Pettit's Dilemma: Legitimacy and the Problem of Contestation in Rousseau's "The Social Contract"

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Abstract. This is a critical analysis of Philip Pettit's interpretation and reception of Jean Jacques Rousseau's "The Social Contract" for Pettit's neorepublican project. The author addresses the essay "Rousseau's Dilemma" in which, Pettit argues that the principles of Rousseau's theories of sovereignty and legitimacy would not allow for contestation to occur in Rousseau's republic. While Pettit believes that Rousseau's theory of legitimacy upholds the republican conception of freedom as nondomination, by preventing private domination in individuals' relations with each other, he stipulates that Rousseau's theory of absolute sovereignty does not protect against public domination. Specifically, it prevents citizens from stepping outside of their roles in the legislative assembly and contesting those laws that they have enacted in a majoritarian voting process. He determines that because the sovereign is absolute, contestation is impermissible. The author argues that Pettit conflates the logic of absolutist government with the directives of the general will. She finds that by conceiving of the general will as an active principle and as the sole source of reason for the conduct of the body politic that it grounds both political obligation and the ability for citizens to contest sovereign law in the event of a contradiction of sovereignty.

Introduction

Born in Geneva in 1712, Jean-Jacques Rousseau led a life of passionate intellectual inquiry. By conversing with himself about the problems that grieved him most regarding civil society he became a key figure in the history of cultural critique. The late Judith N. Shklar speaks for most who have taken an interest in this thinker when, in her delivery of the 1989 Charles Homer Haskins Lecture, she describes her affinity for Rousseau: "since my undergraduate days I had been absolutely mesmerized by Rousseau…when I read him, I knew I was in the presence of an unequaled intelligence, so penetrating…to read Rousseau is to acquire a political imagination and a second education…his writings are so perfect and lucid, and yet so totally alien to a liberal mentality."[1]

The work that is the subject of this paper, *The Social Contract*, is far from perfect, on the contrary John B. Noone characterizes it as one of the most 'unsystematic, disarranged, confusing classics of political philosophy.' Noone elucidates the hidden complexities of Rousseau's argument for sovereignty by reconstructing it and presenting eighteen unique elements that make the social contract legitimate. Many scholars like Noone approach exposition of this text with

[1] Judith N. Shklar, A Life of Learning: Charles Homer Haskins Lecture
Issue 9 of ACLS occasional paper, (American Council of Learned Societies, 1989), 17.

sensitivity and attention to its organic nature.[2] In recent years no one has done this better than Joshua Cohen. His account of the general will, especially the way he explains how implications for interests of individual independence relate to the common good condition, gives rise to a unique and comprehensive reading that elaborates more fully on the theoretical and practical consequences of Rousseau's complex yet compressed contract.[3]

One might suggest that it is difficult to get Rousseau right, and that it can be especially difficult to get him right while thinking about his ideas within a specific theoretical tradition. Obvious misinterpretations surface when the unorganized manner that Rousseau wrote is taken as 'evidence of a simple lack of system'.[4] Interpreters treat concepts atomistically and in isolation from a more comprehensive system that other scholars have worked to provide significant analyses for. An example of this treatment can be found in the way that Rousseau's work is understood in Neorepublicanism. Philip Pettit, one notable scholar, draws distinctions between the Italian-Atlantic tradition that neorepublican ideas are primarily derived from and the 'stylized' Franco-German tradition.[5] He rightfully or wrongfully places Rousseau in this latter tradition. This distinction primarily has to do with meeting the requirements of those 'institutional ideals' of republicanism, i.e., the mixed constitution and contestatory citizenry. Pettit argues that while Rousseau meets the 'ideological ideal' of promoting freedom as nondomination, his promotion of an absolute, inalienable, and indivisible sovereign prevents citizens from taking on a contestatory role in their government.[6]

Pettit does not understand what is unique and 'alien' about Rousseau's theory of sovereignty – he is unaware of certain aspects that might allow for a different conclusion to be drawn about the role of a contestatory citizenry. Section I. of this paper summarizes Pettit's theory of legitimacy that is based on his central neorepublican ideal of freedom as nondomination and the institutional ideals of a mixed constitution, esp. contestation. Section II. gives the broad contours of Rousseau's theory of legitimacy and how it aligns with the ideal of freedom as nondomination. Here, I elaborate more on Pettit's critique of Rousseau's *The Social Contract* in his essay "Rousseau's Dilemma." Section III. addresses two points of departure of Pettit's critique: unanimous consent and absolute popular sovereignty. In addition, I consider a few points that reveal some logical insights regarding Pettit's interpretation, specifically, the purpose and extent of the alienation of natural freedom that is required for the original contract and the possibility of an express right to contestation. Section IV. I argue that Pettit confuses the logical implications of absolutist government and the directives of the general will. Then, I speculate about the function of the general will in the event of a contradiction of sovereignty and that the general will as the grounds for political obligation in a legitimate state also permits contestation by members of the legislative assembly in their dual roles as subjects and citizens.

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[2] John B. Noone Jr., *Rousseau's Social Contract: A Conceptual Analysis*, (Athens: University of Georgia Press, 1980), 1-8.
[3] Joshua Cohen, *Rousseau: A Free Community of Equals,* (Oxford, Oxford University Press, 2010), 44.
[4] Noone, *Rousseau's Social Contract: A Conceptual Analysis,* 3.
[5] Philip Pettit, "Two Republican Traditions" in *Republican Democracy: Liberty, Law and Politics;* ed. Andreas Niederbeger and Philip Schink, (Edinburgh: Edinburgh University Press, 2013), 169.
[6] Pettit, "Two Republican Traditions," 197; Pettit, and "Rousseau's Dilemma" in *Engaging with Rousseau: Reception and Interpretation from the Eighteenth Century to the Present*; ed. Avi Lifschitz, (Cambridge University Press, 2016), 184-88.

