

Spring 2020

The Modern Lawgiver and the Politics of Refounding: What Political Refoundings Reveal About the Nature of Democracy

Anastasia Elizabeth Teller
Bard College

Follow this and additional works at: https://digitalcommons.bard.edu/senproj_s2020



Part of the [Other Political Science Commons](#), and the [Political Theory Commons](#)



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Teller, Anastasia Elizabeth, "The Modern Lawgiver and the Politics of Refounding: What Political Refoundings Reveal About the Nature of Democracy" (2020). *Senior Projects Spring 2020*. 116. https://digitalcommons.bard.edu/senproj_s2020/116

This Open Access work is protected by copyright and/or related rights. It has been provided to you by Bard College's Stevenson Library with permission from the rights-holder(s). You are free to use this work in any way that is permitted by the copyright and related rights. For other uses you need to obtain permission from the rights-holder(s) directly, unless additional rights are indicated by a Creative Commons license in the record and/or on the work itself. For more information, please contact digitalcommons@bard.edu.

The Modern Lawgiver and the Politics of Refounding:
What Political Refoundings Reveal About the Nature of Democracy

Senior Project Submitted to
The Division of Social Studies
Of Bard College

By
Anastasia Elizabeth Teller

Annandale-on-Hudson, New York

May 2020

Acknowledgements

My time at Bard has been a period of immense growth and transformation. I've been challenged in ways I never thought I would, and that is what makes this accomplishment seem so much sweeter. I never would have guessed in August of 2016 when I had just moved on to campus and was an intended Written Arts major that my path would take me here, through this journey, and with this knowledge. My first thanks is to myself, for completing this period of my life with as much grace as possible, and for doing things under pressure I never imagined I could achieve.

To my fellow senior friends, namely Augusta, Lily, Michael, and Tina: thank you for being with me throughout this entire experience of these last four years. There's no one else I'd rather have had this crazy journey with. There are simply too many memories and love that was created in Shelov, Village J, and 25 Thompson to even quantify. Cheers to closing this chapter of our lives, I can't wait to see what's next.

To my old friends from Mulberry; your friendships came at a crucial time in my life. I can't imagine where I'd be without that love and support my junior year. Mulberry forever.

To my parents, nana, and the rest of the family; thank you for giving me this amazing education and making my dreams come true. I'm forever grateful for the sacrifices you all made. I wish I could have been the first in the family to walk across a stage and receive a college diploma, but it looks like it might be mailed instead!

To Bill Dixon; thank you for guiding me through the theory of this project and providing your great expertise and knowledge on the subject.

To Kevin Duong; if I'd never seen your deep passion and drive for political theory, this senior project wouldn't exist. By witnessing your enthusiasm for revolutionary democracy, I realized what my own drives are. *Sous les pavés, la plage!*

To my advisor, Michelle Murray; no one has ever made me think as critically about our world and the way it works than you have. You have managed to be a beacon of optimism and hope while still maintaining a sense of keen pragmatism in regards to the current global political landscape, and for that, I thank you. I couldn't have asked for a better advisor to support me through this strange and novel time.

Table of Contents

Introduction	4
Section I: What are Political Refoundings?	8
Section II: Rousseau’s Lawgiver and Insurgent Universality as Lawgiving	13
Section III: Who is the Modern Lawgiver?	25
Section IV: The Modern Lawgiver, Citizenship, and Democracy	31
Conclusion	39
Bibliography	44

Introduction

“The world we want is one where many worlds fit.”

Zapatista Army of National Liberation,
Fourth Declaration of the Lacandon Jungle, Jan. 1996

How does one make the particular common? How can the identities that are viewed as particularities transform into the universal, the neutral? And what is the importance of challenging universality? These are the central questions that my senior project mulls over and seeks to answer. Shifts in the political peoplehood of a given society has always been a subject of great interest for me, especially in this globalized age with debates and contestations over DACA and the dreamers, the aftermath of the Syrian refugee crisis, and controversies over religious garb and apparel. Clashes between the historically alienated, ostracized, and oppressed against the ruling institutions and norms have seemed to increase in frequency, or perhaps, have merely just begun to get more recognition as our world has become more interconnected and globalized. Of course, these moments of political turmoil have always existed, but as history has progressed towards a more universalist, human rights driven political landscape, these instances of claim-making have become more frequent, garnered more attention, and sparked more conversation in academics, politics, and the like. And through analyzing these events and situations, their actors and actions, their motives and end goals, it becomes clear that all of these participants clashing with the ruling institutions are attempting the arduous task of redefining and refounding a political peoplehood. The politics of refounding is not merely a question of the identity of the people. The politics of refounding also captures the tensions between the individual and the state, the need for radical and revolutionary democracy to break institutional politics out of their stagnancy, and the practice of revolutionary democracy to bring about a more

just and possible future. There are the stakes. Thus, the end goal and motivation of my senior project is to illustrate how citizenship and revolutionary democracy are intrinsically linked. Acts of radical revolutionary democracy become the only instruments utilized to expand, develop, and refound the citizenry. This paper will explore this concept of democracy as transgressive acts suspended in the temporality of their current political moment.

My project attempts to decipher exactly how particularities are able to become common, who or what is the catalyst for such an event, and how or why do political refoundings of the people occur. The argument is broken down into four sections: “What are Political Refoundings?,” “Rousseau’s Lawgiver and Insurgent Universality as Lawgiving,” “Who is the Modern Lawgiver?,” and “The Modern Lawgiver, Citizenship and Democracy.”

In the first section, I define and explain the concept of a political refounding, as well as associated concepts of political peoplehood, popular sovereignty, and citizenship. I examine the complexities and nature of citizenship as both inclusive and exclusive, as both legal status and political action, and consider why citizenship is not a stagnant concept but is instead something always in flux. Analyzing citizenship through the lense of Judith Butler, I explain how the concept of citizenship is always unfinished, and relate this to why political refoundings are always occurring in every society that we know of. The conclusion of this section touches upon the concept of political refoundings as expansions of localism, and the way in which political refoundings appeal to archaic associations of the people that existed before and are independent from popular notions of nationalism.

The second section begins with an analysis of Jean-Jacques Rousseau’s social contract theory, specifically his theory on the general will, civil religion, and the lawgiver. My project

stems from and builds upon Rousseau's theory because of the significant impact his work has had on modern societal and democracy building, as well as the particular focus his work has on the distinction of particular or private wills and common or general wills. Rousseau's *On the Social Contract* dedicates much time to explaining why certain identities and particularities of the members of a people must be relegated to the private sphere in order for the overarching commonalities of the people to be celebrated and exalted for the purpose of creating a greater, unifying societal identity. Because my senior project is analyzing how these previous conceptions of the people are subverted in order for a new people to come into being, it is necessary to analyze why exactly there are distinctions of the public and private sphere in regards to citizenship and membership. Rousseau's lawgiver is the cornerstone of his social contract theory; without the existence of a lawgiver, there would be no Civil Religion, there would be no general will, and there would be no "We the People." I conclude that the lawgiver plays an important role in political refoundings of the people, too; a concept that Rousseau fails to consider or recognize due to his perception of citizenship as stagnant. By reading Massimiliano Tomba's *Insurgent Universality* in conversation with Rousseau's theory on the lawgiver, it becomes abundantly clear that new, modern lawgivers emerge every time a political refounding and reworking of the people occurs. However, the lawgiver of political refoundings will differ in a few ways from Rousseau's lawgiver, which leads to my next section.

