One unique part of Rousseau's *Social Contract* is his argument that a just society must have a specific constitutional arrangement of powers centred around what he calls the Sovereign and the Prince. This makes his philosophy different from other contractualists, such as Hobbes and Locke, who think that the principles of good government are compatible with any number of institutional structures. Rousseau's constitutional theory is thus significant in a way that has no parallel in Hobbes or Locke. More to the point, any problems that exist in his constitutional theory will have consequences for his political thought as a whole. This article argues that there is a contradiction at the center of Rousseau's theory of institutions that threatens the cogency of the *Social Contract*.

**Keywords:** Rousseau; separation of powers; social contract; sovereignty

Rousseau's *Social Contract* is a theory of political right or, as we might put it today, a theory of justice and of obligation. But it is also a constitutional theory, which argues for a specific arrangement of political offices that together form the structure of a just society. Rousseau advocates a constitution made of two necessary and distinct bodies that in his somewhat misleading diction he calls the Sovereign and the Prince. The Sovereign is the lawmaking body, and the Prince is the magistrate that enforces the laws, which means roughly that the Sovereign is the legislative branch of government and the Prince is the executive branch, under which Rousseau includes the judiciary (SC 90/404). He argues not only that a just society must have these bodies in its constitution, but also that they must have a particular make-up and relationship to each other.

The theory of political institutions is one of the most interesting, if least appreciated, parts of Rousseau's book. Its significance lies not only in the nature of the institutions he proposes, which I will discuss shortly, but also in their peculiar derivation from the contract after which the work is named. Like Hobbes, Locke, and other contractualists before him, Rousseau thinks that a good political society must be founded on an agreement among its citizens to organize their public life according to certain normative principles. But there is a difference between Rousseau and his predecessors. For them, the theory of political right is a separate thing from constitutional theory; both Hobbes and Locke argue that the principles of a just society can be embodied in any of various concrete political forms.²

Rousseau, conversely, insists that the social pact is compatible with only one set of legal institutions. The terms of the contract require a particular arrangement and distribution of political offices, centered around the basic institutions of the Sovereign and the Prince. While it is true that Book III of the Social Contract offers a long analysis of the advantages and disadvantages of various forms of government, all of the options he discusses assume these two institutions as the foundation for whatever else might be built upon them. I can think of no other major political thinker, except Plato in the Republic, who proposes so close a connection between the theory of justice on one hand and the concrete theory of institutions on the other.

This is important for a number of reasons. It shows first that from his abstract and formalistic theory of the social pact Rousseau thinks he can deduce a theory of the proper arrangement of powers within a just society. This fact gives a unique richness and significance to his theory of institutions, making it not an addition to his theory of political right, as it is for Hobbes and Locke, but an essential part of it. The second is that if there are problems in his constitutional theory then they will have implications for the foundations of his political philosophy because one cannot be separated from the other.

I believe there is such a difficulty in his constitutional theory, and it is located in his account of the separation of powers, or the relationship between the Sovereign and the Prince. For he says that the Sovereign, in addition to its legislative function, has responsibility for reviewing the operations of the executive branch of the government to be certain that it properly enforces the law and stays within the bounds of its authority. Rousseau thinks that this responsibility is equal in importance to that of making laws, because the typical cause of the corruption of good regimes is that the executive encroaches on the authority of the legislature in order to pursue its own, factional good.³


³ For the details of Rousseau's view on usurpation, see Social Contract, Book III, chs. 10–14 and his Letters Written from the Mountain, as well as Bertrand De Jouvenel, 'Rousseau's
However, this doctrine of legislative oversight is incoherent for reasons that I believe Rousseau himself must grant. To state the case in a preliminary way, the social contract in effect creates the legislature and the executive as necessary consequences of the terms of the pact, but in doing so it robs the first of its ability to guide and correct the other, and thus of the power to guard its prerogatives, which it must do if the state is to survive. The easiest way to understand this paradox is to see how the stipulations of the social pact generate the offices of the Sovereign and the Prince.