I

The central ideal of neorepublicanism is the concept of freedom as nondomination.[7] Philip Pettit says that the primary concern of the state should be to protect individuals from being subject to the arbitrary will of another. Domination, or the power to interfere arbitrarily in another's choices, is checked by the constitutional constraints associated with the mixed constitution – these include the elements of equality under the rule of law, representation, and separation of powers.[8] Another measure to prevent the state from itself becoming a dominating force is an active citizenry that must contest those laws that they do not see as tracking the relevant interests of individuals and the community; relevant interests meaning those interests that align with the ultimate aim of securing and maintaining republican freedom.[9]

The ideal of freedom as nondomination has specific implications for conceptions of justice and political legitimacy. The theory distinguishes between interference and domination. This permits that nondominating interference of authority or law that is created through a fair process and that applies equally to all is not abrogative of freedom – that it actually enhances our free experience within the civil state.[10] The effects of this law become the content factor that Pettit uses to determine the justice of a political order. In plain terms, the justice of an order is understood by considering the acceptability of the order itself and how it regulates citizen's horizontal relations with one another, or in other words, how well the order protects individuals from private domination. However, Pettit says that the legitimacy of an order is determined by considering the acceptability of the coercive imposition of that order and how it regulates the vertical relations between citizens and the state – to what degree the order protects against public domination.[11]

Pettit makes clear that these ideals are distinct – "it is at least logically possible for a just social order to be imposed in an illegitimate manner and for an unjust order to be imposed in a legitimate manner."[12] This distinction also provides that there are separate implications for political obligation involved in these two situations. If an order is imposed legitimately but there is a law that is unjust on subjective grounds, there is still a content-independent justification for accepting the regime.[13] To render the imposition of said law politically illegitimate would necessitate that individuals do not have access to the necessary channels to contest laws within the standard norms of that order. He notes that at the bare minimum citizens can engage in civil disobedience to draw attention to the law in question.[14] This point about contestation is essential for Pettit's account of political legitimacy because theoretically if the standards for legitimacy have been met than the implication for obligation must be attuned to this fact or else citizens who are moved to act, risk creating political turmoil and violence that is not considerate and proportionate to the general acceptability of the regime that is imposing said unjust law.[15]

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[7] Pettit, *Republicanism: a theory of freedom and government,* (Oxford: Clarendon Press, 2002), 31-35.
[8] Ibid, 20.
[9] Ibid, 63.
[10] Ibid, Rep.
[11] Pettit. "Legitimacy and Justice in Republican Perspective." *Current Legal Problems* 65 (2012), 60.
[12] Ibid.
[13] Ibid, 63.
[14] Ibid, 80, 63.
[15] Ibid, 64-5.

II

Jean Jacques Rousseau was also concerned with the problem of legitimacy. In on the *Social Contract,* he provides a solution by substituting legitimate interference for domination by presenting a form of association where no individual is personally dependent and subject to the arbitrary will of another. In other words, Rousseau adopts the classical republican ideal of freedom as nondomination. This is clear from SC I.4 in which freedom is contrasted with servitude. Returning to the basis of natural liberty Rousseau says that "since no man has a natural authority over his fellow man, and since force does not give rise to any right, conventions therefore remain the basis of all legitimate authority among men."[16] Preserving individual freedom is a priority for legitimate authority. As he says, "To renounce one's freedom is to renounce one's quality as man, the rights of humanity, and even its duties. There can be no possible compensation for someone who renounces everything. Such a renunciation is incompatible with the nature of man."[17] So, the question becomes what kind of association can achieve the goal of establishing a common authority yet at the same time allows each individual to follow their own will?[18]

Neorepublicans and Rousseau agree in principle that the solution requires an understanding of law as nonarbitrary interference. Public authority exercises coercive interference, but it is not arbitrary as the law is required to track the interests and ideas of the people.[19] This relationship between liberty and law is grounded on an understanding of how equality is fundamental for political legitimacy. In Joshua Cohen's view, final authority in Rousseau's contract relies on a shared understanding of what the common good requires.[20] And the common idea about this authority between the republican traditions is 'that the state should be founded in concern for the equal liberty of its citizens.'[21] Only when natural freedom is replaced by a 'civil freedom', and a new condition is established in which by being subjected to laws that have their 'essence' and 'object' as the equal liberty of citizens, can the state provide a society in which individuals are protected from domination.[22]

In his essay on republicanism and legitimacy, Pettit summarizes how Rousseau's grounds for legitimacy and political obligation are of a traditional contractarian nature. He says that Rousseau's argument 'was that state coercion is capable of being legitimate if and only if the citizens unanimously vote to submit themselves to the rule of the majority that focuses only on general laws, not particular issues; and with the common good in mind…then the will supported by the unanimously endorsed assembly must count as a general will in which all have an equal share…even if an individual voted no on a law that passed by majority vote, the law is still a part of themselves that is attuned to the general will – so that government cannot be said to deprive them of their freedom'.[23] Pettit argues that this argument is 'over-demanding and infeasible' that 'no states are unanimously endorsed, rule on the basis of a committee of the whole or satisfy the conditions that transform the majority will into a general will.'