The third section of my senior project focuses entirely on who the modern lawgiver is, what qualities a modern lawgiver must have, and why those qualities must be present in order for a person to receive the title of Modern Lawgiver. There are five essential qualities to my conception of the modern lawgiver: [1] the modern lawgiver is local, nameless, common; [2] the

modern lawgiver holds no legitimate, institutional power; [3] the modern lawgiver does not need to have citizenship authorized by a nation-state; [4] the modern lawgiver participates in claim-making; and [5] the modern lawgiver can only be known retrospectively and whose products of the refounding aren't created at the moment of making the claim, but rather when their vision gains traction in the minds of the people. Each of these qualities is examined and justified for why they must be present in all instances of modern lawgiving.

The fourth and final section assembles my main argument and the heart of this senior project: the modern lawgiver ushers in the political refounding of a people, which in turn creates a temporary and true democratic moment in politics. This democratic moment that is caused by the clash between the people and the ruling institutions can go on to influence, disturb, and transform legal systems and governmental affairs. The existence of a modern lawgiver demonstrates how localism allows for politics as usual to break out of stagnancy and evolve. If there were no lawgivers and political refoundings occurring, not only would there be no evolution or shifts in politics, but there would also be no democracy. In this section, I analyze and examine the conception of fugitive democracy popularized by Sheldon Wolin and further my critique of Rousseau through Iris Marion Young while explaining how the modern lawgiver fills the gaps of Rousseau's social contract theory.

Section I: What are Political Refoundings?

Where does democratic authority come from? How does it change and how is it renegotiated? How does it bend to the powers of the people? Who counts as the people? How do the people become a people before they found a government in their name?

At the root of these questions is the concept of popular sovereignty. Popular sovereignty is the defining ideal of all democratic societies. It is a principle that states that the authority of the state as well as the state's laws and government officials are created by, appointed by, and sustained by the consent of the people. Therefore, the people should be the ultimate source of power. I call popular sovereignty an "ideal" and state that the people "should be" the ultimate source of power because I believe it is something that has yet to be fully realized nor can ever be fully realized, but it is an ideal that all democratic societies are striving and progressing towards. Popular sovereignty is intrinsically linked to the concepts of political peoplehood and citizenship, two concepts that are constantly in flux. Therefore, if the political peoplehood and citizenship acquisition, inclusion, and exclusion of a nation are constantly in states of transformation, then popular sovereignty must be as well. But how exactly are these concepts constantly in a state of transformation?

The primary definition of the noun "citizenship" is "the position or status of being a citizen" especially as a legal status synonymous with nationality, typically relating to the rights to live and reside in a given nation state, participate in voting, and being subject to taxation.¹ Citizenship, in this conception, is intrinsically tied to the nation-state and legal processes. Under this definition of citizenship, to be a citizen you must be formally recognized by the government,

¹ "Citizenship, n." *Oxford English Dictionary*. Located at <https://www-oed-com.ezprox.bard.edu/view/Entry/33521?redirectedFrom=citizenship#eid>

usually in terms of passport acquisition and social security identification. Citizenship is a status. And that status is definite, guaranteed, and an instrument of both inclusion (for the citizen) but exclusion (for the non-citizen). However, there is also the secondary definition of “citizenship” as “engagement in the duties and responsibilities of a member of a society.”² This definition of citizenship expresses the noun as an action or a practice. This definition of citizenship is not as inherently exclusive, because anyone can be held to the obligations, duties and responsibilities of any society they see themselves as a member of. When analyzing citizenship historically, it is obvious that citizenship is both. Participating in citizenship as a practice could end in shifting who is included in citizenship as a status. Some of the most obvious examples of this in history include the mid 19th century suffragette movements and illegal voting resulting in women having full access to voting rights, or the Civil Rights Movement in the Deep South resulting in the end of legal segregation. Through the action of citizenship as practice, we can see in these examples that citizenship as status was changed. A new political peoplehood was created, particularities under the law were no more, and there was a shift of what identities were considered common and compatible with an overarching national sentiment.

Attempting to make the particular or the private enter into the realm of the common or the public is the very act of expanding citizenship. Identities that are viewed as commonalities between citizens work to not only strengthen the bonds between the people of a given society, but through this bond-building, there is also a recognition of these identities, and thus the duty to protect these identities influence policy and legislation. As Michael Walzer states, citizenship promotes an idea that people have “stronger duties” to those whom they share a “common life”

² “Citizenship, n.” *Oxford English Dictionary*.

with³. Once an identity is viewed as the common, it has successfully entered into that which is considered the general will, and would ideally be protected under legislation because it promotes the common good of all. The risks of having certain identities dictated as particularities and delegated to the private sphere is that they are not recognized as that which is universal and common, and are thus viewed as threats to the common life of the citizenry and are absent from the realm of politics.

And as the globalization of our world continues to increase in this modern, interconnected, and technologically advanced age, “new actors, sites, and scales of citizenship have emerged that complicate the ways in which citizenship is enacted not as only membership but also as claims.”⁴ In this view, the political realm is no longer merely constituted of a state’s legal subjects, but exceeds them. Migrants and refugees - two groups that lack formal legal citizenship status from the state - have now been able to possess political agency and participate in practices and acts of citizenship. Due to the globalization of societies, there has been an increase in examples of rights of citizenship being invoked by those who are not deemed citizens by the state. Judith Butler states that there has been an “ongoing articulation of universality”⁵ in the modern discourse surrounding citizenship, as these instances of citizenship as a practice done by non-citizens or those with only partial rights to legal citizenship seem to increase in recognition. The universal nature of citizenship has not been “fully or finally made”⁶ because “the universal can be articulated only in response to a challenge from it’s own outside.”⁷

³ Michael Walzer, “Membership,” in *Spheres of Justice: A Defense of Pluralism and Equality* (USA: Basic Books, 1983), 33.

⁴ Engin F. Isin, “Citizenship in flux: The figure of the activist citizen.” *Subjectivity* 29, (2009): 370.

⁵ Judith Butler, “Universality in Culture” in *For Love of Country?* by Martha C. Nussbaum (Boston: Beacon Press, 1996), 51.

⁶ Butler, “Universality in Culture,” 46.

⁷ Butler, “Universality in Culture,” 49.

