Silencing the laws to save the fatherland: Rousseau’s theory of dictatorship between Bodin and Schmitt

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ABSTRACT
Jean-Jacques Rousseau devoted an important chapter of his Social Contract to the dictatorship. Carl Schmitt interpreted Rousseau’s chapter as marking the transition from ‘commissarial’ to ‘sovereign dictatorship’. This article argues that Schmitt’s interpretation is historically and conceptually inaccurate. Instead of paving the way for sovereign dictatorship, Rousseau carefully distinguished the dictatorship from the people’s sovereign authority. Taking position in the ‘debate’ between Bodin and Grotius on the relation between dictatorship and sovereignty, he argued that the dictator could provisionally suspend the people’s sovereign authority, but not abolish it. More particularly, the dictator did not possess the power to make generally binding laws, which had to remain the exclusive authority of the popular assembly. However, this did not prevent Rousseau from recognizing the dictatorship as a means for democratic reform. Rousseau thus conceived of the dictatorship as a time-limited and revocable commission to protect the constitution and to provide for a more stable and effective state organization based on the principle of popular sovereignty.

KEYWORDS
Dictatorship; sovereignty; Bodin; Grotius; Rousseau; Schmitt

Introduction

In his Social Contract (1762), Jean-Jacques Rousseau suggests that it is sometimes necessary to appoint a dictator to protect our liberty, observing that ‘a Dictator could in some cases defend the public freedom without ever being in a position to threaten it.’ As Pasquale Pasquino explains, Rousseau’s appraisal of the dictatorship does not fit well with his image as an important theorist of democracy. However, in Rousseau’s time, there was still a consensus among legal and political theorists that the dictatorship was a legitimate and necessary institution to safeguard the state in times of crisis. Theorists as diverse as Machiavelli, Bodin, Grotius, Hobbes and Montesquieu all insisted that the dictatorship had been crucial for protecting the Roman Republic by suppressing social strife and preventing foreign occupation. It was only during the French Revolution and, more particularly, during the Terror, that the dictatorship obtained more negative connotations, becoming a polemical term to delegitimize one’s political opponents, who were accused of aspiring...
to authoritarian rule. And even then, it was only a particular kind of dictatorship that was rejected, not the dictatorship as such. Indeed, until well into the twentieth century, it was not uncommon for legal and political theorists to advocate a form of ‘constitutional dictatorship’.

As Ernst Nolte warns us, Rousseau’s chapter on the dictatorship ‘only seemingly stands in an antiquarian context which is devoted to the Roman institution’. Instead, Rousseau presented an idealized image of the Roman dictatorship which was informed by his own historical context and served to support his theory of popular sovereignty. One of the first to recognize the novelty and importance of Rousseau’s chapter was the German constitutional lawyer Carl Schmitt. In his 1921 study on Dictatorship, Schmitt presented a detailed analysis of Rousseau’s chapter, arguing that it had made possible the transition from ‘commissarial’ to ‘sovereign dictatorship’. Schmitt recognized that Rousseau had emphasized the dictatorship’s commissarial nature: he had defined the dictatorship as an ‘important commission’, exercised on behalf of the people, to protect the existing constitution. To make the case that Rousseau’s chapter had enabled the transition to sovereign dictatorship, Schmitt was forced to take recourse to a ‘systematic analysis’, which allowed him to read Rousseau against the letter. Combining different parts of the Social Contract, he discovered an ‘antithesis’ between the ‘lawless power’ of the dictator and the ‘powerless right’ of the legislator, which had produced sovereign dictatorship as its ‘consequence’: it had caused the legislator to seize dictatorial power and transform himself into a sovereign dictator. On Schmitt’s reading, this sovereign dictatorship was no longer aimed at protecting the existing constitution, but at creating a situation in which a new constitution became possible.

As I will argue in this article, Schmitt’s claim that Rousseau had paved the way for ‘sovereign dictatorship’ was problematic, not only because Rousseau himself had carefully distinguished dictatorial power from sovereignty, but also because it risked turning Rousseau into a prophet of the French Revolution. Instead of claiming that the dictator possessed sovereign power, Rousseau had suggested that, during the dictatorship, the people continued to hold the highest authority in the state. For Rousseau, the defining characteristic of sovereignty was the authority to issue generally binding laws, and it was precisely this authority which the dictator lacked: as Rousseau emphasized, the dictator could ‘do everything, except make laws’. More particularly, Schmitt seemed to make Rousseau intellectually responsible for the Terror, arguing that he had provided the ‘formula for the despotism of liberty’ by propagating dictatorial rule as a condition for liberating the people. However, as I will argue below, Schmitt’s assertion that Rousseau’s dictatorship came down to a form of ‘omnipotence without law, lawless power [Allmacht ohne Gesetz, rechtlose Macht]’ led to a distortion of his arguments. Rather than claiming that the dictator was above the law, Rousseau emphasized the legal limitations to dictatorial power: the dictator was allowed to temporarily derogate from the laws, but only to the extent that it was necessary to protect the existing constitution. If he overstayed his term or used his power to other ends, the dictatorship threatened to become ‘tyrannical or vain’.

In the wake of Schmitt, modern scholars have emphasized the novelty of Rousseau’s chapter on the dictatorship. Stressing the differences between Machiavelli and Rousseau, Pasquale Pasquino has argued that for Rousseau, dictatorship is ‘a mechanism of stabilization of the new political order that no longer has a direct connection with mixed government’. For Machiavelli, the dictatorship had served to preserve the pluralistic constitution of a mixed government by preventing ambitious

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3Nolte, ‘Diktatur’, 906 (my italics).
5Ibid., 126–7/110–2.
6Ibid., 134/119.
7Rousseau, Social Contract, IV, 6, 4.
8Schmitt, Dictatorship, 121/104.
9Rousseau, Social Contract, IV, 6, 11.
10Pasquino, ‘Remarks on Rousseau’s Dictatorship’, 152.
individuals and factions from disturbing its intricate balance of powers. By contrast, Pasquino explains, Rousseau conceived of dictatorship as a means to overcome this pluralistic order and to stabilize a new constitution based on popular sovereignty. François Saint-Bonnet, too, emphasizes the novelty of Rousseau’s theory of dictatorship. Comparing Rousseau’s theory to John Locke’s, he explains that for Locke, executive emergency power had remained subject to natural law, while Rousseau had released the dictator from legal constraints on his power. On Saint-Bonnet’s reading, Rousseau’s theory depended on the transformation of natural man into the citizen, which entailed ‘a relative disqualification of the legal through the imperative of patriotism’. This was also attested by Rousseau’s language: the cold ‘safeguarding of the state’ had been replaced with the emphatic ‘safeguarding of the fatherland [salut de la patrie]’, thus paving the way for a sacrificial logic, which demanded that citizens gave their lives to protect the people’s liberty.

Although I do not want to contest the validity of these interpretations, it is my impression that Rousseau formulated his theory of dictatorship not primarily in dialogue with Machiavelli or Locke, but with Bodin and Grotius. As I will show in this article, by distinguishing the dictator’s power to silence the laws from the people’s authority to make the laws Rousseau positioned himself in the ‘debate’ between Bodin and Grotius about the nature of dictatorial power and its relation to sovereignty. More particularly, Rousseau’s notion of commissarial dictatorship was closely related to Bodin’s definition of dictatorship as a ‘simple commission’: the dictator did not himself possess sovereign authority, but he exercised his power as a ‘commission’ on behalf of the sovereign. However, in contrast to Bodin, Rousseau attempted to democratize the dictatorship by making it subject to the ‘general will’ of the people. Rousseau’s dictator was thus appointed by an extraordinary assembly of the people, which could revoke his commission at any time. Hence, the dictatorship’s commissarial nature did not prevent Rousseau from recognizing it as a means for democratic reform. He thus conceived of dictatorship as a time-limited and revocable commission to protect the constitution and to provide for a more stable and effective state organization based on the principle of popular sovereignty.