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[16] Jean-Jacques Rousseau, Donald A. Cress, and Peter Gay, The Basic Political Writings, on the Social Contract, (Indianapolis, Hackett Publishing Company, Inc., 1987), 144.
[17] Ibid.
[18] Ibid, 148.
[19] Pettit, *Republicanism*, 65.
[20] Cohen, *Rousseau: A Free Community of Equals*, 33.
[21] Pettit, "Two Republican Traditions," 3.
[22] Rousseau, 173.
[23] Pettit, "Legitimacy and Justice in Republican Perspective," 67.

Furthermore, Pettit acknowledges that Rousseau is concerned with legitimizing the exercise of coercive power by a popular sovereign.[24] However, in "Rousseau's Dilemma," he concludes that Rousseau's solution does not call for a contestatory citizenry and neither do his adopted principles of absolute sovereignty allow for one in theory. Pettit argues that Rousseau's theory of sovereignty includes a citizenry that is composed of individuals that can only act in their roles as lawmakers in the legislative assembly.[25] In other words, there is no citizenry that exists as a check on the absolute power of the sovereign. This amounts to a skeptical view of the conception of legitimacy that Rousseau is working with. While freedom as nondomination is the common goal, and the social contract might provide a general framework for creating law that is equal in its essence and object, it does not account for possibly the greatest threat to freedom – public domination.

III

Pettit finds Rousseau's answer to the question of political legitimacy problematic precisely because of Rousseau's theory of sovereignty. As an association that arises from a unanimous and consensual agreement, a principle of majority rule is established and on the grounds that the sovereign is absolute this majority rule is incontestable.[26] It is important to note early on that Rousseau's *Social Contract* does not address how citizens ought to behave in the event that they feel as though the sovereign no longer legislates according to the general will, or in other words, when a regime becomes oppressive. So, where might Pettit be getting Rousseau wrong? It is important to begin by considering how we ought to interpret this omission in light of Rousseau's attempt to ground legitimate authority. Pettit thinks Rousseau 'prudently ignored the issue."[27] It could be true that he ignored the contestation problem for the sake of establishing a cohesive and ideal theory for political community. As a matter of practicality this might be a shortcoming of the text in general. Another relevant point is Rousseau's concern for social stability. Generally, he viewed factionalism and contestation as signs of the deterioration of an upright sovereign guided by the general will. This highlights the kind of conception of legitimacy that Rousseau is attempting to articulate as this conception is highly relevant for making determinations about the political obligation that the sovereign requires from citizens. A normative conception of legitimacy attempts to justify the state's exercise of coercive power and to create an obligation to obey. Under a normative concept of legitimacy, certain criteria or a benchmark of acceptability must be met. For Rousseau, this criterion amounts to the conditions of the social contract. The conditions of the social contract are a difficult and ambiguous set of principles and claims to understand clearly, without always arriving at some kind of contradiction. But to begin, it is intelligent to consider the basic contractarian elements that Pettit criticizes, unanimous consent and majority rule, before, in section four, I examine Rousseau's special brand of absolutism and its logical conclusions that Pettit is most concerned with.

Liam Farrell points out how explicitly Pettit "emphasizes in a Lockean fashion the importance of 'contestation' over that of 'consent' as the basis for political legitimacy and, further, its significance in order to secure the ideal of liberty as non-domination.[28] This is most evident in Pettit's critique of Rousseau. The feasibility of actual unanimous consent at the origins

[24] Ibid, 60.
[25] Pettit, "Rousseau's Dilemma," 32.
[26] Ibid.
[27] Pettit, "Two Republican Traditions," 197.
[28] Liam Farrell. "The Politics of Non-Domination: Populism, Contestation and Neo-Republican Democracy." Philosophy and Political Criticism 46, no. 7 (2020), 859.

of political society is clearly suspect.[29] However, Pettit takes the social contract at face value and puts aside questions of feasibility in order to get a clear sense of Rousseau's ideas. We might understand obligation within society arising from placing one's person under the supreme direction of the general will. This requires a unanimous voluntary agreement to surrender natural right in order to establish the public person, a sovereign that makes creates civil liberty and law on the basis of majority rule.

Pettit allows that Rousseau's main point about the social contract – that it is an 'act by which a people is a people' where 'each, by giving himself to all, gives himself to no one' – somewhat aligns with the republican goal of preserving freedom as nondomination, yet he is skeptical about the social contract's ability to protect against public domination.[30] He is wary of this idea of submitting to the general will of the public person.[31] This understanding confuses Rousseau's grounds for political legitimacy and his grounds for political obligation. Pettit's basic criticism here is about the ability of consent to justify legitimacy. I do not disagree that this is the idea of the contract; however, I am skeptical that the content and activity of this original agreement seamlessly carry over to political community in the way Pettit thinks so.