Because citizenship is only expanded through this challenge from the outside, it is reliant on an outside - or rather, outsiders - to keep expanding. This is the paradox of the ideal of universality. The universality of citizenship - as in giving equitable rights and status to all members of a given society - is an ideal that is constantly being progressed towards, but can never reach full articulation. Because citizenship as legal status is inherently exclusionary - clearly stating who is included as a member and who is not - the ideal of universality can never reach true realization. Instead, legal citizenship will always exist as an unfinished process striving towards this goal of total universality, always transforming, always in flux, and never reaching totality.

The necessary and persistent fluctuation of citizenship as a process relates to the process of political refundings. With every fluctuation of citizenship, a political refunding occurs. A political refunding is when the people of a particular group, society, or nation is suddenly reworked; the people of yesterday are no longer the same people of today, which may not be the same people of tomorrow. A political refunding usually includes a greater inclusion of who the people are, what qualities the people bear, what the people look like, act like, and value. To look at political refundings in a very narrow and simple lense, one could look at the expansion of voting rights. The expansion of voting or other rights is not in itself a political refunding, but it hints towards the fact that a political refunding had occurred prior to legislation. When women and black people were legally allowed to participate in the act of voting in the United States, the legal definition and the composition of who the people are was reworked and redefined. But this reworking and redefinition was purely in a legal, institutional sense; the political peoplehood had most likely shifted to include those parties a long time prior to any legislation. The people were refunded, and then the people's actions allowed for the push that caused changes in legal

definition of the term “people”. Political refoundings aren’t merely an expansion of rights. Instead, an expansion of rights is the culmination of a political refounding. To look at political refoundings as an expansion of rights is to simplify the issue and to link it to the structures of the state above all. Tracking the concrete examples of rights acquisition and expansions makes the inner reworkings of the people seem a bit more tangible and verifiable, but in actuality, rights expansions act as proof that political refoundings occurred in the populace prior to change in legal structures. The expansion of rights is not the inception of a political refounding but rather it is the product or end goal of a refounding. The expansion of rights become relics of political refoundings, mere evidence and proof that one had occurred prior to change in law that allowed for that law to become manifest.

Refounding and redefining the people work through aspects of commonality and unity that exist outside of and separate from the norms and laws of the established constitution of a nation-state. The act of refounding appeals to a power of the people that existed before notions of national identity; political refoundings of the people are the work of localism and destabilize the greater institutions in place. It is local because it works through the average, common member of a given society, it is destabilizing because it creates its own channels and methods of expression that are not part of the institutionalized system. In a sense, political refoundings of the people are an expansion of the local, a direct result of the clash that occurs when the local sphere challenges the authority of the ruling institutions, and are completely independent from previous nationalist associations.

Section II: Rousseau's Lawgiver and Insurgent Universality as Lawgiving

When considering political foundings or the inceptions of societies, obviously one should refer back to the great social contract theorists of the past. Jean-Jacques Rousseau's *The Social Contract* includes extensive theory on the power of the people, common and particular wills, the institution of civil religion, and the way political societies are founded. These Rousseauian concepts became cornerstones of many - if not all - modern democratic societies of today. For these reasons, I will begin my theoretical pursuits with him.

The fundamental principle that Rousseau's social contract theory is founded upon is the general will and common good of all, as well as the Civil Religion. According to Rousseau's philosophy, all democratic modern nation states operate through concepts of the private and the public. It is necessary to separate the private, particulars of life from the general public and wellbeing of all in order to form a society in which the citizens who author the laws of the government might do so with the idea of the common good for all members of society in mind. If the law becomes a reflection of the collective will, man will always rule thyself. Therefore, there is no more tyranny in government since one returns to being the master of one's self and cannot be at odds with one's own will. The general will is that which is for the common good of all, while private interests are viewed as the antithesis of that, merely a collection of particular wills⁸. Rousseau makes it clear that the general will is not the will of the majority oppressing a minority because there is no individualism in the law⁹. In order for true, fully realized democracy to be institutionalized in a society, there must be a surrender of private interests¹⁰.

⁸ Jean-Jacques Rousseau, *The Social Contract*. Edited by Jonathan Bennett. Ebook (2017), 14.

⁹ Rousseau, *The Social Contract*, 14.

¹⁰ Rousseau, *The Social Contract*, 14.

Rousseau also states the need for the institution of a Civil Religion in order for loyalty and membership in a society to be expressed and upheld. He states:

So there's a purely civil profession of faith, the content of which should be fixed by the sovereign—not exactly as religious dogmas, but as social sentiments that are needed for to be a good citizen and a faithful subject.¹¹

This quote expresses Rousseau's idea of a Civil Religion. Rousseau states that there is a "civil profession of faith", thereby giving a divine nature or sanctity to the state. Saying that all "good citizens" or "faithful subjects" must obey and profess this faith creates the idea that the nation is divine and must be honored like a god. This statement also puts the state above personal religion, placing an emphasis on the idea of national religion. This national religion would be the "civil profession of faith", a common religion that bonds all citizens under one church and one god, that god being the state. Because Civil Religion bonds us all under our veneration of the nation, it acts as a "social sentiment"; that is, we are all unified in society under our national pride and religion. The privatization of particular wills and exaltation of the general will become this Civil Religion. It is through the emphasis of the general will that the Civil Religion comes into being. Civil Religion is much like a nationality; it is the manifestation of the commonalities, bonds, duties and obligations that the members of a given society hold to their fellow citizens. To be an upstanding and lawful citizen and member, Rousseau believes that one must adhere to and participate in the veneration of the Civil Religion, which in turn reflects the values and interests of the general will. Object worship and veneration that express the nature of the Civil Religion is also important to Rousseau. These objects of Civil Religion are great displays and symbols of patriotism and nationality, such as flags, weapons, warships, the sacred scriptures of

¹¹ Rousseau, *The Social Contract*, 72.

the nation like constitutions, declarations, treaties and presidential speeches, the fireworks on the Fourth of July, and the statues and busts of fallen national heroes. The imagery of the Civil Religion becomes a symbol for the Civil Religion itself. By replicating these images or installing these national objects of veneration throughout a given society, there is a vast and quick propagation of the Civil Religion, which in turn causes a propagation of the general will, the common bonds, and identities, values, and customs that are deemed acceptable in the public sphere of life. The creation of a general will and a Civil Religion depend entirely on a social disintegration and a social reconstruction, but how can social reconstruction happen if there was no prior conception of common bonds between the people in a society? How do the people recognize each other as such? Who decides what the general will and the Civil Religion encompass?