Rousseau says that the contract bringing a fair society into existence can have only one form. Famously, it demands that each associate forfeit everything to the community under the direction of the common benefit. His way of putting it is, "These clauses, rightly understood, all come down to just one, namely the total alienation of each associate with all of his rights to the whole community" (SC 50/360). While the reasoning behind this formula is much debated, the basic idea is that it provides the conditions under which rational, self-interested agents can combine powers without putting into danger their own lives, possessions, and well being.*

On this basis the Sovereign is the easier of the institutions to understand, because the associates implicitly create it when they enter the contract to begin with. The pledge of subordination to the general will of the community, which is the essence of the social pact, implies that there be some means for determining what that will is, and the sovereign legislature is that means, for sovereignty "is nothing but the exercise of the general will" (SC 57/368). The exercise in question is the making of laws that declare the common good of the political body.

But who is the Sovereign? In the first instance it can be no one but the people themselves because the condition for entering the pact is that each associate forfeits everything. If no one brings anything into the pact, then obviously no one brings the right of determining the general will and directing the powers of the republic. Since there must be a sovereign, but sovereignty cannot belong to anyone in particular, he thinks it can only belong to everyone, which is to say that the supreme legislature is the people as a whole. Although there is controversy as to whether Rousseau's theory allows the people subsequently to delegate their sovereignty to representatives, the answer does not matter for now because the problem I will discuss concerning the relationship between the Sovereign and the Prince exists on either reading.5

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5. The most nearly complete discussion of Rousseau's views on representative
As for the executive, its emergence from the social pact is more complicated. The first point is that for the state to function some person or group must enforce the laws. "The public force therefore has to have its own agent which unites and puts it to work in accordance with the directives of the general will, which serves as a means of communication between the State and the Sovereign" (SC 82/396). Rousseau's name for this person or group is the Prince. The case here is different from that of the Sovereign because in the latter no one but the people in the assembly can in the first instance hold the office. The executive function seems to imply no such thing, and so its character appears indeterminate.

One can begin to understand the issue by noticing that, whatever else is true of the executive, its authority must come from the Sovereign. Since the Sovereign is the owner of all the forces of the community, the power of the executive can come from nowhere else, which is Rousseau's point in saying the executive power is an 'emanation' from the Sovereign (SC 58/370). Thus, the Prince comes into being when the legislature makes some person or group its deputy for the purpose of enforcing the law. The origin of executive power is, so to speak, a performative utterance; the Prince can be anyone because it is whomever the Sovereign says it is.

Rousseau's important term in this regard is 'Government'. The government is the institution that the Prince is in charge of, and Rousseau defines it thus: 'I therefore call Government or supreme administration the legitimate exercise of the executive power, and Prince or Magistrate the man or the body charged with that administration' (SC 83/396). In truth, Rousseau often slides between the words Prince, Government and Chief; yet this is not exactly an equivocation because a strict line cannot be drawn between them. 'Properly speaking, there is no simple Government. A single Chief [or Prince] has to have subordinate Magistrates; a popular Government has to have a Chief' (SC 99/413).

Book III mostly concerns the forms that the government can take, which means that it describes the different people and groups that the Sovereign can name as its minister for executing the law. His rubric of democracy, aristocracy and monarchy is an analysis of different kinds of executives; the Sovereign, on the other hand, is always the people, and the supreme legislative authority of the people is assumed throughout his discussion of the various forms of administration. The Prince derives its power from the whole government is: Richard Fralin, *Rousseau and Representation: A Study of the Development of his Concept of Political Institutions* (New York: Columbia University Press, 1978).

Rousseau vacillates between saying that the creator of the Prince is the Sovereign [SC (117/433)], and the Lawgiver [SC (89/402)]. The Lawgiver is a third office, but one that has no part in the regime once it is established. In either case, the authority of the Prince comes from the Sovereign, even if the Lawgiver gives council as to who the Prince should be [SC (70/383)].