In her lectures *On Political Obligation*, Judith Shklar elucidates the meaning of consent for obligation in Rousseau's contract. She understands that the citizens are obliged to the general will by which they have been 'transformed and reeducated to feel and know that their condition as free and equal citizens depends on it. Their obligation is [to] the general will within and to repress the particular will…real obligation [is] possible only as part of a transformative contract, sustained by constant civic education."[32] In a similar vein, she says that Rousseau was moved by David Hume's own criticism: that any account of obedience or disobedience based on 'promising' is incorrect and that real obligation arises from the internalization of custom.[33] This custom for Rousseau is sovereignty, the exercise of the general will. This understanding supports the line of thought that in the social contract the voluntary act of consent is prior to moral community, political obligation, and duty, therefore this act is not binding on the community. The contract itself is merely a definition for political obligation.[34] The sovereign can be dissolved at any time. Consent might only be the grounds for the initial association and basis for majority rule in order to justify an overarching concept of legitimacy – however, Pettit still argues Rousseau's idea of political obligation is still greatly tied to this latter point.[35]

The simple of act of express consent itself might not warrant political obligation, but what about the form of association that individuals are consenting to? Does majority rule, the principle that makes this association worthwhile for the goal of creating nondominating authority establish absolute obligation to the sovereign? In other words, what should an individual's relationship be with this democratic ideal? Similar to how a virtually empty act of consent does not justify total obligation, the required alienation of freedom by each individual for the creation of a popular sovereign is not total impersonal alienation that would give the sovereign absolute

[29] Tacit consent is most often associated with Rousseau's theory; however, here I am most concerned with the moment of unanimous consensual agreement of the social contract.
[30] Pettit, "Rousseau's Dilemma," 181.
[31] Pettit, "Two Republican Traditions," 187.
[32] Judith N. Schklar, Samantha Ashenden, and Andreas Hess. *On Political Obligation*. (New Haven: Yale University Press, 2019), 118-9.
[33] Ibid 113-116. See David Hume. "10. Of the Original Contract" In *David Hume on Morals, Politics, and Society* edited by Angela Coventry and Andrew Valls. (New Haven: Yale University Press, 2018). 208-223.
[34] Noone, "The Social Contract: A Conceptual Analysis," 8-13, 26.
[35] SC I.7.2; I.5.3.

power in its majoritarian decision making. The alienation required for the contract is not total alienation of the will, but a total individual alienation on behalf of the group as whole. From this we understand individuals as still possessing a moral quality to their action, this is necessary for obligation and the legitimacy of the contract.[36] Pettit points out this 'central anti-Hobbesian conclusion,' that a people cannot simply promise to obey or else it is no longer a people.[37] Rousseau recognizes this requirement, or necessary caveat, for political obligation that Hobbes did not; however, Pettit correctly emphasizes the idea that the people as a whole have this privilege as a contracting party, not individual citizens.

For the character of unanimous consent to carry over from the original contract to the nature of sovereign law, individuals are 'forced to be free.'[38] And this point might appear contradictory in light of the goal to preserve freedom as nondomination. But as John B. Noone points out, the equal coercive imposition of authority preserves freedom.[39] Notably, in his hypothetical Pettit says let fallibility of the general will not be an issue in determining if contestation would be permissible.[40] For the sake of this experiment let us pretend that the general will is in the majority decision in regard to any type of law. Now, what does this mean for obligation? Yes, it is true that the majority rightly binds the minority in this case, as described above. But is this not just another way that the state exercises its coercive power in the way that most states do?

However, this is not precisely the problem. This is not the relevant point of concern and Pettit acknowledges this.[41] His hypothetical embedded in the *Social Contract* is approximately a situation in which a legitimate order imposes a law that is unjust in the eyes of some individual, and under these conditions there might still be a 'content-independent justification' for political obligation.[42] On the other hand, it appears that the legitimacy of the imposition of the order is still under scrutiny in regard to this concept of the general will. Pettit sees majority tyranny arising from the popular sovereign that Rousseau establishes. The problem of majority rule is not just a problem in Rousseau, but for most theories of government – as democratic government can become arbitrary by losing sight of its primary goal of preserving equality and liberty through the fair and equal participation and distribution of law by instead substituting a populist approach to governing. But where neorepublicans have adopted methods of mixed government to curb tyranny, Rousseau found an answer in the general will originating in the finer points of the social compact.[43] But as far as Pettit is concerned Rousseau barely provides an answer.

Noone quotes Rousseau, "anyone who refuses to obey the general will shall be forced to do so by the whole body," and Noone himself says that "commentators see something sinister in this conjunction of force and freedom" but it is right to say that "political freedom is maintained by de facto obedience to law" to disobey a law would be an "individual seeking to establish an unequal relationship" between himself and the body. By shirking sovereign authority, this

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[36] Noone, 14, 33-4 & SC I.8.1.
[37] Pettit, "Two Republican Traditions," 186. See SC II.1.3; I.7.3.
[38] SC I. 7.7.
[39] Noone, "The Social Contract: A Conceptual Analysis," 34-6.
[40] Pettit, "Rousseau's Dilemma," 28.
[41] Ibid, 24. Pettit accepts that Rousseau's theory of legitimacy as it requires coercion to establish civil liberty is legitimate as long as the assembly is established by common consent and turns out to operate in a "distinctively benign manner."
[42] Pettit, "Legitimacy and Justice in Republican Perspective," 63.
[43] For a discussion of the problem of majority tyranny see Annelien de Dijn, "Rousseau and Republicanism," Political Theory 46, no. 1 (2018).

individual steps outside of the realm of morality and political obligation and therefore does not have any freedom or rights because of this choice.[44] This is unacceptable for Pettit as his conception of legitimacy requires not only a justification for what we might call positive political obligation or obedience, but also a vertical relationship with mechanisms, such as contestation, to protect against public domination.