Rousseau introduces the concept of a legislator or lawgiver to remedy this unknowable phenomenon of the creation of societies. Rousseau states that in order for a people to become a people, first a lawgiver must come to unify the people and give them the right to form a body politic. But, to Rousseau, becoming the lawgiver is a daunting task filled with great responsibility:

Someone who ventures to tackle the task of making a people needs to have a sense of being able to change human nature, so to speak—to transform each individual, who on his own is a complete and solitary whole, into part of a greater whole from which he in a way receives his life and his being; to alter man’s constitution in order to strengthen it; to replace the physical and independent existence that nature gave us by a partial and moral existence.¹²

The “someone” that Rousseau is addressing is someone who makes a people and robs them of their previous state of nature. This “someone” is Rousseau’s concept of the lawgiver or

¹² Rousseau, *The Social Contract*, 20.

legislator. Stating that they “need to have a sense of being able to change human nature” means that giving common bonds and institutions is similar to the act of creation, suggesting that the lawgiver must be nearly god-like in abilities to rewire a fractured group of individuals into a unified association of citizens. Rousseau’s lawgiver has an almost divine quality about them because they create a new reality and new world. Beings are no longer singular individuals, but members of a greater whole. Rousseau goes on to describe the “complete” and “solitary” wholeness of an individual, expressing the idea that in the state of nature, man needs no government to perfect him; man is most perfect when he is solitary and uncorrupted by society. However, society ushers man into being “part of a greater whole” from which man “receives his life and his being”. These phrases express that when man is ushered into a civilization, he now has a role to play in order to contribute to society; that role is not a role he chooses, but a role that is projected onto him by other members of society. These projections include the general will, the common good of all, and the Civil Religion. The “partial” existence is man’s existence in a society, stating that society oftentimes restricts us from the fullness of life, leaving us only with a “partial” existence and experience. The restrictions that Rousseau is describing is the separation of particular identities and private wills from common identities and the general will, a separation that every society forces upon its members.

In a certain sense, Rousseau’s lawgiver authors citizenship and membership by allowing people to recognize each other as members of a particular society. The lawgiver is a unifying force and the existence of a lawgiver is the marker of the creation of any society that is and ever will be. The existence and acts of the lawgiver are essentially the inception of a people; the founding moment of a given population and the creation of the commonalities that bond them.

Rousseau gives certain non-negotiable qualities to the lawgiver. Rousseau's lawgiver: [1] is of common descent, [2] is someone who wishes to change the nature of man, [3] is someone who creates a moral and ethics system to abide by, [4] is someone who wishes to bring about a unified society and membership system, and [5] only emerges at the inception of a society, never to be heard of or acknowledged again. The lawgiver is someone who is of common descent, as someone who already holds authority over men cannot act in impartiality or in accordance with the general will¹³; the lawgiver is someone who wishes to "change man's constitution and strengthen it," someone who wishes to give man a "partial and moral existence", someone who attempts to "transform each individual, who on his own is a complete and solitary whole, into part of a greater whole from which he in a way receives his life and his being"¹⁴. Therefore, the lawgiver is essentially someone who finds an empty role of power and responsibility in a budding society and fills it. Rousseau's lawgiver is a common man of common rank who notices the opportunity to step into a position of power and make strangers recognize each other as kin. The lawgiver authors commonalities, bonds, and local kinship. The lawgiver gives people a name, virtues, duties and obligations towards one another. The lawgiver transforms the people from a fractured state into a whole. The lawgiver gives one a cultural language to operate by through inserting a new morality into the public sphere, authors a sign system of their own, and shifts where power and authority is located, if only temporarily.

However, a flaw in Rousseau's logic is he fails to notice or mention the possibility and potentiality of a political refounding. The lawgiver, as Rousseau describes them, is a being fixed in the beginning of society building. The lawgiver does not appear again other than to form the

¹³ Rousseau, *The Social Contract*, 20.

¹⁴ Rousseau, *The Social Contract*, 20

initial people of a society. He never mentions that there are redefinitions of the people, or acknowledges that political peoplehood can change and transform, becoming more inclusive or exclusive. Rousseau's notion of the people is fixed and static, and this notion is the greatest limitation to his theory of the lawgiver. Rousseau's theory on the lawgiver is rooted in a static conception of citizenship, a citizenship that is unchanging and inflexible. But citizenship is not static. There's endless proof that citizenship changes and fluctuates. That proof comes in the form of legal redefinitions of the people, the granting of rights to the historically disenfranchised, mass demonstrations in support of a more inclusive conception of the people, etc. But if citizenship isn't static, like Rousseau believes it is, and it is always changing, then what, or who, makes these changes possible?

The being that makes these changes possible is a lawgiver that differs from the one Rousseau imagines - a modern lawgiver that steps into the role that Rousseau describes but reauthors the commonalities amongst a people and redefines a society that is already in existence. Rousseau's theory surrounding the lawgiver fails to recognize the fact that the people are always going through cycles of refounding and redefining, therefore, it must be possible for another lawgiver to emerge in a society to begin this process of refounding. The lawgiver and the act of lawgiving is an unfinished process because citizenship is not static like Rousseau assumes it is. If the people of a given society is always changing and transforming, including and excluding in different ways, and is always redefining, then there must be a lawgiver that emerges with every new iteration. A new, modern lawgiver is reintroduced into a society whenever a political refounding occurs, as they are the catalyst for such an event to happen. Because citizenship is always morphing and will never reach a definite end state due to the ways

it is always progressing towards some semblance of universality, there must exist a lawgiver who ushers in these redefinitions of the political peoplehood. The citizenry and the people are always being refounded; the makeup of a body politic changes and expands endlessly. Those that were once not considered citizens at the inception of the nation state can be considered citizens in the future if their identity is able to be viewed as the common. Just as Butler has argued, citizenship is a process that is always expanding, it is always left unfinished, especially in this age dominated by the contemporary normative order of universal citizenship. There must exist an outside in order for there to be an inside; there must be non-citizens in order for there to be citizens. So long as there exists a standard that all nation-states must strive towards a universal conception of citizenship, there will be an influx of outsiders becoming insiders, non citizens becoming citizens, and thus a lawgiver to initiate that change.

The concept and actions of a modern lawgiver isn't isolated to Rousseauian theory alone; other theorists have pointed out moments in history where people have stepped into the role of the modern lawgiver to bring about a new political peoplehood to a given society. The acts of lawgiving, which is also the act of founding or refounding a people, has been theorized by Massimiliano Tomba under the name of "insurgent universality". Although Tomba's theory of insurgent universality is not a response to nor stems from Rousseauian concepts, lawgiving and insurgent universality have some clear overlaps. Tomba speaks of insurgent universality as something similar to the political refoundings and revolutionary democratic moments discussed in this thesis; insurgent universality is "when the practice of democracy exceeds the constitutional shell of the state."¹⁵ Tomba's text follows the theory of insurgent universality

¹⁵ Massimiliano Tomba, *Insurgent Universality: an Alternative Legacy of Modernity* (New York: Oxford University Press, 2019) 1.