The dictatorship before Rousseau

In his book on Dictatorship, Schmitt traced the notion of ‘commissarial dictatorship’ back to the sixteenth-century French lawyer and political theorist Jean Bodin. According to Schmitt, it was Bodin’s merit not only to have ‘founded the concept of sovereignty for the modern theory of the state’, but also to have ‘recognized the connection between the problem of sovereignty and the dictatorship and – indeed only through the limitation to a commissarial dictatorship – to have given it a definition that must still be considered fundamental today’. Bodin discussed the dictatorship in the famous chapter on sovereignty of his Six livres de la république. Here, he defined sovereignty as the ‘absolute and perpetual power of the state’. More particularly, he characterized the sovereign as the authority that did not recognize any higher authority above itself except God: ‘celui est absoluem souverain, qui ne recongoist rien plus grand que soy apres Dieu.’ In this context, Bodin raised the question whether those who held the highest power in the state for a limited time only could

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be regarded as sovereigns. Examples included the Roman dictator as well as other extraordinary commissars invested with emergency power such as the ‘ancient Balia of Florence’. Bodin concluded that those who held the highest power in the state for a limited time could not be regarded as genuine sovereigns, because, due to these temporal limitations, they remained subject to a higher power, i.e. that of the ‘Sovereign Prince’, on whose authority they depended.  

Roman legal sources had indeed suggested that dictators held the ‘highest power [summa potestas]’ for a limited time. According to the Roman jurist Pomponius, this included the power to put Roman citizens to death without the possibility of appeal: the right of provocatio, the right of citizens to appeal from serious sentences to the people, could not be used against a dictator. However, as Pomponius explained, to prevent abuses of dictatorial power, dictators were not allowed to remain in office for longer than six months. Like Pomponius, Bodin maintained that Roman dictators were not subject to provocatio and that they were required to abdicate after their six months’ term expired. However, he also suggested that this was true only of the earliest dictators. Invoking the Roman grammarian Festus, he explained that the earliest dictators had ‘full power [toute puisance] and had it in the best possible form, or optima lege as the ancient Latins called it’. On Bodin’s reading, this implied that there was ‘no appeal [from a dictator] in those days, and all other offices were suspended’. However, as Bodin explained, the dictatorship had been significantly limited with the creation of the tribunate: henceforth, if a dictator was appointed, the tribunes had continued in their functions and retained their right to intercede on behalf of citizens threatened with arbitrary exercises of dictatorial power. For Bodin, it illustrated that the dictator did not possess sovereign authority himself, as he remained subject to the higher authority of the Roman people.

Specifying the relation between dictatorship and sovereign authority, Bodin introduced the notion of a ‘commissarial dictator’: [it] thus appears that the dictator was neither a prince nor a sovereign magistrate, as many have written, and that he held nothing more than a simple commission to conduct a war, or to put down sedition, or to reform the state, or to bring in new magistrates. The characterization of the dictatorship as a ‘simple commission’ cannot be found in earlier sources, and may therefore have been Bodin’s own invention. Previous authors had sometimes suggested that the dictatorship was a limited power, in the sense that other state officials had continued in their functions, so that they acted as the dictator’s ‘guardians’. By contrast, Bodin asserted that the dictator was himself a ‘guardian [curator]’ of the ‘sovereign authority’, that is, the Roman people and senate, on whose behalf he was appointed and who could revoke his commission at any time. As

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20Ibid., I, 8 (123/2).
22D.1.2.2.18 (Pomponius). The dictator’s six months’ term is also mentioned in Cicero, De legibus, 3, 9; Livy, Ab urbe condita, 3, 29, 7; 23, 22, 11 and 23, 2; Appian, Bellum civile, 1, 3, 9.
23Bodin, Six livres, I, 8 (123/3) and III, 2 (377).
24Ibid., I, 8 (123/2–3). The reference is to Festus, De verborum significatione libri XX, CXLI, 4–10.
25Ibid., I, 8 (123/3).
26Bodin referred to the example of the dictator Papirius Cursor, who had threatened to put to death his master of the horse Fabius Maximus. In Livy’s account (8, 35, 2), the tribunes had brought the case of Fabius before the people’s assembly, and forced the dictator to remit the punishment of his master of the horse. However, Livy was ambiguous regarding the important question of whether the dictator was legally subject to the power of the tribunes. As Oakley notes, Papirius did not explicitly claim that, as a dictator, he was not subject to provocatio, which one might have expected. Earlier in his speech, he even seemed to take into account the possibility of tribunician intercession by ‘praying that the tribunes might not employ their power – itself inviolate – to violate by their interference the authority of Rome’ (8,34.6). However, elsewhere Papirius explicitly denied that the tribunes could legally prevent him from punishing his master of the horse, as he emphasized that they ‘cannot bring him legal relief [non iustum auxilium ferentii]’ (8.35.5). Oakley, A Commentary on Livy, Books 6–10, 730.
27Bodin, Six livres, I, 8 (123/ 3, my italics). In the Latin edition, Bodin referred to the traditional grounds for which dictators were appointed: ‘nec alii illud tribunatum fuisset, praeter curationem bellii gerendi, aut seditionis sedandae aut Rei pub. constituantae, aut magistratuum creandorum, aut clavi figendi’. Bodinus, De republica libri sex, 79–80. The reference to the dictatura clavi figendi causa (‘dictatorship for driving in the nail’) is lacking in the French edition. This was a dictatorship to perform a particular religious ceremony to appease the gods when Rome was suffering from pestilence.
28For instance, in his Discourses on Livy, Machiavelli had argued that ‘the Senate, the consuls, the tribunes, remaining in their authority, came to be like a guard on [the dictator] to make him not depart from the right way’. Machiavelli, Discourses on Livy, trans. Harvey Mansfield and Nathan Tarcov (Chicago and London: University of Chicago Press, 1998), I, 35, 6–7.
Benjamin Straumann explains, Bodin likened the dictator’s commission to the *precarium* of Roman law, a grant of enjoyment of things revocable at will by the grantor: while a regular magistracy could not be revoked before its term expired, the dictatorship could be revoked at will by the sovereign authority.\(^{29}\) However, Bodin’s understanding of the dictatorship as a ‘simple commission’ implied other limitations as well. Most importantly, the extent of the dictator’s power depended on the task for which he was appointed: the dictator was thus authorized to take those measures that were necessary to achieve his task, for instance, to conduct a war, to put down sedition, or to reform the state. However, if he used his power to other ends, or if he took measures that were not necessary for his task, he violated his commission and acted without legal authorization.

Like Pomponius, Bodin also emphasized the temporal limitations to the dictatorship. Apart from the six months’ term, he suggested that a dictator’s term was primarily dependent on the task for which he was appointed, arguing that ‘when [his] mission was accomplished, [his] power expired’.\(^{30}\) Dictators were thus expected to lay down their powers forthwith after completing their task, often after weeks or days, rather than months. Bodin gave the examples of Cincinnatus, who, after defeating the enemy, resigned from his dictatorship, which he had held for only fifteen days, Servilius Priscus, who did the same after eight days and Mamercus after one.\(^{31}\) By contrast, towards the end of the Republic, Sulla and Caesar had violated the dictatorship’s temporal limitations. On Bodin’s (historically inaccurate) account, Sulla had obtained a dictatorship ‘for eighty years’, although he had given it up ‘after four years’ when the civil wars had quieted down.\(^{32}\) However, invoking Cicero, Bodin suggested that Sulla’s dictatorship was not a genuine dictatorship at all, but a ‘cruel tyranny’.\(^{33}\) Interestingly, Bodin did not object against the legal ground (*causa*) of Sulla’s dictatorship ‘for reforming the state [*rei publicae constituendae causa*]’, which he mentioned among the legitimate legal grounds of a missorial dictatorship.\(^{34}\) Rather, it was the fact that Sulla had violated the dictatorship’s temporal limitations that had allowed him to establish his ‘cruel tyranny’. Caesar, too, had ignored the temporal restrictions on the dictatorship when he had himself appointed as ‘dictator for life’. Bodin did not regard Caesar’s ‘dictatorship for life’ as a genuine dictatorship either, but as an extra-legal ‘cover for seizing the state’.\(^{35}\) However, it should be noted that Bodin refrained from identifying Sulla and Caesar as sovereign rulers.\(^{36}\) Instead, he emphasized that both ‘dictators’ allowed the tribunes to use their veto freely, implying that they remained subject to the higher authority of the people.\(^{37}\)