It seems that Rousseau's definition of sovereignty, as the exercise of the general will, is understood by Pettit as grounds for political obligation that only justifies obedience in cases where the general will is upheld in the decisions of the legislative assembly. "Insofar as a society is set up by a social contract, it counts for Rousseau as legitimate; and insofar as it operates on the basis of the general will it counts, we might say, as just."[45] But this presents a common dilemma in interpretation. Many critics of Rousseau deny that a true differentiation can be made – that there is no general will beyond the will of the majority. In reflection on Rousseau's answer to the question of if citizens are still free even if they are required to submit to laws that they did not consent to, Pettit accepts the traditional positive answer that if the assembly is not factionalized and still acts for the general will then the civil freedom that was established by the original consensual and voluntary contract still stands; therefore, citizens are still required to submit, they are "forced to be free".[46] However, in his question about contestation, he detracts from this position and rather than considering if the sovereign is legitimate under Rousseau's definition, he places more weight on the subjective position of an individual in relation to their government. "If individuals *judge* that it is factionalized and *believe* that its decisions no longer follow the general will would the sovereign allow contestation by these citizens?"[47] Pettit's interpretation, and I think Annelien de Dijn shares my sentiment, is very neglectful of any innovative conception of the general will. While individuals might "legitimately feel that they are ruled according to the will of another and hence unfree" – this subjective side of freedom that Pettit appeals to might not be adequate to declare that the sovereign is illegitimate and no longer tracks the general will.[48] It is possibly not adequate because as Rousseau says there is much difficulty in distinguishing the general will from a particular will, but it must be done. When a person disagrees with the sovereign's decision their feeling must not be based in how the law might interfere with their particular interests in a benign manner, but their reasoning must be directed toward the common good.

But this still does not quite get to the heart of the matter concerning contestation. I emphasize that this problem of the general will is much more than a matter of differentiation in the way described above. I have described Rousseau's theory of 'positive' political obligation and its characteristics in regard to the general will; however, Pettit's problem concerning contestation still stands and I believe this is due to his decision to 'not let fallibility of the general will be an issue' and his framing of the question in the language of a 'right' to contest. I see that he does this to avoid ambiguity, but to consider the fallibility of the general will is indispensable for understanding obligation in *The Social Contract*. The idea that the general will cannot *err* is not the same as to say that the law that sovereign enacts cannot err. Rousseau was aware of this problem.[49] I might propose that the general will in itself, as something that cannot be wrong, this

[44] Noone, "The Social Contract: A Conceptual Analysis," 34-35.
[45] Pettit, "Rousseau's Dilemma," 31.
[46] Ibid, 24.
[47] Ibid, 30-1.
[48] Dijn, "Rousseau and Republicanism," 64-5.
[49] SC II. 3.1.

idea grounds the legitimacy of the state, but in order to understand obligation we must consider this other point about the fallibility of the people as sovereign. I am not proposing what had already been mentioned that obligation is only demanded when the general will is embodied in sovereign law. Possibly, the very fact that we cannot always determine this, I think, makes the general will a much more pliable concept than Pettit imagines it to be for a theory of obligation. I will elaborate on this point of interpretation in section IV. But first, I will address some specifics of Pettit's argument concerning absolute popular sovereignty.

In light of this confusion over the general will, Pettit's interpretation of Rousseau's theory of sovereignty is a little too purist and bent on the idea of a tyrannical majority. He cites the SC II.4 "On the Limits of the Sovereign Power" to support his insistence that individuals really have no rights beyond those established by sovereign. He refers to the social contract, 'if individuals were left some rights,' he interjects with 'presumably, rights of contestation' and then back to Rousseau's words, 'there would be no common superior to adjudicate between them and the public'… 'each would be judge in his own case'… 'the state of nature would obtain.'[50] This is why the sovereign's decisions must be absolute. It is clear that Pettit's added idea in this context would amount to a seemingly clear textual defense for why citizens could not assume a contestatory role. However, it is important to point out that in this context the issue of contestation appears as a question of individual rights, which in Rousseau is already quite ambiguous.

Joshua Cohen provides one way of reconciling rights and a sovereign directed by the general will. Cohen makes a very compelling argument that considerations for individual independence can be implied if we adopt an understanding that the general will is upheld through a method of collective decision making in which citizens of the assembly enact common good legislation that benefits all individuals due to the standard commitment of treating 'associates as equals.' He makes a point that Rousseau never discusses a need to 'weigh consideration of the common good against the value of individual independence in deciding whether a regulation ought to be imposed.'[51] This is showing that individual independence is not necessarily a sufficient condition for the common good, which might appear unacceptable to some. However, Cohen points out that enacting the common good, creating sovereign law, is also not simply a matter of a majority rendering a decision on a regulation of individual freedom that meets the singular criteria of being somewhat beneficial to the community – on the contrary, "the regulation cannot be a burden that is useless to the community," and also, each person 'alienates by the social pact only that portion of his freedom which is important for the community."[52]

The force of this section for Pettit is that the sovereign at the end of the day is 'judge of the importance' of what individuals must alienate for the good of all. In "The Limits of the Sovereign Power" it seems that the sovereign's determination in individual isolated cases of legislation is absolute and at the end of the day the provision of 'individuals alienating only what is necessary' comes off as unenforceable in the looming shadow of this latter qualification, due to a basic lack of political right to contest sovereign decision about what is to be alienated. It is important to remember that the sovereign is the people and individual citizens make up this sovereign who are legislators in one regard and subjects in another, it seems only logical that considerations about the level of individual coercion that is involved with a regulation would be considered for the purpose of determining if the legislation aspires to the common good. As

[50] Pettit, "Rousseau's Dilemma," 18. See SC I.6.7 & II.4.6.
[51] Cohen, *Rousseau: A Free Community of Equals*, 45.
[52] SC II.4.3.