during four key moments in history: the French Revolution, the Paris Commune, the Soviet Constitution of 1918, and the Zapatista Rebellion. These are also key historical moments during which the people were being redefined, someone was fulfilling the role of the lawgiver, there was a manifestation of political power occurring outside of the confines of the authorized government institution, and the people were being united through localism, as opposed to institutions and nationalism. *Insurgent Universality* describes how during revolutionary moments of reauthoring the peoplehood, the people relied on “archaic”¹⁶ associations of the people and the local that existed before the modern nation-state. Those four key moments in history that Tomba discusses proves that lawgivers can and do appear in an already created society in order to reshape it and give it new meaning. Tomba’s four key moments of insurgent universality are also four key pivotal moments throughout history when people have stepped into the position that Rousseau describes and attributes to the character of the lawgiver. To take the first example of the French Revolution, there must have been a modern lawgiver who gathered the people of the Third Estate and made them recognize one another not only as individuals with common socioeconomic backgrounds, but members of the French state deserving of the same rights and equality of the nobility, aristocrats, clergy and royalty. The lawgiver in that particular situation was the first person to suggest that all men are born free and remain free and equal, thus igniting the spark that led to the French Revolution and beginning the process of that political refounding. The political refounding that occurred because of the French Revolution was that the ultimate source of power and authority was no longer located in the divine right of kings, but in the hands of the commonfolk. The general will was no longer the will of the absolutist king,

¹⁶ Tomba, *Insurgent Universality*, 26.

but instead the will of the Third Estate. There was even a reworking of the Civil Religion and the symbolic objects associated with it. During the French Revolution, symbols of the French monarchy, such as the fleur-de-lys, were scrubbed from all visible areas. Phrygian caps and tricolor cockades become the new objects of veneration and tools for the propagation of the new Civil Religion. The Civil Religion of the French Revolution still thrives today, as the song *La Marseillaise* has been the country's national anthem since 1795. Through analyzing and picking apart Tomba's example of the French Revolution, it is clear that the revolutionaries were not only participating in what Tomba calls insurgent universality, but that they were also participating in a political refounding, meaning a modern lawgiver must have been involved. Essentially, Tomba's insurgent universalism is an instance of political refounding, which can only be initiated through the work of a modern Rousseauian lawgiver.

Insurgent universality and Rousseauian lawgiving both appeal to the ties and connections at the heart of society building that are separate from ideas of national identity or legal status. Rousseau's lawgiver exists before a society is created and creates archaic associations to appeal to the commonalities of a people. These associations that Rousseau's lawgiver creates aren't linked to ties to a particular nation because the lawgiver exists before any sense of nationalism is tangible amongst the people. In a sense, Rousseau's lawgiver gives the people nationalism, or a national identity. It is only through lawgiving that a national sentiment might become manifest. But because Rousseau's lawgiver exists before the inception of a nation-state and merely helps to usher in the creation of a nation-state, it is clear that the associations the lawgiver creates aren't dependent on or even necessarily linked to a nation-state. When Rousseau theorized about the lawgiver, he viewed the lawgiver as the person who begins a society or creates a people. A

people can be created independent from a nation-state and be purely local, as in the example of insurgent universality. Tomba's insurgent universality is the hearkening back to the archaic associations that the lawgiver founds societies upon. It is through the mechanisms of lawgiving that insurgent universality works to create and found a people or movement that is separate from the overarching national sentiments of a given place or time in history. Thus that creation of commonalities between members in a society is not dependent on state recognition or approval, nor is the state the sole maker of a people. Understanding this as true would mean that membership in a society and the refounding of a people is a process that can and does occur completely independent from the nation and from institutions; it is a local process, and thus a process that need not be legitimized through or acknowledged by the state. Tomba also states:

The universality that I call insurgent has to do with the democratic excess that dis-orders an existing order and gives rise not to chaos, like the theories of the social contract prescribe, but to a new institutional fabric. The democratic excess is such that it goes beyond the constitutional armor of the representative state and calls into play a plurality of powers to which citizens have access, not through the funnel of national citizenship but in daily political practice. This abandons the grounds of the politics of recognition; it does not ask for inclusion but, rather, practices a universal political citizenship that exceeds the limits of legal citizenship and calls into question the forms of dominion, not only in the political sphere but also in the social order.¹⁷

In this excerpt, the "democratic excess" of the people is that of the general will of the people, as Rousseau would say. And it is when the general will or democratic excess of the people begins to misalign itself from the "existing order" that the people give way to a "new institutional fabric". Therefore, once the people recognize that there is a new general will surfacing amongst them due to the acknowledgment of wills previously deemed private or particular, that general will goes on to reauthor and change the established institutions. First the people are reimagined,

¹⁷ Tomba, *Insurgent Universality*, 21.

and then the refounded people inevitably cause institutional change. Tomba makes the distinction that the power of insurgent universality is not found through rights given by the state or through the “funnel of national citizenship”, but rather the members of the society have access to these “plurality of powers” through their daily political practices. This distinction between power being given by national citizenship and power being given by political practices highlights that those who are not considered legitimate members of a society by the state are still able to engage in political practices, engage in democratic moments, and shape the institutional fabric of a given society. Challenging the “forms of dominion” in the political and social spheres, questioning who the people are, reshaping and reauthoring the people are all inherently political acts that manifest on a local level; these acts have both theoretical and material consequences on the greater institutions of a given society. Therefore, the reauthoring of a people always effects and shapes the realm of politics, exactly because it does not seek to gain legitimate recognition from the institutions at place, but instead highlights and brings to light the limits and constraints of said flawed institutions. Insurgent universality is political refounding, and political refounding of the people occurs only when the people have outgrown the established government.

Tomba states that coming to understand these key moments of revolutionary history “is about considering the practice of insurgents as theory in action that goes to constitute the collective ink with which the political documents of an insurgency are written”. Insurgent universality is mainly anonymous, because when democracy is real, its practice does not need “great personalities or leaders.”¹⁸ When applying this logic to that of political refounding, it is

¹⁸ Tomba, *Insurgent Universality*, 2.

obvious that the remaking and defining of a people does not need the legitimation of the government or of official documents, declarations, or manifestos. It is the political potentiality and agency of the “insurgents” or actors that gives the power and legitimacy to these documents. Tomba is describing and offering a new narrative to well-known revolutionary moments in history that have already been studied greatly, whose documents have already been legitimized and withstood the test of time; however, what if we apply this logic to revolutionary moments and political refoundings of the people that are currently occurring but haven’t been fully realized yet? What are the qualities that characterize these “insurgents”, these modern lawgivers? And how might we begin to identify them?

Section III: The Modern Lawgiver

The modern lawgiver is any person or group of people that enacts or causes a refounding of the people. They are the agent and mechanism by which the refoundings occur. They are the catalyst for such political inclusion. The modern lawgiver holds five certain key characteristics and attributes, which are outlined as such: [1] the modern lawgiver is local, nameless, common; [2] the modern lawgiver holds no legitimate, institutional power; [3] the modern lawgiver does not need to have citizenship authorized by a nation-state; [4] the modern lawgiver participates in claim-making; and [5] the modern lawgiver can only be known retrospectively and whose products of the refounding aren't created at the moment of making the claim, but rather when their vision gains traction in the minds of the people.