In his *Six livres*, Bodin made a sharp distinction between the dictatorship and sovereign authority: dictators were not sovereign rulers, because the dictatorship was not unlimited either in power (as it was subject to tribunician intercession), or in function (as it was limited by the dictator’s task), or in length of time (as the dictator’s power expired when his mission was accomplished). Instead, Bodin defined the dictatorship as a ‘simple commission’, which could be revoked at will by the sovereign authority, that is, the senate and people. However, as Richard Tuck points out, Bodin’s distinction between the dictatorship and sovereign authority proved to be immensely controversial.\(^{38}\) It was the Dutch jurist Hugo Grotius, who, in his *Rights of War and Peace* (*De jure belli ac pacis*, 1625), met Bodin’s distinction head on: ‘I am unable to agree with those who declare that the dictator

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\(^{30}\)Ibid., I, 8 (124/3).

\(^{31}\)These examples are taken from Livy, *Ab urbe condita*, 3, 29, 7 (Cincinnatus); 4, 47, 6 (Servilius Priscus); 23, 23, 7 (Mamercinus).

\(^{32}\)Bodin’s account does not seem historically accurate, as no term is mentioned for Sulla’s dictatorship in Roman sources (apart from Appian, who claims that Sulla was made ‘dictator for life’) and he probably abdicated after no more than 18 months. Appian, *Bellum civile*, 1, 3 and 1, 99. Twyman, ‘The Date of Sulla’s Abdication and the Chronology of the First Book of Appian’s Civil War’.

\(^{33}\)The reference is to Cicero, *De lege agraria*, 3, 2, 5.

\(^{34}\)Bodin, *Six livres*, I, 8 (124/3).

\(^{35}\)Ibid., I, 8 (124/4): ‘sous ce voile il avoit envahi l’estat’.

\(^{36}\)On this point see Straumann, *Crisis and Constitutionalism*, 282, n. 16: ‘Bodin, unlike Schmitt did not think that the latter were truly sovereign; he is much closer to Roman reality, too, in pointing out that Sulla et al. had acted at the pleasure of the people, not as “constituting sovereigns”’.


was not the bearer of sovereignty because his power was not perpetual.' Contrary to Bodin, Grotius characterized the dictatorship as a 'kind of temporary kingship [quasi temporarii regni]', which was 'not subject to the people'. On Grotius's view, this was especially true of the earliest dictatorships, which had not been subject to provocatio or tribunician intercession. Grotius invoked Livy to assert that in the earliest times, an edict of the dictator was complied with as a ‘divine decree’ and that ‘no recourse’ (auxilium) was available against a dictator’s decision. He also quoted Cicero to support his own claim that the dictator was invested with ‘royal power’ (vim regiae potestatis). For Grotius, this implied that, for the duration of his term, the dictator was not dependent on those who had appointed him (i.e. the consuls at the initiative of the senate), or on any other state authority (e.g. the tribunes on behalf of the people).

Criticizing Bodin, Grotius maintained that temporal limitations to the dictatorship did not change the nature of the dictator’s power. He explained that the ‘character of immaterial things is recognized from their effects, and legal powers which have the same effects ought to be designated by the same name. Now the dictator during his period in office performed all acts by virtue of the same legal right which a king has who possesses absolute power; and his acts could not be rendered null or void by any one’. In other words: temporal limitations to the dictatorship did not change the fact that, for the duration of his term, the dictator was invested with the absolute power of a king, which could not be revoked or vetoed by any other authority. The only difference was that the king had a greater ‘prestige [majestas]’ than the dictator, who held his power by a ‘right limited in time’. However, on Grotius’s view, this did not alter the fact that both were invested with summa potestas, being subject to no higher authority. Hence, the dictator was not a mere commissar, as Bodin had argued, but a sovereign ruler. By relating the dictatorship to the question of sovereignty, Bodin and Grotius provided the terms of the debate. Later writers understood the dictator either as an extraordinary magistrate or commissar, who remained subject to a higher authority, or as a temporary sovereign, who acted on his own authority.

Although seemingly oriented towards the past, the debate between Bodin and Grotius about the Roman dictatorship expressed concerns and anxieties that originated from their own legal and political context. From the sixteenth century on, fuelled by new ideas about the state, the number of the state servants had begun to grow at a very fast rate. As Luca Mannori and Bernardo Sordi explain, these public officials were entrusted not only with traditional tasks, such as the administration of the military, the judiciary, or taxation, but increasingly also with a new type of public activity: the care

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39Grotius, De jure belli ac pacis libri tres, I, 3, 11, 2. Translated as Grotius, On the Law of War and Peace. Grotius does not mention Bodin by name in this passage. However, Barbeyrac and Gronovius, as well as later commentators, have consistently read Grotius’s remark as an implicit reference to Bodin. See Barbeyrac, I, 3, 11, n. 5 and Gronovius, I, 3, 11, n. 32. Elsewhere in De jure, Grotius had explicitly identified Bodin as one of his sources, while criticizing him for confusing politics with the science of law. Ibid., prolo., 57.

40Ibid., I, 3, 8, 12.

41The references are to Livy, Ab urbe condita, 2, 18. 8 and Cicero, Philippica, I, 1.3 (where Cicero applauds Marcus Antonius for having removed the office of dictator from the constitution, an ‘office that had usurped the power of absolute monarchy [vim regiae potestatis]’). The notion that the dictator was invested with royal power was also defended by a number of Renaissance writers, including Sir Thomas Elyot, who characterized the dictator as a ‘sovereign’ and as ‘possessing the pristine authority and majesty of a king’, and Josse Clichtove, who listed the dictatorship as one of five ‘modes of kingship’, arguing that the dictatorship differed from these other modes only in that it was temporary. References to these sources can be found in Tuck, The Sleeping Sovereign, 24.

42Grotius, De jure belli, I, 3, 8, 13.

43Ibid., I, 3, 11, 2.

44Ibid., I, 3, 11, 2. Here, too, Grotius seems to implicitly criticize Bodin for having failed to distinguish between the concepts of sovereignty and majestas. Cf. Bodin, Six livres, 122/1.

45For instance, in De cive (1632), Thomas Hobbes concluded that the dictator was ‘not to be regarded as a Monarch, but as the first minister of the people [primo populii ministro], and the people can, if it shall see fit, deprive him of his office [administratio] even before his term is finished’. Hobbes, De cive, 7, 16. In a similar vein, Samuel Pufendorf argued that the ‘dictator was not a monarch but only an extraordinary magistrate [magistratum extraordinarium], who exercised his power ‘as delegated to him by another’. Pufendorf, De jure naturae et gentium libri octo, book 7, chapter 6, par. 15.