Rousseau says it is not necessary for the sovereign to offer a guarantee to its subjects that it will uphold this reciprocal relationship that ensures the equality of rights because it is already inherent in the activity of the people as self-legislators.[53] Here, we adopt an understanding of the common good not as mere public utility in aggregate form but one that requires consideration of each member as an equal part of the whole.

But what does any of this say about the hypothetical permissibility of a certain right like that of contestation? Directly to the question the previous discussion does not provide a satisfactory answer. Pettit's reference to the reciprocal relationship between subject and sovereign, but in which the sovereign is the de facto final judge in deciding what individuals must alienate, bolster's his claim that only the people as a whole have the right to oppose the sovereign and that individuals are only meant to comply. To put it plainly I do not think that an individual right of contestation could theoretically exist under this sovereign. Pettit is correct in assuming that contradiction of sovereignty does arise when 'individuals are left some rights,' this is akin to partial personal alienation required of individuals, these 'natural rights' are not tied to political obligation that legitimacy requires.[54] In Rousseau's vision contestation is not a simple right that individuals can possess at the leisure of a decent state, it is a radical idea that opposes the unity of the people and is a rejection of a common good approach to politics. With the positive title as citizens, individuals have rights under the sovereign, not rights that are contrary to the moral community's very existence.

However, just because contestation is denied in the form of a right it does not follow that contestation itself can be a liberty alienated at the bequest of the sovereign that would in effect deny any contestatory activity. Cohen's account introduces us to the general will in a way that allows for individual rights to be considered possible and reveals how a populist reading of Rousseau's sovereignty is disingenuous to the foundation of the social contract. We might understand obligation within society as placing one's person under the supreme direction of the general will, not necessarily under the law that is created by the sovereign. Rousseau himself repeatedly expressed that while the general will is not wrong, the people in their legislative capacity can make law that is wrong. Cohen makes this clear in stating that while the 'general will is sovereign or supreme, it is not exhaustive or complete.'[55] The obligation that is required for the social contract and sovereignty to be legitimate might not consist in submitting to the general will as embodied in sovereign law as it is 'not the sole source of reason for conduct.'[56] And even more crucially, this latter quotation from Cohen along with his idea that individuals must be considered as indivisible parts of the whole brings to light that individuals possess a moral quality to their actions that is independent from majority enacted decisions and determinations for political obligation.[57] Now, we may understand that majority rule as a facet of the general will grounds political obligation, but not in all circumstances of individual conscience. Political obligation is the ideal that those positive elements that Pettit highlights give rise to, but the general will as it acts to direct the legitimate imposition of coercive power by the sovereign also acts as a device for regulating a vertical and reciprocal relationship that Pettit himself demands for a theory of legitimacy. I am imagining a relatively straightforward situation in which citizens are most definitely obliged, but can simultaneously possess other convictions

[53] SC I.7.5.
[54] Noone, "The Social Contract: A Conceptual Analysis," 14.
[55] Cohen, *Rousseau: A Free Community of Equals*, 37.
[56] Ibid, 38.
[57] Noone, 34.

and act differently, such as contest laws that they find to be unjust, even if this might seem contradictory to sovereignty.

IV

The general will provides direction for the sovereign in creation of law and imposition of authority. The sovereign can only consider and decide on issues that are general and in the abstract. And the general will also acts as a self-mediating guide for individuals in their considerations for the common good. It was important for Rousseau to separate the particular from the general in the making of law because of his concern for creating nondominating law that promotes equality and liberty. But this method brings to light questions about contestation and the vertical relationship individuals may have with the sovereign. How can the sovereign have such a relationship if it cannot consider particular matters? In order to answer this question, we should first examine how Pettit understands an absolute sovereign directed by the general will.

As previously noted, Pettit does not see much potential in the concept of the general will – nor does he understand its role in the exercise of sovereignty, he more so picks it up and puts it in down in the manner that I have described. And then he moves on to thinking about contestation according to an orthodox interpretation of Rousseau's theory of absolute sovereignty. In "Rousseau's Dilemma," he understands Rousseau's theory of popular sovereignty in such a way that he *should* reach his conclusion in the manner in which he proceeds. Rather than looking at the structure of Rousseau's social compact to make better sense of sovereignty, Pettit forfeits this undertaking and adopts a rather anemic and predictable Hobbesian understanding of absolutism. In Rousseau's case it might be too easy to say that because the sovereign enjoys absolute power contestation is in effect ruled out. But this is more or less how Pettit goes about interpreting Rousseau.

It appears that Pettit interprets absolutism as the grounds for obligation. This reflects a similar problem - that Hobbes himself fails to distinguish between legitimate authority and the mere exercise of power.[58] Noone points out that a very important difference between Hobbes's and Rousseau's respective theories is that while Hobbes thinks legitimacy is itself conventional, that authority must simply be justified in order to count as legitimate; Rousseau understands that legitimacy is itself not conventional, but that legitimate authority must rest on some kind of convention.[59] This convention is not the absolute status of the sovereign, but the convention is a general will that arises from the social contract. In other words, political obligation does not rely on the absolute status of the sovereign, the absolute status is just the form that meets the demands of legitimacy that the contract sets forth.