Although Gourevitch does, Rousseau typically does not capitalize the word magistrate [magistrat] as he does Sovereign, Prince, Government, Chief, People, State, etc.
people, and can have its authority taken away as they see fit. This is why he says that ‘the trustees [dépositaires] of the executive power are not the people’s masters but its officers, [and] it can establish or remove them whenever it pleases’ (SC 118/434). This is so even in hereditary regimes. ‘Thus when it happens that the People institutes a hereditary Government, either monarchical in one family, or aristocratic in one order of Citizens, this is not an engagement it enters into; it is a provisional form it gives to the administration, until such time as it pleases to order it differently’ (SC 118-19/434-35).

But it is here that the problem arises. The issue is somewhat complicated, so to get at it I will take a route that may seem indirect at first, but which is ultimately the easiest way to make it clear. The way to see the paradox is to ask, given the Sovereign’s role as the supreme power in the state, could it assign to itself the office of the Prince? The answer is that it could not, and the reasons for this reveal the paradox in the connection between the legislature and the executive. The reasons the legislature cannot make itself the executive fall into two sets, which are on one hand prudential or conditional, and on the other logical or necessary. The first is easier to understand, but the second is more important.

There are two practical reasons the Sovereign cannot make itself Prince. The first is that the political system of the Social Contract is already so burdensome on the citizens that it would be impossible for them all to perform the executive function in addition to the legislative one. Even Rousseau’s vigorous ideas about public service run into the fact that a body of citizens that is collectively both legislator and executive would have no time for industry, domestic life, or the other functions of humanity. ‘It is unimaginable that the people remain constantly assembled to attend to public affairs, and it is readily evident that it could not establish commissions to do so without the form of the administration changing’ (SC 91/404). This means that the people must establish deputies, and in doing so they transfer the office of the executive from themselves as a whole to a minister, thereby making a new form of government. The second practical reason that the Sovereign should not also be Prince is that a government becomes less effective as the number of ministers grows. Since the Sovereign is composed of all the citizens, there could be no less efficient administrator (SC 88/402).

Yet, in addition to these practical considerations, there is another part to the question of who can execute the laws. As a matter of principle it is impossible for the Sovereign to act as the Prince because the Sovereign is incapable of performing the kinds of acts that are required of the executive. This may appear odd given that the Sovereign is the supreme authority in the state, and that the Prince is merely its deputy, for it seems that a political body ought to be able to do itself whatever it has the authority to entrust someone

8. Timothy O’Hagen explains the mathematics of Rousseau’s theory of the proper size of governments in Rousseau, Arguments of the Philosophers (London: Routledge, 1999), pp. 136-52.
else to do. But this is not so. The kinds of issues that the legislature is able to speak towards do not meet the requirements of the executive branch of the government. To put it simply, the Sovereign is unable to address itself to individual citizens because the general will 'cannot, being general, pronounce judgment on a particular man or fact' (SC 62/374). Yet the job of the government is, in the name of the law, to bring the force of the whole to bear on individuals (82/395).

Rousseau's argument for why the legislature cannot speak to particular citizens is difficult, and commentators disagree about his intentions. The case can be made clearer by considering the terms of the social pact. The forfeiture of everything to the community, which is the stipulation of the covenant, means that the law must apply to everyone in the same way because once the associates are in the pact they have no unique rights or obligations that could single them out for special burdens or privileges. 'Thus by the nature of the pact every act of sovereignty, that is to say every genuine act of the general will, either obligates or favors all Citizens equally, so that the Sovereign knows only the body of the nation and does not single out any one of those who make it up' (SC 63/374). The equality that characterizes the laws means that the pronouncements of the Sovereign must be universal, which is to say that they cannot name names. Since the general will is for the welfare of the community, the job of the legislature is to describe in what laws that welfare consists. It must say what kind of actions will be rewarded and what kind punished; and it is within its rights when it establishes rules and punishments to this effect. What it cannot do is to bring judgment upon individuals.