The first characteristic is that the modern lawgiver is local, nameless, and common. By using the term local as a descriptor, I am stating that the modern lawgiver operates through individualistic activism in their community; they do not operate through the overarching institutions already in place. There is a sense of political localism to their actions. The modern lawgiver acts through grassroots operations, appealing to their community and collectivity on a local level before their influence reaches a larger audience. Therefore, because the modern lawgiver is local, the lawgiver must be a grassroots organizer in a sense. By using the term nameless and common as descriptors, I stress that the modern lawgiver is an ordinary person of ordinary background. They are nameless in the sense that they hold no titles, or sometimes even formal recordings of their actual name. They are common because they exemplify all the commonalities of the political peoplehood they are trying to bring into being. The modern lawgiver is functionally anonymous; they might never be truly named or truly known. Just as

Tomba states, true democratic practice is largely anonymous. The modern lawgiver of a refounding could essentially be any single ordinary person that that refounding includes. The modern lawgiver holds no title, their name holds no weight. They are not a particularity of the society, they are any person deemed a neutral and virtually nondescript actor, exhibiting and stressing only the commonalities of all members of that refound society, and none of the differences.

It is essential that the modern lawgiver be an entity that is deemed local, nameless, and common because the modern lawgiver should be an example of any person that might exist in this particular society that they are reimagining. The modern lawgiver must be free from any and all particularities because they must exhibit the neutral qualities and emphasize the strong commonalities that any member of said society holds. The faceless and anonymous nature of the lawgiver allows for their struggles and passions to be appropriated by all members, thus leading to the lawgiver's reimagination of a given society taking root in the minds of the people. The modern lawgiver must be viewed as though they could be anyone in order to fully convince the people to take action.

The second characteristic is that the modern lawgiver holds no legitimate institutional power. Therefore, the modern lawgiver cannot already be an agent of state power, like a politician, a member of law enforcement, or military personnel. Similarly, since class and socioeconomic standing relate to dynamics of power and authority, the modern lawgiver must not be a member of the bourgeois class. If the modern lawgiver was an agent of state power, and held great wealth, these characteristics would conflict with the assertion that the lawgiver must be nameless and common. If the lawgiver already held great power and authority in the society

before or after the refounding, it could be argued that the lawgiver is only attempting to enrich their own personal standing, or is operating on their own personal agenda. Ensuring that the lawgiver holds no legitimate institutional power also ensures that the modern lawgiver is acting to bring into fruition a society that is better for all, not just some, and not just themselves. Power and authority would corrupt the vision and actions of the lawgiver. A lawgiver striving to hold institutional power and integrate into the elite class as opposed to breaking down institutions would be no lawgiver at all.

It is essential that the lawgiver not be considered part of the upper-class because if that were the case, the actions of the lawgiver may be viewed as merely reinscribing pre-existent social hierarchies. The lawgiver being of a middle or low class bracket and holding no political authority shows that the lawgiver is common with the people in their disempowerment. It is through the acknowledgement of mutual and common struggle that the lawgiver is able to empower and excite the people towards action.

The third characteristic is that the modern lawgiver does not need to have citizenship authorized by a nation-state. Because the modern lawgiver acts through local means and operations that do not work through but against the constraints and limitations of the greater, ruling institutions, the modern lawgiver does not need their membership in the people to be authorized by any government, group, organization, etc. The modern lawgiver's membership is self-determined. It is because they are the lawgiver that they are now a member of the people, if they weren't already before. The modern lawgiver does not need government-given membership or acknowledgement. The modern lawgiver acts in order to change the institutions in place and

reconceive who the people are. Therefore, citizenship - as a lawgiver - is characterized by action and participation, not on documentation or legal processes.

It is important to recognize that the modern lawgiver can be someone that does not have formal state given citizenship in their given society because it stresses that the modern lawgiver does not work through the limitations of government and state power, but against it. The modern lawgiver is critical of current institutions and establishments. Through the act of lawgiving, the modern lawgiver is attempting to do away with and reconstruct the limits and boundaries of the political peoplehood.

The fourth characteristic is that the modern lawgiver participates in claim-making. Political claim-making is the process in which a subject asserts the existence of a societal problem that should or must be improved upon; these problems might be asserted through morally charged demands on the right to certain rights or these problems might be ameliorated through an attempt to construct a new normative definition to a given situation that necessitates change and action. In this new conceptualization of the lawgiver, the modern lawgiver is someone that participates in political claim-making, but not all participants of political claim-making are lawgivers. Lawgiving is not simply making a claim that challenges or pushes the boundaries of what the state authorizes, but lawgiving creates a new culture in politics, which relates to the final characteristic of the modern lawgiver. The modern lawgiver is someone who speaks a claim into existence, thus gifting the people the political language to go on to influence and disrupt the monotony of current politics. Through the modern lawgiver's speech acts, they are able to ignite a new movement in political claim-making. Political claim-making by a modern lawgiver is an essential part to any nation or society, as processes of claim-making keep

politics from stagnation. By people demanding access to certain rights or stating that they have claim to certain benefits of citizenship, the people are able to influence and change the course of politics. Political claim-making, when done by a lawgiver, changes the landscape of politics by inserting a new ethicality or morality.

The act of political claim-making is an essential step for the lawgiver to be a lawgiver. If the lawgiver did not participate in claim-making that would go on to create a new culture in politics (the fifth characteristic), then the lawgiver would fail to be a lawgiver. It is through the invocation and appropriation of existing rights by people who are not receivers of these rights that the act of lawgiving comes about. This characteristic, as well as the final characteristic, are the most crucial characteristics of the modern lawgiver.

Finally, the fifth characteristic is that the modern lawgiver can only be known retrospectively and the products of their refounding aren't created at the moment of making the claim, but rather when their vision gains traction in the minds of the people. Like previously stated, modern lawgiving creates a new culture in politics. It influences and reshapes the previous rhetoric, and it founds new norms. Modern lawgiving might not produce immediate change but it gives the tools and language necessary to do so. Lawgiving changes what is viewed as the general will and the Civil Religion, oftentimes leading to the creation of its own novel symbols and objects of veneration or the appropriation and editing of classic examples that already exist. Lawgiving is the attempt to bring something into being, to create a possible future; therefore, the modern lawgiver does not know that they've done their work unless there is proof that their vision of society takes hold in the minds' of the people. For these reasons, no one can be acknowledged as acting in the position of the lawgiver at the moment that they are acting; the

title of lawgiver is something that can only be assumed retrospectively. The lawgiver always exists in the past. This is what complicates but also reifies the assertion that Tomba makes about the insurgents always being nameless, anonymous constituents of the political documents of an insurgency; sometimes the documents that acknowledge and legitimize the reauthoring of a people aren't written and institutionalized until long after the revolution first begins.