Legitimate law in Hobbes' view consists in little more than consent and renunciation on behalf of people to a determinate judge that makes law on behalf of all. All law is sovereign and therefore legitimate. Under this regime the possibility of a contestatory citizenry is nil. One reason for this is that consent is not ongoing, there is no basis for understanding sovereignty as a reciprocal relationship. A citizen might offer a word of advice to the Sovereign, but there is no obligation on behalf of the Sovereign to listen or act on citizen voices as if they are of a distinctively political will that speaks authoritatively.[60]

To support his understanding, Pettit cites parts of the chapters "On the Sovereign" and "On the Limits of the Sovereign Power." This interpretation of Rousseau's sovereignty that I

[58] Christine Korsgaard, The Sources of Normativity, (Cambridge, Cambridge University Press, 1997), 29.
[59] Noone, *Rousseau's Social Contract: A Conceptual Analysis*, 11.
[60] See Chapter 30 of *Leviathan*.

attribute to Pettit colors his reading of these chapters as we shall see in this section. Pettit places much weight on signs of the incontestability principle of absolute sovereignty. He thinks that in the case of a conflict between an individual and the sovereign – the sovereign is the 'judge of what is of consequence' for the general will.[61] It is true that the sovereign is the final judge, but in light of the directives of general will this absolute power becomes ambiguous for the question of contestation.

I propose that he conflates the logic of absolutism and that of the general will. An idea of absolutism is that the sovereign must be 'above the law' and this leads to a standard consideration that the sovereign should not, but more so *cannot*, be in contradiction with itself, and therefore, it cannot 'give a command to itself.'[62] In discussing the inalienability of sovereignty Rousseau says, "it is absurd for the will to tie its hands for the future and since it does not depend upon any will's consenting to anything contrary to the good of the being that wills."[63] Pettit correctly identifies that this notion of an absolute sovereign unconstrained by other bodies or wills is not unlike the idea that a sovereign ought to not be in contradiction with itself. However, the nature by which contradiction arises is quite different from a situation in which the sovereign ends up being subjected to law rather than being in its rightful place which is above the law. The nature by which contradiction arises in Rousseau's account depends on the law or limits already set forth by the general will. It is absurd for the will to consent to anything contrary to the good of the being that wills. One might suggest that this is the same as to say that the sovereign is absolute in and for itself. But clearly 'the good of the being that wills' is a qualification, that the sovereign is bound to something other than its pure existence. What is contrary to this 'good' is in one respect any matter that is outside the 'competence' of the sovereign.[64] This is any matter that is not general and not deemed essential for the common good. Therefore, when a particular matter is brought before the sovereign this is when a contradiction occurs. It is worth quoting this section from "On the Limits of the Sovereign Power" at length:

> In effect, once it is a question of a state of affairs or a particular right concerning a point that has not been regulated by a prior, general convention, the issue becomes contentious. It is a suit in which the private individuals are one of the parties and the public the other, but in which I fail to see either what law should be followed or what judge should render the decision. In these circumstances it would be ridiculous to want to defer to an express decision of the general will, which can only be the conclusion reached by one of its parts, and which, for the other party, therefore, is merely an alien, particular will, incline on this occasion to injustice and subject to error. Thus, just as a private will cannot represent the general will, the general will, for its parts, alters its nature when it has a particular object; and as general, it is unable to render a decision on either a man or a state of affairs.[65]

Pettit sees in this quotation that in an incident where the general will comes into conflict with a particular will there is no 'super-sovereign' to decide on the issue.[66] This demonstrates the

[61] SC II.4.3.
[62] Hobbes, *Leviathan*, 26.6. Also see SC I.7.
[63] SC II.1.3. And Pettit, "Rousseau's Dilemma," 22.
[64] SC II.4.9.
[65] Ibid II.4.6.
[66] Pettit, "Rousseau's Dilemma," 18.

contradiction that I have described above. This moment of conflict could be thought of as an incident where an individual or group brings a point of contestation regarding the sovereign law to the attention of the sovereign. In conjunction with this textual evidence, Pettit emphasizes that the sovereign decides the importance of what is to be alienated for the general will. However, it is far from clear that in the event of the contradiction of wills that the sovereign does decide, and even less clear that the sovereign would decide on the matter arbitrarily.

There are two conceptual possibilities that I would like to explore. As stated previously contestation could be an example of a particular matter that cannot possibly be considered by the sovereign. This particularity hinges on the idea that contestation itself is a contradiction of sovereignty in the way Pettit describes. The content of the point of contestation is not of concern, but the very fact that the act of contestation is a questioning of sovereign authority makes it an alien object, something that is outside the scope of the sovereign's legislative competence. If we interpret this situation as Pettit does, we are only left to accept his conclusion that the majority tyrannically binds the minority to the law in question. Here we clearly see the relevance of his reference to Hobbes in saying that the 'sovereign cannot give a command to itself' or we might say the sovereign cannot rule against itself.

By placing greater importance on the 'competence' of the sovereign, we might imagine that the contradiction is resolved due to individuals' roles in the sovereign assembly and their relationship with the absolute nature of law that upholds the general will. Rather than thinking along the lines of absolutism plus contestation equals a contradiction of sovereignty, it is necessary to consider that the general will as the grounds for political obligation does *not* expressly deny contestation. We can move on to considering if the content is general and relevant for the common good. If the point of contestation has been regulated by a general convention, that it is a matter of the sovereign law itself then it is within the sovereign's domain to decide on the issue. If the point of contestation is particular as described in the quotation above this contradiction disturbs the relationships between citizen and sovereign and an express decision of the general will is not possible, but what does this mean? In this case how will the sovereign respond?