This limit to what the Sovereign can do forms a kind of natural check on its power. Even though the executive does not have the same discretionary power over legislature that the legislature has over it, there is a natural limit to what the legislature can do, because its right to make law extends only to perfectly general statutes. Any transgression of this authority would be visible to everyone. True, it is not as easy as it appears to define what makes a law perfectly general; as soon as one begins to think of actual cases, the distinction begins to dissolve. A graduated income tax, for example, is perfectly general in the sense that it does not name names, yet it applies unequally to individual citizens. But in any case, Rousseau provides other checks on the Sovereign, such as saying that it can only convene at regular, previously determined intervals, the result of which is, he hopes, a balanced and stable division of powers between executive and legislature (SC 111/426).


To return to the general issue, this is the necessary or logical reason that the Sovereign cannot appoint itself to the office of the Prince. The Prince's job is to be concerned with individual citizens; but this is something that the Sovereign cannot do. He says,

We have seen that the legislative power belongs to the people, and can belong only to it. It is easy to see that, on the contrary, by the principles established above, the executive power cannot belong to the generality [of the people] in its Legislative or Sovereign capacity; for this power consists solely in particular acts which are not within the province of the law, nor, consequently, within that of the Sovereign, since all of the Sovereign's acts can only be laws (SC 82/395-96).

But, here the paradox becomes obvious. The coercive power of the executive is legitimate only as long as it correctly applies the law to cases, and the Sovereign's duty is to replace the Prince when it abuses its power. But since the Prince can only deal with particulars, while the Sovereign is by its nature blind to all individuals, it is impossible for the Sovereign to evaluate whether the Prince is performing adequately. In its role as check on the executive power, the Sovereign must look to see if the Prince has correctly applied the law to particulars, but since it cannot judge particulars, it cannot possibly know.

The importance of the issue cannot be overstated because Rousseau's theory of political decline is that republics typically fall when the executive usurps the legislative office. He, as Cranston says, 'points out that while it is desirable for the business of administration to be entrusted to magistrates or chiefs, those magistrates will naturally tend with the passage of time to encroach on the sacred territory of legislation, and thus to invade the sovereignty of the people, and finally to destroy the republican nature of the state'.

The Sovereign must guard its prerogatives, because the consequence of failing is the encroachment upon its powers by ministers, who can substitute their will for the general will and thus institute some form of what Rousseau calls anarchy (SC 108/423). This is his point in saying, 'it is by this simple means that all governments of the world, once they are invested with the public force, sooner or later usurp the Sovereign authority' (SC 119/435). If the Sovereign is unable to evaluate the acts of the Prince, then it cannot correct or guide the Prince, and the system of checks and balances that Rousseau advocates is futile.

Rousseau himself senses the problem and attempts to answer it in the chapters called 'Of the Institution of Government' and 'Means of Preventing the Usurpation by the Governments'. These are some of the most fascinating sections of the book, for his theory of the separation of powers raises many problems in addition to the one I have been discussing, and in these two

12. See also, 'Means of Maintaining the Constitution', in his Consideration on the Government of Poland and on Its Projected Reformation (SC 197-211/975-89).
chapters he tries to answer them. While he succeeds in showing that many of the apparent difficulties in the theory disappear on a careful examination of the Sovereign and the Prince, he ultimately fails to explain away the basic paradox of how a legislature that is blind to particulars can pass judgment on an executive that knows only individuals.

The first problem he considers is how a Sovereign that cannot speak to individuals can appoint its magistrates to begin with. In other words, how can the legislature name certain people as trustees of the executive power when it is incapable of referring to individual members of the state? In this case at least Rousseau has a ready answer. He says that there are two steps in the establishment or replacement of a government; in the first, the Sovereign stipulates what the form of government will be, in the second the people choose their magistrates. The former is a law because the Sovereign, refraining from mentioning individuals, says only that the government shall have a certain form. The latter, as it concerns individuals, is not an act of the Sovereign; instead the people choose who shall be their Prince.