46The ‘controversy’ between Bodin and Grotius is mentioned in Thomasius, Institutionum iurisprudentiae divinae libri tres, book 3, chapter 6, par. 126 and Wolff, Jus naturae methodo scientifica pertractum pars octava, chapter 1, par. 70.
and preservation of the population.\textsuperscript{47} This included, for instance the administration of food, health, poor relief, public safety, trade and roads.\textsuperscript{48} However, the typical old regime public officials, although in theory appointed by the king, tended to operate more or less autonomously of their master. Even when they did not consider their office a personal property, they regarded it as the kind of privilege reserved to members of their rank and social status. It was to sidestep these regular officials that early-modern sovereigns started to appoint so-called ‘court commissars’. These commissars were fiduciaries that were directly chosen by the king and his ministers, from their own entourage, and whose power was revocable at any time. This was the case in France, where the king started to use the system of revocable commissions in order to create a pyramid of agents that were exclusively dependent on him and his Council.\textsuperscript{49} These royal commissars were assigned to handle particular matters of the public interest, not on the basis of local customary law, but simply according to the instruction of the king and his ministers. According to Mannori and Sordi, this system of royal commissars effectively contributed to the centralization of the state and its gradual transformation into a \textit{monarchie administrative}.\textsuperscript{50}

Early-modern legal and political theorists understood the Roman dictatorship in light of these developments. For instance, in his \textit{Six livres}, Bodin made a distinction between regular officers and royal commissars.\textsuperscript{51} Regular officers were public persons entrusted with \textit{ordinary} tasks that were defined by law.\textsuperscript{52} By contrast, royal commissars were public persons entrusted with \textit{extraordinary} tasks that were defined only by their commission.\textsuperscript{53} Unlike regular officers, commissars were appointed for a particular task and for a limited time: they had no ‘right’ to their office, but were required to resign after completing their task. They were responsible only to the sovereign, that is, to the king and his ministers, who could revoke their commission at any time. In this context, Bodin regarded the dictatorship as a \textit{particular kind of commission}, namely an extraordinary ‘commission to conduct a war, or to put down sedition, or to reform the state, or to bring in new magistrates’\textsuperscript{54}. The dictator differed from other commissars in that he was temporarily invested with ‘full powers [\textit{toute puissance}]’ to enable him to cope with a particular emergency.\textsuperscript{55} While other commissars remained bound by the laws, the dictator was temporarily authorized to derogate from the laws, but only to the extent that it was necessary for his task. The dictatorship thus served to sidestep regular officials, who, for the duration of the dictatorship, became subordinate to the dictator’s authority.

Against this background, it is understandable why it was so important for Bodin to distinguish the dictatorship from sovereignty itself. As extraordinary commissar, the dictator had to remain subordinate to the sovereign ruler; if he violated his term, or if he acted contrary to his commission, he risked undermining the very sovereign authority that had appointed him. This was precisely what had happened when Sulla and Caesar had ignored the temporal restrictions on the dictatorship and turned it against the republic itself. They had abused the dictatorship as a ‘cover for seizing the state’. It was therefore crucial to distinguish the dictator’s power from sovereign authority: as commissar, the dictator acted \textit{on behalf of} the sovereign, but as long as he remained bound by his commission and limited term, he could not himself appropriate sovereign power and seize the state. However, on Bodin’s view, this did not prevent dictators from contributing to constitutional reforms. Rather, being invested with an extraordinary power to derogate from the laws, dictators

\textsuperscript{47}Mannori and Sordi, \textit{The Science of Administration and Administrative Law}, 230.
\textsuperscript{48}In his monumental \textit{Traité de la police}, Nicolas Delamare distinguished no less than eleven domains of public administration: religion, morality, food administration, public safety, roads, sciences and liberal arts, commerce, manufactures and mechanical arts, household servants, laborers and the poor. Delamare, \textit{Traité de la police}, vol. 1, 4. I have gratefully taken this reference from Mannori and Sordi: \textit{ibid.}, 232.
\textsuperscript{49}\textit{ibid.}, 232.
\textsuperscript{50}\textit{ibid.}, 233.
\textsuperscript{51}See also Schmitt, \textit{Dictatorship}, 32/25.
\textsuperscript{52}Bodin, \textit{Six livres}, III, 2 (372): ‘L’officier est la personne publique qui a charge ordinaire limitée par edict’.
\textsuperscript{53}\textit{ibid.}, III, 2 (372): ‘commissaire est la personne publique qui a charge extraordinaire, limitée par simple commission’.
\textsuperscript{54}\textit{ibid.}, 1, 8 (123–4/3).
\textsuperscript{55}\textit{ibid.}, 1, 8 (123/2).
were able to overcome local resistance against the sovereign and thereby contribute to the establishment of a more centralized and effective state organization. Indeed, as Bodin argued, every public office had originally been established as a commission. The commissars that had created these offices had included dictators who had been specifically appointed ‘for reforming the state [pour réformer l’estat].’ As Bodin concluded, these dictators did not possess sovereign authority themselves, but they contributed to reforming the state by creating new public offices on behalf of the sovereign, thereby providing for a more stable and effective state organization.

Rousseau on the Roman dictatorship

In the last book of his *Social Contract*, Rousseau included a brief chapter on the Roman dictatorship. Like Bodin, he praised the dictatorship for having guaranteed the survival of the Roman Republic in times of crisis, when it was threatened by civil strife and foreign invasion. Especially in the earliest times, the dictatorship had ensured the effective functioning of the state, which could not be sustained by the force of its constitution. At that time, ‘morals’ had prevented dictators from abusing their authority and from keeping it beyond their term. Like Bodin, Rousseau suggested that it was not the dictatorship, but the prolongation of military commands which had eventually brought tyranny to Rome: he observed that ‘a dictator could in some cases defend the public freedom without ever being in a position to threaten it’, while the chains that would deprive Rome of its liberty ‘would be forged, not in Rome itself, but in its armies’. Rousseau even deplored the fact that towards the end of the Republic, the Romans had come to distrust dictatorial power and had used it only sparingly. In his view, this ‘error’ had caused them to commit ‘great mistakes’. He gave the example of the failure to appoint a dictator in response to the conspiracy of Catiline. Instead of appointing a dictator, the senate had granted the consuls (including Cicero) temporary emergency powers. According to Rousseau, it was only because of a happy confluence of events that the conspiracy was smothered. By contrast, had a dictator been appointed, he would easily have crushed the conspiracy.

Rousseau explained the purpose of the dictatorship by relating it to the ‘inflexibility of the laws’: under normal circumstances, the authority of the laws required that they were applied without exception and not allowed to bend with events. However, in times of crisis, the inflexibility of the laws could become pernicious to the state, as it prevented swift and resolute emergency responses. In those cases, laws that had been designed for normal times proved to be dangerous obstacles to the effective protection of the state. As Rousseau explained, ‘the orderliness and deliberateness of formalities requires a space of time which circumstances sometimes deny one’. In those exceptional circumstances, when there was an imminent threat to the fatherland, the laws were provisionally

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56 Ibid., III, 2 (392–3).
57 Ibid, I, 8 (124/ 3). In the Latin edition (80): ‘reipublicae constituentiae causa’.
58Straumann (Crisis and Constitutionalism, 282) observes that Bodin did not sharply distinguish between these extraordinary dictatorships ‘for reforming the state (in the Latin edition: rei publicae constituentiae causa) and the earlier ‘ordinary’ dictatorships. However, in fact, the only example of a dictator that was appointed ‘for reforming the state’ was Sulla (and perhaps, but this is uncertain, Caesar). My impression is that Bodin did distinguish between the ground of Sulla’s dictatorship (rei publicae constituentiae causa), which he considered lawful and legitimate, and the way in which Sulla had effectively exercised his dictatorship, which he regarded as unlawful and ‘tyrannical’. More particularly, Bodin regarded Sulla as a ‘tyrant’, not because he had ‘reformed the state’, but because he had violated the temporal limitations to his authority.
61Ibid., IV, 6, 3 and 6.
62Ibid., IV, 6, 8.
63Ibid., IV, 6, 9.
64Ibid., IV, 6, 1. Rousseau’s explanation seems to echo Machiavelli, who, in his *Discourses on Livy*, had suggested that the dictatorship, which allowed for quick and effective emergency responses, served to compensate for the ‘slow motion’ of the regular order of government in republics. Machiavelli, *Discourses*, I, 34, 3. See also Pasquino, ‘Remarks on Rousseau’s Dictatorship’, 149.
suspended. Governmental power was temporarily concentrated in an emergency authority, which became capable of responding to the danger quickly and effectively. As Rousseau observed, ‘[a] thousand cases can arise for which the Lawgiver did not provide, and it is a very necessary foresight to sense that one cannot foresee everything’. The Lawgiver could not know in advance what crises would arise, nor could he anticipate what measures they required. What he could foresee, however, was that unpredictable crises would inevitably occur: hence, it was a ‘very necessary foresight’ to provide for an emergency authority that would be temporarily released from the laws to cope with such crises.