To speculate, the legislative assembly must not always 'force' those who engage in contestation to be free. If we remember that the general will is always upright but that the legislative assembly can be incorrect in its decisions, this insight gives a reason for why the sovereign can and ought to sometimes rule against itself, because it is not capable of providing an express decision of the general will. At the beginning of the First Discourse Rousseau says something relevant for this interpretation. In speaking of the expected reception of his essay by an 'enlightened' assembly he says, "Fair minded sovereigns have never hesitated to pass judgments against themselves in disputes whose outcomes are uncertain; and the position most advantageous for a just cause is to have to defend oneself against an upright and enlightened opponent who is judge in his own case."[67]

Yet, sovereignty is not whole, "The general will is no longer general, sovereignty becomes magistracy, when it is faced with an individual will's particular question that is not answered by a prior convention."[68] But this fact is a safeguard against despotism. On a point as important as contestation the absolute word of the sovereign could render any future attempts at contestation unlawful. But if the legislative assembly is sensitive to this fact that Rousseau puts

[67] Jean-Jacques Rousseau, Donald A. Cress, and Peter Gay, The Basic Political Writings, Discourse on the Sciences and the Arts, (Indianapolis, Hackett Publishing Company, Inc., 2.
[68] SC II. 4.6.

forth, and aware that a contradiction has arisen but that a decision must be rendered, it must look to something beyond the express directives of the general will. By becoming a matter of magistracy, the sovereign can go back and review how the generalities of the sovereign law ought to be corrected to prevent future injustice if this is what the people in their magisterial capacity have ruled on the issue at hand. The sovereign can rule on what has already been decided.[69] For the sovereign must realize that it is impractical to decide on the matter arbitrarily or without considering the particularities of the point of contestation. Or, in Pettit's words, without 'looking at the context of subjugation,' – the political realities of domination to see if particular forms of government interference are nonarbitrary and legitimate – that they continue to track the 'certain relevant interests and ideas' of those who are affected.[70]

How can the people realize this special circumstance? Book 2 Chapter 7 "On the Sovereign" states that the "Sovereign has no interest contrary to that of individuals, therefore the sovereign power has no need to offer a guarantee to its subjects, since it is impossible for a body to want to harm all of its members, and, as we will see later, it cannot harm any one of them in particular."[71] The relationship between citizen and sovereign might appear dubious. Rousseau thinks that the sovereign only requires a relationship with itself, this is true; however, in stating that a determination must be made between the respective rights and duties of citizens highlights how the sanctity of the contract that is found in the whole body depends on if individuals in their dual roles as citizens and subjects "seek to combine their two-fold relationship and all the advantages that result from it."[72] While Pettit views the sovereign as isolated in its relationship with itself, he forget that individuals in an association do in fact establish a reciprocal or vertical relationship that is informed by their dual-roles as citizens and subjects. Rousseau says, "there is a considerable difference between being obligated to oneself, and to a whole of which one is a part."[73] This interpretation of the reciprocal relationship that Rousseau alludes to is essential for creating sovereign law that is nondominating.

In the case of contestation, the general will, as the source of legislative authority and political obligation, is unclear in its direction. Rousseau says that, "By itself the populace always wants the good, but the judgment that guides it is not always enlightened. It must be made to see the objects *as they are*, and sometimes as they *ought* to appear to it. It must be given a sense of *time* and *place*. It must weigh present, tangible advantages against the danger or distance, hidden evil."[74] The sovereign in special circumstances *must* consider what is particular in order to uphold the general will. Rousseau himself makes clear that this itself is a necessary contradiction.[75] The Prince is thought to be the one who gives the people direction and enlightens their judgment. However, what distinguishes this prince from a 'usurper' bent on injustice who could really just be an ordinary and virtuous citizen bringing forward a point of contestation relevant for the general will?

And in light of this twofold commitment that individuals have, I speculate that when a contradiction occurs and the sovereign must consider what is particular, for example, when there is a point of contestation brought before the sovereign that concerns a great injustice that has permeated the heart of the body politic, there is no greater law to give the sovereign a sense of

[69] SC III.17.
[70] Pettit, "Republicanism: a theory of freedom and government, (Oxford: Clarendon Press, 2002), 61-63.
[71] SC I.7.5.
[72] SC I.7.4.
[73] SC I.7.1.
[74] SC II.6.9. My emphasis.
[75] SC III.17.3.

direction on the matter than the law that emanates from within.[76] Rousseau says that the most important law is in the hearts of citizens. This law "preserves a people in the spirit of its institution and imperceptibly substitutes the force of habit for that of authority. I am speaking of mores, customs, and especially of opinion, a part of the law unknown to our political theorists but one on which depends the success of all the others."

Conclusion

This paper has shown that there is great potential evidence for reconciling Rousseau's theories of legitimacy and absolute sovereignty with contestation. I have sought to present an interpretation of *The Social Contract* that depicts Rousseau's republic as one where individuals do have rights and liberties that they can enjoy in the absence of a dominating state. I continue to believe that contestation as a method for curbing the abuse of power by an absolute sovereign is a necessary consequence of this theory of government. There is always more work to be done when inquiring into the thought of a thinker as great as Rousseau. I just hope I have done his work justice in this attempt.

[76] SC II. 12. 5.