Section IV: The Modern Lawgiver, Citizenship, and Democracy

The modern lawgiver as a political actor reveals both the tensions between and the interdependence of revolutionary politics and politics as usual. The modern lawgiver is not only the catalyst of societal change and redefinition, but they exist as the product of the clash between the people and the institution. When the people outgrow the limits and conformity of the institutions already in place, a new modern lawgiver emerges. The modern lawgiver fills the gaps left in Rousseau's social contract theory and makes possible a society that is constantly striving towards a more just future.

Take for example, Rousseau's theory of the general will. One great criticism of the general will is that it can easily succumb to prejudiced group think, silencing and excluding others based on the overarching power structures of racism, sexism, xenophobia, etc. Iris Marion Young, in her essay "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship", is critical of these Rousseauian concepts. By viewing equality as sameness under the law or in status of citizenship, Young argues that true social equality cannot be attained because the particular is thus viewed as having no place in the realm of politics. Young states that when only generality and commonality of the citizenry is promoted, homogeneity is also promoted, and thus difference is seen as a threat to a functioning society. To be perceived as having an impartial general perspective, the interests of the privileged are often the only interests promoted. The only neutral bodies are those that align with the overarching power structures that exist: the wealthy, the elite, the white, the able bodied, and those that are adjacent to these identities. These identities are all particular identities masked as the universal, the common, and become ideals forced onto the rest of the public. If the public is the universal, the general, and

the common, then public participation requires one to promote sameness, thus marginalizing oppressed groups and giving them no way to articulate their difference without being viewed as challenging the citizenship of all.

So then one must consider, how does one begin to insert the particular into the public realm of politics considering the challenges that these processes will inevitably encounter? How does the modern lawgiver work, what do the acts of attempting to make the particular common look like, and what are these acts of modern lawgiving productive of? What do these acts symbolize in relation to these larger processes of citizenship and democracy?

By attempting to expand the notions of what is public by inserting identities and relations previously delegated to the private sphere into the public sphere, the modern lawgiver is attempting to shift the commonalities present amongst all citizens, what all citizens have invested stakes in, and thus expanding citizenship and reauthoring it in some way. Attempting to make the particular common through modern lawgiving would then mean carving out a place for one's self in the current confines of citizenship in order to expand it; and the instrument of this carving would be democratic acts. However, the institutions of government are a poor framework for those who are not yet considered in the overarching universal identity of the common. Therefore, these acts must happen outside of the limits of the government and state institutions; they are revolutionary and radical in this way. The mechanism by which the modern lawgiver expands citizenship through these radically transgressive acts are a moment of democracy; a democracy that cannot be instituted or regulated, the unadulterated speech of the people separate from the limits and confines of institutions. It is only through revolutionary democratic acts that one might ignite the movement needed to alter the stagnancy of the institutions in place, disturb

that which is deemed the universal, and influence the future of politics to become more inclusive. And it is through this never finished process of including that a society can strive to become more just. But how does one conceive of a democracy separate from the institutions of government?

One conception of this is fugitive democracy, popularized by the theorist Sheldon Wolin. Wolin makes a distinction between fugitive democracy and an institutionalized, constitutional form of democracy. Constitutional democracy just reinforces and legitimizes existing power structures in society. However, fugitive democracy is the idea of democracy as a moment, not a form¹⁹. It is not intended to be turned into a system of government, but is rather the efforts and actions to change and alter a system of government through community action. Wolin states that “Democracy was born in transgressive acts, for the *demos* could not participate in power without shattering the class, status, and value systems by which it was excluded”²⁰; therefore, democracy was never something capable of being institutionalized, but rather was always a temporary and revolutionary power exchange. Wolin defines democracy as “a project concerned with the political potentialities of ordinary citizens, that is with their possibilities for becoming political beings through the self discovery of common concerns and of modes of action for realizing them”²¹. Democracy is meant to erode the structures that bar access from the political experience and make it exclusive; it is collaborative in the way it demands that all subjects play a role in deciding their own governance. In all forms of government, there are groups that are otherized,

¹⁹ Sheldon S. Wolin, “Fugitive Democracy” from *Constellations Vol. 1, No. 1* (Cambridge, MA: Blackwell Publishers, 1994), 19.

²⁰ Wolin, “Fugitive Democracy”, 17.

²¹ Wolin, “Fugitive Democracy”, 11.

excluded, and exploited, but through acts of revolutionary transgression they are able to enter and take part of the political²². Wolin differentiates between “politics” and the “political”:

I shall take the political to be an expression of the idea that a free society composed of diversities can nonetheless enjoy moments of commonality when, through public deliberations, collective power is used to promote or protect the wellbeing of the collectivity. Politics refers to the legitimized and public contestation, primarily by organized and unequal social powers over access to the resources available to the public authorities of the collectivity. Politics is continuous, ceaseless, and endless. In contrast, the political is episodic, rare.²³

Democracy does not aim to end diversities or not acknowledge difference, but is manifested when those previously barred from the citizenry make their claims for involvement. The political is caused when the ruling ideology is challenged. Wolin believes that “ordinary individuals are capable of creating new cultural patterns of commonality at any moment”²⁴; these new cultural patterns of commonality can be understood as a reauthoring of citizenship, who is excluded and included, bringing the private into the forefront of public affairs and matters, thus producing revolutionary democracy that can be manifested and implemented into a society. Therefore, it is obvious from this description, that the modern lawgiver participates in and brings about a moment of fugitive democracy, and that fugitive democracy is synonymous with political refundings. But the modern lawgiver does not do this alone; the true power of this temporary political moment rests in the people that the lawgiver brings into being.

One unique aspect of the concept of the lawgiver is that although the lawgiver is the one that authors the laws, they hold no right to legislate; that is only for the people to decide²⁵.

Therefore, the lawgiver engages in the process of claim making, but it is only through the

²² Wolin, “Fugitive Democracy”, 18.

²³ Wolin, “Fugitive Democracy”, 11.

²⁴ Wolin, “Fugitive Democracy”, 24.

²⁵ Rousseau, *The Social Contract*, 21.

people's participation in the government that these claims might be authorized, legitimized, and legislated, because the people are the absolute source of power. The modern lawgiver commits the first speech act, and the people bring this speech act into being. The modern lawgiver does not wholly erode the structures that exist in their society and are not able to do away with cultural norms and social regulation, but instead they are able to perpetuate new norms that better allow for dissent and political action. The existence of the modern lawgiver is an answer to the critique of Rousseau's theory on the general will; modern lawgivers are the catalysts that save societies from the stagnancy and omnipotence of ruling institutions and exclusive, conforming, oppressive wills. They may not wholly do away with the sentiments of the past or fully break the chains of authority and social hierarchy, but they exist and come into being as a tool to make flexible that which seems rigid and fixed. The modern lawgiver is the first revolutionary for a new people. The modern lawgiver is a utopian, a dreamer, and a creator.