This is only half an answer, however, because it fails to explain who the people are when they make this choice, given that they are not the Sovereign. Rousseau argues that they are the executive itself, choosing another executive as a replacement. This raises the obvious problem of how a government that does not exist can replace itself, to which he answers:

Here again is revealed one of those astonishing properties of the body politic by which it reconciles apparently contradictory operations. For this reconciliation is accomplished by a sudden conversion of Sovereignty into Democracy; so that without any perceptible change, and simply by a new relation of all to all, the Citizens having become Magistrates pass from general to particular acts, and from the law to its execution (SC I 17-18/433-34).

This passage explains how the Sovereign can establish the Prince without referring to individuals. It makes a temporary executive of the whole people, a sort of committee of the whole, thereby naming no one in particular. This ingenious arrangement implies, by the way, that democracy is the most basic form of Government because it is first, and the one through which others must pass before they can be instituted. He continues:

It is the distinctive advantage of Democratic Government that it can be established in fact by a simple act of the general will. After which this provisional Government either remains in office if such is the form that is adopted, or it establishes in the name of the Sovereign the Government prescribed by law, and everything is thus in order. It is not possible to establish Government in any other legitimate manner (SC I18/434).

This clever explanation of the relationship between the legislature and the executive shows how the former can replace the latter when it wants to. But how can it know when it should? This problem remains. Despite its many virtues the theory fails to explain how the legislature can know if the executive is doing its job well.
In response to this worry, Rousseau says that when an executive wishes to usurp the Sovereign's authority, it typically does it by forbidding the people from meeting in assembly; thus, the Sovereign can protect itself by assigning to the people a regular schedule of convocations. The periodic assemblies of which I have spoken are suited to forestall or to postpone this misfortune, above all if they do not require formal convocation: for then the Prince could not prevent them without openly declaring itself a violator of the laws and an enemy of the State' (SC 119/435). This again shows how the Sovereign can accomplish concrete things, such as convening itself, without saying anything about anyone in particular. Nonetheless, this is a weak means by which the Sovereign can protect itself because it prevents only one of the innumerable ways in which the Prince can abuse its powers, ways that the Sovereign is by its nature ignorant of and which it cannot investigate, let alone correct, remedy or eliminate.

At this point one may wonder whether this interpretation of the separation of powers is overly literal. After all, even if the Sovereign cannot pass judgment on individuals, the people who make it up certainly can. So, why not simply say the citizenry, taken as individuals, has enough sense to know if the executive is abusing its power? Then, when the people assemble again as the Sovereign, they can use this background knowledge as a foundation for creating a new Prince through the procedure outlined above. This would avoid the problem concerning how the Sovereign can judge cases. Even if it cannot, its members taken separately can, and perhaps that is enough. Indeed, Rousseau seems to say as much, not in the Social Contract, but in the eighth of the Letters Written from the Mountain. Referring to Geneva he says:

In a State such as yours, where sovereignty is in the hands of the People, the Legislature exists always, even if it does not show itself always. It is assembled and speaks only in the general Council; but outside of the general Council it is not annihilated; its members are scattered, but they are not dead; they cannot speak by means of the Laws, but they can always keep watch over the administration of the Laws; this is a right, this is even a duty attached to their persons, and which cannot be taken away from them at any time.13

Whatever Rousseau's intentions in the Letters, this is impossible as an interpretation of the Social Contract for a number of reasons. The Letters offer quite a different theory of the state than the one found in the earlier work, which proposes more exacting standards for what counts as a binding social pact and a lawful arrangement of powers. In particular, the Letters allow for a division of Sovereignty which is impossible on the principles of the Social Contract, and which makes the two systems not only different but contradictory.14

Thus there can be no simple transfer of doctrines from one book to the other.

But there is a more definitive point. In the *Social Contract* the deliberations of the Sovereign have an epistemic function; they are intended to reveal the general will, which is something over and above the judgment of any individual in the state, even of the wisest people in the state. So, on Rousseau’s own terms, there is no particular reason to trust the individual person’s judgment that the Executive is or is not abusing its power, any more than there is reason to trust that person’s judgment about other questions regarding the general will. Only the people in assembly as the Sovereign would be in a position to pass judgment on the actions of the executive and, for the reasons I have discussed, it cannot do so.

