' (*SC*, IV, ii, 111).
- 16 For an explanation of the liberum veto, see Elster, 1993, p. 200.
- 17 Rousseau does not elaborate on this point, because he notes, 'since this question of voting is among those I have most carefully discussed in the *Social Contract*, it is superfluous to repeat myself here' (*Poland*, p. 205).
- 18 As in *Poland* (p. 195) 'The principle from which these rules are deduced is demonstrated in the *Social Contract*'. Also, *Poland*, pp. 190, 192, 205, 267. See also Miller, 1984, p. 129.
- 19 On civic (participatory) freedom vs. moral freedom, see Miller, 1984, pp. 177–9. For the virtue of the simplicity of law, see *SC*, IV, i, 109.
- 20 *Poland*, p. 214. Noone (1970, p. 699) offers an itemized list of what formal procedural rules (which he does not call fundamental law, but might) comprise the *Social Contract*, such as the inalienable and indivisible nature of sovereignty and the decision rules for legislation.
- 21 Although we might note that these laws are not formulated by the assembly, but only ratified.

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