As Rousseau explained, this emergency authority could be created in two ways. In case of smaller crises, it sufficed to temporarily increase the activities of the regular government by concentrating power in one or two of its members. In those cases, the laws continued to be effective, but the form of their administration changed. According to Pasquino, this temporary concentration of executive power had ‘no clear equivalent in the classical doctrine’. However, Rousseau probably had in mind the senatus consultum ultimum by which the consuls (that is, two members of the regular government) were temporarily authorized to take all the necessary measures to protect the state from harm, without being bound to the requirement of prior consultation of the senate. By contrast, in more serious crises, ‘when the peril [was] such that the laws as an instrumentality [were] an obstacle to guarding against it’, a dictator was appointed. The dictator was not a member of the regular government, but an extraordinary ‘officer’ entrusted with the task of protecting the fatherland. As Rousseau explained, unlike the senatus consultum ultimum, the appointment of a dictator led to the temporary suspension of the laws. Following Pomponius’s definition of dictatorial authority, Rousseau emphasized that the dictator was even authorized to put Roman citizens to death without appeal, because the laws relating to provocatio were temporarily suspended. Hence, in Rousseau’s view, Cicero, who had given the order to execute Catiline’s co-conspirators under the senatus consultum ultimum, had been rightly called to account for putting Roman citizens to death, ‘a charge that could not have been levelled at a Dictator’.

In his chapter, Rousseau defined the dictator as the ‘supreme chief, who silences all the laws and provisionally suspends the Sovereign authority [chef suprême qui fasse taire toutes les lois et suspende un moment l’autorité Souveraine]’. He thereby suggested that the dictator was not merely authorized to derogate from particular laws (i.e. the laws relating to provocatio), but to suspend all the laws as well as the people’s sovereign authority. Rousseau’s reference to the silencing of the laws and the suspension of the sovereign authority recalled Montesquieu’s observation that the ‘sovereign bowed before the dictator and the most popular laws remained silent [le souverain baissoit la tête, et les lois les plus populaires restoient dans le silence]’. However, contrary to Montesquieu, Rousseau did not believe that the dictatorship temporarily ‘removed the republic from the hands of the people’. Instead, he suggested that, during the dictatorship, the people continued to hold the highest authority in the state. More particularly, Rousseau proposed to make a distinction between, on the

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65Ibid., IV, 6, 1.
66Ibid., IV, 6, 4.
68Rousseau, Social Contract, IV, 6, 4.
69Ibid., IV, 6, 10. Rousseau therefore concludes that Cicero was ‘justly honored as the liberator of Rome, and justly punished as a transgressor of the laws. However brilliant may have been his recall, it is certain that it was a pardon’. As Rousseau suggests, Cicero was pardoned, not declared innocent, because he had been forced to break the laws. By contrast, had a dictator been appointed, the laws would not have been broken, but suspended. Elsewhere in his Social Contract, Rousseau explains that those who conspire against the state – like Catiline’s co-conspirators – are put to death ‘less as a Citizen than as an enemy’. By turning against the state, they cease to be members of it: they forfeit their rights under the social contract, and may be exiled or killed. As Rousseau puts it, they must be ‘cut off from it either by exile as a violator of the treaty, or by death as a public enemy; for such an enemy is not a moral person, but a man, and in that case, killing the vanquished is by right of war’ (II, 5, 4).
70Ibid., IV, 6, 4.
72Ibid., 11, 16 (419/177).
one hand, the dictator’s time-limited authority to suspend the laws and, on the other, the people’s sovereign authority to make the laws: although the dictator had the authority to ‘silence the laws’, he could not make them speak. He could provisionally suspend the legislative authority of the popular assembly, but he could not abolish it. As Rousseau formulated it, the dictator ‘can do everything, except make laws [il peut tout faire, excepté des lois]’.73

By relating the dictatorship to the question of sovereignty, Rousseau took position in the debate between Bodin and Grotius: as Rousseau explained, the dictator had the power to suspend the sovereign authority, but, contrary to what Grotius had claimed, he did not thereby become a sovereign himself: he did not even possess sovereign authority for a limited time, because he lacked the power to make generally binding laws, which remained the exclusive authority of the popular assembly. As Rousseau formulated it, the dictator ‘dominates it without being able to represent it [il la domine sans pouvoir la représenter]’.74 Rousseau’s phrase can be read as a direct criticism of Louis de Jaucourt’s observation that the Roman dictator had ‘represented sovereignty [représentait la souveraineté]’.75 Following Montesquieu, Jaucourt had interpreted the Roman dictatorship as being primarily directed against the people, arguing that this ‘magistracy had to exercise itself with brilliance, because its aim was to intimidate the people’.76 Both Jaucourt and Montesquieu had understood the Roman dictatorship in the context of the social struggles that had ultimately led to the decline of the republic. On Montesquieu’s reading, the dictatorship had mainly served to protect the balanced constitution of the republic, in particular its aristocratic elements, against attempts of ambitious politicians to seize power on behalf of the people. This explained why the dictatorship temporarily suspended even the ‘most popular laws’, including those that permitted the ordinances of magistrates to be appealed to the people.77 As the dictatorship served to restore the balance of power in the republic, i.e. the balance between its aristocratic and popular elements, its aim was ‘to intimidate, not to punish, the people’.78

By contrast, Rousseau believed that the dictatorship was not directed against the people, but against those forces that prevented a constitution based on popular sovereignty. In his view, any sharing of sovereign authority would necessarily imply a reduction of the people’s liberty.79 Hence, contrary to Grotius and Jaucourt, Rousseau believed that the dictator’s task was not ‘to intimidate the people’, but rather to defend a constitution based on the people’s inalienable and undivided sovereignty.80

Following Bodin, Rousseau emphasized the commissarial nature of the dictatorship: he considered it an ‘important commission [une importante commission]’, entrusted to the ‘worthiest person’, who was temporarily released from the laws in cases that had not been foreseen by the legislator.81 Although Rousseau was not explicit about the procedure for appointing a dictator, elsewhere in his Social Contract, he suggested that it was the kind of decision taken by an ‘extraordinary assembly’ required by ‘unforeseen circumstances’.82 This extraordinary assembly was convoked by ‘magistrates appointed to that end and according to the prescribed forms’.83 Rousseau did not specify