This is a grave problem in the framework of Rousseau’s political philosophy. He believed the fall of just governments usually comes when the magistrates entrusted to enforce the general will use their power for their own personal or factional advantage, and that the steps he himself suggests to delay this usurpation may ultimately be ineffective, so that even the equitable and free society that he envisions could fall victim to the abuses of its executive. These are points that I suspect no reader of the *Social Contract* or even the *Considerations on the Government of Poland* could miss. The argument of this paper, if it is correct, shows something deeper—there is a contradiction at the center of his theory of the division of powers. Rousseau contends that a just society must have a particular constitutional structure of Sovereign and Prince, with a particular separation of powers, and a set of checks and balances. But the nature of this structure itself robs the legislature of its basic check on the power of the executive.

The upshot is that the institutional arrangement he advocates is incoherent; and because he thinks that these institutions follow necessarily from the terms of the social pact, which is itself necessary, the game seems to be up, leaving no prospect for a political order formed on the model he indicates. Because I believe he is correct that the terms of the social pact are necessary given the state of nature that he describes, there seem to be only two ways toward a solution: either to develop an alternative idea of the state of nature, which will produce a different theory of the social pact and so different political institutions, or to show that he is mistaken about the institutions that follow from the social pact that he describes. The first of these I regard to be impossible within the scope of his philosophy.

The second seems more promising, because it might be possible to show that contrary to what he believes a different set of institutions is compatible

with the social pact. Indeed, the difficulty mentioned above of understanding why he says that Sovereignty cannot be represented and the Sovereign cannot speak to individuals might be the sign that his theory of institutions is weak and could be reworked. Yet, there is a problem here too. Whatever the political system is like, it must presumably have a sovereign legislature, and this legislature either can or cannot address itself to individuals. If it cannot, then the difficulty of checking the executive’s power remains. If it can, then nothing prevents it from naming itself as the executive, at which point the separation of powers would collapse, and all checks and balances would be nullified.

It would therefore seem that there could be no better constitution than one in which the executive power is combined with the legislative: But this is precisely what makes this Government inadequate in certain respects, for things which ought to be kept distinct are not kept distinct, and the Prince and the Sovereign being nothing but the same person, form, so to speak, nothing but a Government without a Government (SC 90/404).

I will note as a kind of speculative postscript that this problem may have historical as well as philosophical significance. In a recent essay, Jean Starobinski suggests that one reason the French Revolution transformed into the Terror and Bonapartism is that the revolutionaries could not understand the separation of powers in the *Social Contract*. This may seem far-fetched, but he makes a number of interesting observations. In particular, he says that the constitutions from 1791 to 1795 collapsed because they ‘failed to provide for a clear and balanced relationship between the legislative and executive powers, a problem to which Rousseau himself, too eager to emphasize the primacy of the general will, did not pay sufficient attention’. I cannot agree that Rousseau failed to pay attention to the problem, given that the relation between the powers occupies most of the third and longest book of the *Social Contract*. But the deeper point remains. If the cause of the revolutionaries’ confusion was that they could not understand the relationship between the Sovereign and the Prince, we can now see why. The reason is not that Rousseau failed to pay attention to it, but rather that in spite of the considerable attention he did pay, the theory is incoherent. If the writers of the constitutions could not make sense of his theory, it is because the theory does not make sense.

Starobinski says that Rousseau’s constitution ‘granted unlimited sovereignty, and an absolute right to oversee the actions of the government, to the

general will, that is, to the community of citizens. The Convention had claimed the central role for itself and, unable to make a clear allotment of power, could not avoid failure. For Napoleon, the time had come to restore the power of the executive.¹⁷ This encroachment by the Prince on the Sovereign is what Rousseau predicts, and what he fears most. The problem is that the system of checks and balances he recommends to guard against it in fact guarantees that it will happen.