73 Rousseau, Social Contract, IV, 6, 4. Rousseau’s claim that the Roman dictator could ‘do anything, except make laws’ is probably historically inaccurate. Thus, in her dissertation on the Roman dictatorship, Marianne Hartfield gives several examples of dictators who initiated legislation. Hartfield, The Roman Dictatorship, 276–9.
74 Rousseau, Social Contract, IV, 6, 4.
75 Jaucourt, ‘Dictateur’, 957 (my italics).
77 Montesquieu, Spirit of the Laws, 11, 16 (419/177). According to Montesquieu, it also explained why the Roman dictator was installed ‘for only a short time because the people acted[ed] from impetuosity and not from design’. In this context, Montesquieu compared the Roman dictator to Venice’s state inquisitors. While the Roman dictator’s task was to defend the aristocracy against the people, Venice’s state inquisitors served to defend the aristocracy against the nobles. Unlike the people, who acted from impetuosity, the nobles acted from design, and the ambitions of a single person soon became that of an entire family. According to Montesquieu, this explained why Venice’s state inquisitors were a permanent institution, while the Roman dictator was installed for only a short time. Ibid., 2, 3 (245/16).
78 Ibid., 2, 3 (246/16).
79 Rousseau, Social Contract, II, 1 and 2.
80 Ibid., IV, 6, 3.
81 Ibid., IV, 6, 11. Cf. IV, 6, 3.
82 Ibid., III, 13, 1. See also: Saint-Bonnet, L’etat d’exception, 275.
83 Ibid., III, 13.
which magistrates were authorized to convoke the extraordinary assembly, nor what formalities had to be observed. However, he did suggest that the ‘order to assemble’ had to be regulated by law.\footnote{Ibid., III, 13, 2.} Elsewhere, he explained that the dictator was appointed by a ‘special act [un acte particulier]’, and he suggested that this act could only be repealed by the popular assembly itself.\footnote{Ibid., IV, 6, 3. Under Roman law, dictators were in fact appointed by the consuls (at the initiative of the senate) without a special act. Bodin acknowledged that dictators were ‘sometimes created by a statute of the people’ (Bodin, Six livres, III, 2 (376–71)). By contrast, Rousseau suggested that the appointment of dictators by a ‘special act’ was not an exception, but the rule. On the appointment of dictators and the Lex Valeria: Kunkel and Wittmann, Staatsordnung, 668 and 701.} This implied that the dictatorship could be revoked at any time: ‘[i]t is absolutely nothing but a commission, an office in which they, as mere officers of the Sovereign, exercise in its name the power it has vested in them, and which it can limit, modify, and resume’.\footnote{Rousseau, Social Contract, III, 1, 6.} Hence, for Rousseau, the notion that the people’s sovereignty had to remain inalienable and undivided implied that the popular assembly could at any time limit, modify or resume the power of the dictator, who acted merely on behalf of the people, as its temporary commissar.

However, Rousseau was well aware of the risks involved in the appointment of a dictator. This caused him to propose three restrictions on dictatorial authority which served to prevent its abuse. First of all, he sought to limit the dictatorship by specifying the conditions under which it could be lawfully deployed. Like the medieval civil and canon lawyers, who had held that derogation from the laws was justified only in cases of ‘evident necessity’,\footnote{On ‘evident necessity’ as a legal cause for justifying derogation from the laws see, inter alia, Pichler, Necessitas; Roumy, L’origine et la diffusion de l’adage canonique necessitas non habet legem, VIIe-XIIe s’, 301–19; Saint-Bonnet, L’état d’exception, 140–4.} Rousseau argued that the use of dictatorial power had to remain limited to ‘rare and manifest cases [cas rares et manifestes]’; more particularly, he observed that such power could only be deployed when ‘the general will is not in doubt’.\footnote{Rousseau, Social Contract, IV, 6, 3 and 4.} In addition, he maintained that the risk of disturbing the public order, which the silencing of the laws inevitably entailed, could only be justified by ‘the greatest dangers [les plus grands dangers]’, that is, existential threats to the fatherland.\footnote{Ibid., IV, 6, 3.} He explained that ‘one should never suspend the sacred power of the laws except when the salvation of the fatherland [salut de la patrie] is at stake’.\footnote{Ibid., IV, 6, 3.} This implied, among other things, that the dictator was not allowed to employ his emergency power for offensive purposes. Nor could dictatorial power be used in situations that did not constitute a threat to the survival of the fatherland (e.g. minor crises, when it sufficed to temporarily increase the activities of the regular government). Instead, Rousseau explained, dictatorial power could only be used in ‘rare and manifest’ cases, when the general will was ‘not in doubt’ that it was necessary to suspend the laws in order to save the fatherland.

Like Bodin and the Roman sources he had invoked, Rousseau also emphasized the temporal restrictions on the dictatorship. More particularly, he argued that it was of the utmost importance that the ‘special act’ by which the dictator was appointed fixed its duration to a ‘very brief term which can never be extended’.\footnote{Ibid., IV, 6, 3.} In his Six livres, Bodin had mentioned the traditional six months’ term, but he had also suggested that the dictator’s power expired when his mission was accomplished. On Bodin’s view, it was the violation of these temporal limitations that had allowed Sulla and Caesar to use the dictatorship as a pretext for ‘cruel tyranny’ and as a ‘cover for seizing the state’.\footnote{Rousseau, Social Contract, IV, 6, 3 and 4.} In a similar vein, Rousseau suggested that as a rule, existential threats to the state tended to be brief – the state being either ‘soon destroyed or saved’ – and that dictatorial power threatened to become ‘tyrannical or vain’ if it was maintained after the crisis had passed.\footnote{Ibid., IV, 6, 11.} Like Bodin, Rousseau observed that most Roman dictators abdicated long before their six months’
He vividly described how ‘[i]t seemed … that so great a power was a burden to the one in whom it was vested, such was his haste to get rid of it; as if taking the place of the laws had been too painful and too perilous a station’. In Rousseau’s view, the burden was the responsibility to save the fatherland at any price, even if it included a sacrifice of life and — what he seems to have regarded as even more significant — the suspension of the laws. For the dictator, this was a ‘perilous station’, for, as he was forced to silence the laws, he could easily be accused of aspiring to tyranny.

A third and final restriction on the dictatorship followed from the notion that its purpose was to protect a constitution based on the principle of popular sovereignty. As we have seen, Bodin had regarded the dictator as ‘guardian and trustee’ of the king and his ministers. By contrast, for Rousseau, the dictator’s power had become completely subordinate to the ‘general will’ of the people. In practical terms, the suspension of the sovereign authority implied that legislative oversight was temporarily diminished: the dictator could not be held accountable for deviating from the laws. However, as we have seen, the dictator was not allowed to abolish the sovereign authority: he could not alter or take away the legislative authority that was vested in the popular assembly. Rousseau’s understanding of these constitutional limitations may have been informed by Machiavelli, who had argued that the ‘dictator could not do anything that might diminish the state, as taking away authority from the Senate or from the people, undoing the old orders of the city and making new ones, would have been’. However, contrary to Machiavelli, who had held that, in order to secure the liberty of citizens in a republic, power had to be divided between different assemblies and magistracies, Rousseau believed that sovereign authority had to be concentrated in the popular assembly. For Machiavelli, it was the competition between the various magistracies and assemblies, rather than some kind of undivided sovereign power, which guaranteed republican liberty. It prevented ambitious individuals from obtaining dangerous monopolies of power and ensured that magistrates focused on the public good, rather than their own factional interests. By contrast, Rousseau believed that the people’s sovereignty had to remain inalienable and undivided. Therefore, he concluded that the dictator could only act on behalf of the popular assembly, as its temporary and revocable commissar, to protect its exclusive and undivided sovereignty.

Rousseau returned to the Roman dictatorship in his Considerations on the Government of Poland, which he completed some ten years after his Social Contract. Here, he compared the Polish ‘Confederation’ to the Roman dictatorship, observing that ‘Confederation is in Poland what the Dictatorship was among the Romans: both silence the laws in times of peril [l’«une et l’autre font taire les lois dans un péril pressant»]. Under the Polish constitution, the deputies of the Diet had the so-called liberum veto: this implied that a single deputy could prevent a decision of the Diet and thereby paralyze the government. However, as Rousseau explained, in times of peril, the liberum veto could become an obstacle to the state’s survival, as it prevented swift and effective emergency responses. In those situations, a Confederation of the nobles was formed which possessed temporary emergency powers: it could take all the necessary measures to protect the state, without being subject to the liberum veto.

94Ibid., IV, 6, 11.
95Ibid., IV, 6, 6.
96Machiavelli, Discourses on Livy, I, 34, 2 (74). Rousseau shared Machiavelli’s basic thesis that the aim of the Roman dictatorship was to preserve the republic, not its aristocracy. There are other parallels between Rousseau’s and Machiavelli’s understanding of the dictatorship: both believed that republics could not do without the dictatorship because of the slowness (il moto tardo; la lenteur des formes) of regular republican decision-making, which became dangerous in times of crisis. Moreover, both maintained that the dictatorship could not harm republican liberty so long as dictators were appointed according to constitutionally prescribed forms (secondo gli ordini pubblici; selon les formes prescrites). Also, both emphasized the temporal limitations to the dictatorship and suggested that the prevailing ‘morals’ had prevented the earliest dictators from abusing their power. Finally, both suggested that it was not the dictatorship, but the length of military commands that had allowed Sulla and Caesar to seize power in the state. Ibid., I, 34, 1, 2 and I, 35, 1 (73–4 and 76).
97Ibid. Rousseau’s Considerations are hereafter cited with page numbers of the French original preceding those of the English translation.
98Saint-Bonnet, L’État d’exception, 276.
Rousseau considered the Confederation a ‘masterpiece of politics’, suggesting that without it, the ‘Republic of Poland would long ago have ceased to exist’ and ‘freedom would have been destroyed forever’.101 However, he also acknowledged that ‘learned men’ had criticized the Confederation as a ‘violent state in the Republic’, which could easily be abused.102 In response to this criticism, Rousseau pointed at a ‘great difference’ between the Confederation and the Roman dictatorship: while the dictatorship had been turned against the Republic by Sulla and Caesar, who had used it as a pretext for violating the laws and seizing power in the state, the Confederation, on the contrary, was but a ‘means for consolidating and restoring the constitution [un moyen de raffermir et rétablir la constitution]’: hence, it served to ‘tighten and reinforce the slackened spring of the State without ever being able to break it’.103 In his Considerations, Rousseau thus effectively modelled the Polish Confederation after the earlier Roman dictatorships, which, he concluded, could not be abused so long as they were ‘carefully regulated’.104

From commissarial to sovereign dictatorship: Schmitt’s reading of Rousseau

In his 1921 study on Dictatorship, Schmitt presented Rousseau’s Social Contract as marking the transition from ‘commissarial’ to ‘sovereign dictatorship’.105 As Schmitt explained, the aim of ‘commissarial dictatorship’ was to restore the normal order, which had been disturbed by a crisis, and to protect the existing constitution. To enable the dictator to effectively achieve this aim, he was temporarily released from legal constraints on his power: he was authorized to silence the laws to restore a situation of normality, in which the laws could once again be applied. Hence, according to Schmitt, ‘the commissarial dictator suspended the constitution in order to protect it – the very same one – in its concrete form’.106 By contrast, the aim of sovereign dictatorship was to overcome the existing order and make possible a new constitution. As Schmitt explained, the sovereign dictatorship recognized ‘in the entire existing order the situation that it will remove through its actions’.107 Rather than temporarily suspending the existing constitution in order to protect it, sovereign dictatorship aimed at creating the conditions in which a new constitution became possible: it ‘does not suspend an existing constitution through a law based on the constitution – a constitutional law; rather, it seeks to create a situation in which a constitution is made possible that it regards as the true one. Therefore [sovereign] dictatorship does not appeal to an existing constitution, but to one that is still to come’.108 As Schmitt explained, unlike ‘commissarial dictatorship’, which was regulated and limited by the existing constitution, ‘sovereign dictatorship’ was based on the ‘total negation of the existing constitution’. However, on Schmitt’s view, sovereign dictatorship was not a ‘question of sheer power’ that ‘evaded all legal considerations’. Instead, its existence was presupposed by the new constitution which it had made possible. On Schmitt’s reading, Rousseau’s chapter had paved the way for the ‘sovereign dictatorships’ of the French Revolution: it had allowed the French revolutionaries to recognize the dictatorship as a means for overcoming the existing order and creating a new constitution based on the principle of popular sovereignty.

99Rousseau, Considerations, IX, 14 (998/220).
100Ibid., IX, 14 and 16 (998/219). According to Jean Fabre, Rousseau is here referring to Mably, who had criticized the Confederation as a ‘vice which has served as a palliative for another vice’. Mably was critical of the practice by which minorities of the nobles had used the Confederation to escape the Diet’s principle of unanimous decision-making, thus contributing to political anarchy in Poland. Mably, Du gouvernement et des loix de la Pologne, in Œuvres complètes, vol. VIII, 27.
101Ibid., IX, 14 (998/219). The Neuchâtel manuscript contains an alternative formulation: ‘consolidating and reanimating the constitution [rafaffermir et ranimer la constitution]’ (my italics).
102More particularly, Rousseau maintained that it was necessary to ‘determine the situations in which they [the Confederations] may legitimately take place, and then carefully regulate their form and function’. Although he did not specify what regulations he had in mind, he did observe that ‘only violent undertakings’ could justify resort to the Confederations, mentioning foreign invasion as an example. Ibid., IX, 16 (999/220).
103Schmitt, Dictatorship, 114–26/96–111.
104Ibid., 133/118.
105Ibid., 134/119 (trans. modified).
106Ibid., 134/119 (trans. modified).
However, as we have seen, Rousseau himself had emphasized the *commissarial* nature of the dictatorship – a fact that Schmitt duly noted. More particularly, Rousseau had suggested that the aim of the dictatorship was to *preserve*, not to overcome, the existing constitution; for that reason, the dictator was authorized to provisionally *suspend* the people’s sovereign authority, but not to *abolish* it. To make the case that Rousseau’s chapter had nonetheless enabled the transition to ‘sovereign dictatorship’, Schmitt was forced to take recourse to a ‘systematic analysis’, which allowed him to read Rousseau against the letter. Combining different parts of the *Social Contract*, Schmitt related the dictator to the equally ‘unusual and extraordinary’ figure of the legislator, whose task was to propose legislation to the popular assembly. As Schmitt explained, the legislator was the ‘exact opposite’ of the dictator: while the dictator had the power to suspend the laws, but was not allowed to legislate, the legislator had the authority to propose the laws, but lacked the power to enact them: ‘The content of the legislator’s action is right [Recht], but devoid of legal power: it is powerless right. Dictatorship is omnipotence without law [Gesetz]: it is lawless power.’ According to Schmitt, the ‘antithesis’ between the dictator’s ‘lawless power’ and the legislator’s ‘powerless right’ was so extreme that it was bound to turn into its opposite: a legislator claiming dictatorial power. Indeed, as Schmitt argued, it was this combination of dictatorial power and legislative authority that had made possible the transition from commissarial to *sovereign* dictatorship: ‘[w]hen a relationship emerges that makes it possible to give the legislator the power of a dictator, to create a dictatorial legislator and constituent dictator [verfassunggebenden Diktator], then the commissarial dictatorship has become a sovereign dictatorship.’

Schmitt’s dialectical reading of Rousseau, in which the ‘antithesis’ between dictator and legislator was said to be ‘so extreme that it *must* turn into its opposite’, was problematic, not only because Rousseau himself had emphasized that the dictator was *not* allowed to legislate, but also because it suggested that the subsequent ‘sovereign dictatorships’ of the French Revolution were somehow the ‘consequence’ of Rousseau’s theory. Referring to Rousseau and Mably, Schmitt explained that ‘the signs of an upcoming revolutionary dictatorship were not so evident to their authors as it may seem after the events of the Revolution.’ He also conceded that Rousseau himself was probably unaware of the ‘antithesis’ between the dictator’s lawless power and the legislator’s powerless right – indeed, nowhere in his work did Rousseau even allude to a relation between the dictator and the legislator. However, in Schmitt’s view, this did not make the antithesis ‘any the less significant’, as it had produced sovereign dictatorship as its ‘consequence’. As Wilfried Nippel has pointed out, by suggestively combining different parts of Rousseau’s *Social Contract*, Schmitt attributed meanings to the text that ran counter to its author’s intentions. In particular, he seemed to make Rousseau intellectually responsible for the Terror by suggesting that he had provided the ‘formula for the despotism of liberty’, propagating dictatorial rule as a condition for liberating the people. Schmitt’s reading of Rousseau was therefore historically

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110 *Ibid*, 127/112: ‘The omnipotence of the dictator rests on his being empowered by an existing constitutional organ that is constituted. This is the concept of the commissarial dictatorship’ (trans. modified).
114 *Ibid*, 111: ‘This relationship will come about through an idea that is, in its substance, a consequence of Rousseau’s *Contrat social*, although he does not name [it] as a separate power: *le pouvoir constituant* [the constituting power]’ (italics added).
116 *Ibid*, 126/110: ‘The fact that Rousseau was not aware of this antithesis does not mean that is any the less significant’.
118 Schmitt, *Dictatorship*, 121/104.
and conceptually problematic, as it was informed by post-revolutionary experiences and conceptualizations.\(^{119}\)

Schmitt’s claim that the synthesis of Rousseau’s views of the dictator and the legislator had to result in a ‘sovereign dictatorship’ could be contested for various reasons. First of all, the need to emphasize an ‘extreme contradiction’ between the dictator’s ‘lawless power’ and the legislator’s ‘powerless right’ led Schmitt to give a distorted picture of Rousseau’s dictatorship. As we have seen, rather than claiming that the dictator was above the law, or that a lawless ‘despotism’ was necessary to liberate the people, Rousseau had emphasized the legal and constitutional limitations to dictatorial power: for instance, the dictator’s term and task were defined by a ‘special act’, and he was not allowed to take away or abolish the legislative authority of the popular assembly. In a similar vein, Schmitt’s dialectical reading caused him to misrepresent Rousseau’s view of the legislator as possessing merely a ‘powerless right’. Rousseau did indeed emphasize that the legislator – like the dictator – did not possess any sovereign power. Hence, the legislator could merely propose the laws, but he did not have the power to enact them, which remained the exclusive authority of the popular assembly.\(^{120}\) But this did not mean that the legislator possessed no power at all, nor that he stood ‘outside the state’, as Schmitt claimed.\(^{121}\) Instead, Rousseau described the legislator as ‘an extraordinary man in the state’,\(^{122}\) whose task was to propose laws allowing individuals to direct themselves towards the public good and become good citizens (thereby solving the paradox that ‘men would have to be prior to laws what they have to become by means of them’\(^ {123}\)). However, if Rousseau’s dictatorship was not a ‘lawless power’ and the legislator’s activity not a ‘powerless right’, than there was no reason to accept Schmitt’s assertion that the synthesis of these figures had to result in a sovereign dictatorship. Instead, the distribution of competences between the legislator and the dictator proposed by Rousseau could just as well result in a stable constitutional arrangement with the legislator proposing, the popular assembly enacting, and the dictator defending the laws, on the condition that both the dictator and the legislator respected the people’s sovereign authority.

Finally, Schmitt also failed to recognize an important shift that was taking place in Rousseau, namely the democratization of dictatorial power. As we have seen, instead of paving the way for sovereign dictatorship, Rousseau had carefully distinguished between the dictatorship and the people’s sovereign authority: although the dictator had the power to silence the laws, he did not possess the highest power in the state, that is, the power to make generally binding laws, which had to remain the exclusive authority of the popular assembly. Indeed, Rousseau’s dictator did not have any power of his own, but he acted as a mere commissar of the popular assembly, which could at any time revoke, modify or limit his commission. If he were to deviate from his commission and claim a power of his own, he would diminish the people’s sovereign authority, and become a threat to its liberty. By proposing a sharp distinction between the dictatorship and sovereign authority, Rousseau sought to ensure that the dictatorship remained a democratic institution, aimed at protecting the people’s undivided and inalienable sovereignty. Hence, rather than justifying the transition toward sovereign dictatorship, as Schmitt had claimed, Rousseau conceived of the dictatorship as

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119 In two important contributions, Nippel traces Schmitt’s distinction between ‘commissarial’ and ‘sovereign dictatorship’ back to Theodor Mommsen, who, in his monumental work on the Roman law of state, had distinguished between the earlier Roman dictatorships, which were part of the existing constitution and thus ‘constituted powers’ and the dictatorships of Sulla and Caesar, which he defined as ‘exceptional constitutive powers [ausserordentliche constituiierende Gewalten]’. As Nippel explains, Mommsen’s concept of ‘exceptional constitutive powers’ does not find support in Roman sources, but seems to be informed by the notion of the pouvoir constituant, which was invented during the French Revolution. Mommsen, Römisches Staatsrecht, vol. 1. 141–72 and 702–42; Nippel, ‘Carl Schmitt’s “kommissarische” und “souveräne Diktatur”’, 129–33 and Nippel, ‘Saving the Constitution’, 46–8.


121 Schmitt, Dictatorship, 126/110.


123 Ibid., II, 7, 9. For a discussion of this paradox see, e.g., Honig, Emergency Politics, 12–26.
a time-limited and revocable commission to protect the existing constitution and provide for a more stable and effective state organization based on the principle of popular sovereignty.

**Conclusion**

In his 1921 study on *Dictatorship*, Schmitt gave special attention to Rousseau’s chapter on the dictatorship; he considered Rousseau’s chapter a turning point in the history of dictatorship, as it had enabled the transition from ‘commissarial’ to ‘sovereign dictatorship’. As Schmitt explained, the antithesis between the dictator’s ‘lawless power’ and the legislator’s ‘powerless right’ had produced ‘sovereign dictatorship’ as its ‘consequence’. However, as we have seen, Schmitt’s reading of Rousseau was both historically and conceptually inaccurate. Rather than paving the way for sovereign dictatorship, Rousseau had carefully distinguished between the dictator’s power and the people’s sovereign authority. Following Bodin, he had characterized dictatorship as an ‘important commission’, which was exercised on behalf of the sovereign, who could at any time resume, limit, or modify the dictator’s power. Moreover, in order to prevent dictators from abusing their power, Rousseau had emphasized the temporal restrictions on the dictatorship: dictators were thus required to lay down their powers forthwith after the crisis had passed, for otherwise the dictatorship would become ‘tyrannical or vain’. Crucially, Rousseau had claimed that the dictator could not make generally binding laws, which had to remain the exclusive authority of the popular assembly. Hence, rather than paving the way for a sovereign dictatorship, Rousseau had emphasized the dictatorship’s *commissarial* nature: it was aimed at protecting the *existing* constitution, not at creating a new one.

However, the dictatorship’s *commissarial* nature did not prevent Rousseau from recognizing it as a means for democratic reform. Bodin had already observed that some dictators were appointed with the specific task of ‘reforming the state’. Although these dictators did not themselves possess sovereign authority, their task was to provide for a more centralized and effective state organization by overcoming local resistance against the sovereign authority. In Bodin’s view, dictators could even create new public offices to make the existing state organization more stable and effective. As I have suggested, Bodin’s understanding of the dictatorship was informed by legal and political developments of his time: it reflected the attempts of early-modern rulers to sidestep regular officers, who considered their office as their property or privilege, and to create a pyramid of extraordinary commissars that were directly dependent on their authority. Like Bodin, Rousseau believed that the dictatorship had contributed to reforming the constitution, even if the dictator did not himself possess sovereign authority. Indeed, in Rousseau’s view, it was only as a *time-limited and revocable commission* that the dictatorship could guarantee the people’s undivided and inalienable sovereignty. Hence, Rousseau conceived of the dictatorship as an ‘important commission’ to protect the existing constitution and to provide for a more stable and effective state organization based on the principle of popular sovereignty.

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