These moments of lawgiving *are* moments of revolutionary democracy: instances where the spirit and the will of the people are suspended in the temporality of the political moment, influencing the future of politics to come and fully operating outside the given boundaries of authority. They are also moments of insurgent universalism, showing that "What emerges in insurgent universality, when the temporality of the state is interrupted, is not a wasteland but, rather, a society rich in groupings and associations that are entrusted with forms of self-government."²⁶ This relates to Tomba's theory that insurgent universality exists to give rise to a "new institutional fabric". The actions of the modern lawgiver, who is the wielder of insurgent universality, are to not only work against the institutions in place, break down the

²⁶ Tomba, *Insurgent Universality*, 29.

institutions in place, but also create new, better, more inclusive and more just institutions. The modern lawgiver offers us the tools necessary to reauthor our laws, our creeds, our values, and reshape society as we know it into a contemporary civil society that represents all of those who are now part of the people.

The modern lawgiver exists because citizenship is not stagnant and is not finished. The act of defining, including, and excluding the people from the citizenry will always be an unfinished, ever expanding and ever retracting process. Such is the nature of having membership oriented nation-states; these processes are bound to continue for as long as a people must be defined for there to be the existence of a state. The existence of the modern lawgiver proves that the fluctuations of citizenship is not wholly dependent on the state and its wishes, but on the will and passions of the people. Membership is not only guaranteed or asserted by and through the state. Although citizenship as a concept only exists because of the modern, territorial nation-state and its limitations in ensuring the rights of its “people”, the act of lawgiving proves that the people also play a role in defining who is a member. So citizenship is a concept unique to this nation-state system, but not wholly dominated by the overarching ruling institutions. The modern lawgiver is the giver of membership, a membership distinctly separate from the concept of institutional, state-given citizenship but also a membership that could influence that which is defined in the institutional, state-given citizenship.

The political potentiality of the modern lawgiver is the lawgiver’s most important characteristic. This relates to the comparison made about the difference between politics and the political. As said by Wolin, politics is the monotony of everyday institutionalized government, it is “ceaseless, endless”. It is oftentimes stagnant and routine and operates through the unequal

power structures that have already been put into place. The political is that which is “episodic and rare,” moments of “collective power” that are utilized to uplift the collectivity and create commonalities. The acts of the lawgiver are acts of the political, while the future influence of the lawgiver on a given society is that which is politics. Similarly, insurgent universality is an act of the political, that will go on to influence and shift the structures of power existing in the politics. These three things: the modern lawgiver, the insurgent, the true democratic moment; these three things are all the same in the way they interact with, influence, and change the monotony of institutions through the acts of the local. When politics change and adjust to make possible the future that the lawgiver is attempting to author, that is the same process of legitimizing that Rousseau describes. The modern lawgiver exists as a political being that engages with and influences the future of politics. This is also how the lawgiver relates to my conception of revolutionary democracy; when the modern lawgiver acts, they act in the political realm, and the political realm is the only space in which true revolutionary democracy exists. Therefore, the lawgiver is engaging in an act of fugitive democracy: a conception of democracy as a collaborative act and effort, not an institution or system of government but rather a temporary act of resistance or revolution that occurs during these clashes. And these acts of fugitive democracy are essential to the politics that Iris Marion Young supports. Democracy, in its truest form as the unadulterated speech of the people, is incompatible with institutions and impossible to capture within a system of government. There is no such thing as a wholly democratic system of government. However, it is through the temporary moment of unbridled democracy that all politics and all institutions are capable of change. Therefore, democracy can manifest temporarily in every society - no matter how undemocratic the institutions in place may

seem - as long as there are members to bring about that political moment. Democratic potentiality is within the grasps of all people. It is only through such acts by the lawgiver and such acts that constitute revolutionary democracy that the stagnancy of politics might be changed and the power structures might be disturbed or broken. One cannot have inclusive government or historically disenfranchised people involved in politics if it were not for the political, if it were not for fugitive democracy, if it were not for a new lawgiver to enter into a society and make particularities common amongst a people. All of these concepts are intertwined and dependent on one another to bring about a more just society.

Conclusion

The aim of this paper was to consider how outsiders come to be included in a membership community because I wanted to discover how identities that are deemed particular or incompatible with prevailing ideals of the common can attempt to become part of the public sphere in order to reveal a concept of democracy as a collaborative act and effort; not an institution or system of government, but rather a temporary act of resistance or revolution that occurs during these clashes. The identification of the role of the modern lawgiver as an agent and initiator of political refundings is an observation that can aid in the analysis of claim-making movements of the past, present, and future. Although modern lawgivers can never be known, named, or identified, the existence of such a person offers an alternate narrative and perspective to the histories of revolutions and political refundings that must be explored. The catalysts of every great revolution were not the names that everyone knows, but the person who gave the heroes and the legends the language to conceive of such a reality. The modern lawgiver commits the first act of speech, and the people manifest their utopia into reality. Lawgiving is not about institutional change but instead about confrontation and struggle, the making of a fleeting and transient political moment that is pure and unadulterated democracy.

Due to the constraints and challenges I faced while writing this senior project, I was unable to include a thorough and succinct case study of a contemporary instance of modern lawgiving and an attempt to make the particular common. My intentions were to analyze the events of *l'affaire du voile* or the headscarf controversy in France through the lense of the politics of refunding and the concept of the modern lawgiver. Applying the concept of the modern lawgiver onto this particular political situation reveals that these grade-school aged

students were modern lawgivers that succeeded in altering the political climate of their society, inserting a previously incompatible identity into the prevailing view of French nationalism and citizenship, and influencing the future of French politics and debate for years to come. These girls are of common origin, they hold no power or authority in the state. Their act of refusing to remove their headscarves is a morally charged claim, asserting that one shouldn't have to remove those identities deemed private in order to interact in public institutions, such as education. The girls are shaping the "greater whole" of society by inserting themselves and their identities into the public life and public affairs; not retiring these identities into private matters or particular associations but rather giving these identities a role where there historically hasn't been any place for it. These acts of refusal became a movement, sparked a conversation, inspired others to take a stance, and offered the people a choice to reshape what was previously viewed as common.

The girls participating in the headscarf controversy are engaging in the political that produces the conversation that might eventually reshape and influence everyday politics, just as the lawgiver essentially comes into the realm of politics in a temporary, episodic and rare moment to reauthor the constitution of the people. Therefore, the acts of the lawgiver and the acts of the participants of the headscarf controversy hold the same role: they disturb the monotony of the current system to strengthen and reshape it using morally charged claims and reauthoring the commonalities amongst the people to found a greater whole and body politic. Lawgiving is any act that attempts to make the particular common because making the particular common is a process of refounding and redefining the people. The girls involved in the

headscarf controversy are participating in the politics of founding, identifying themselves as both Muslim and French citizens and redefining the members of French society.

La Commission Stasi, named after the ombudsman of the French Republic, Bernard Stasi, of 2003²⁷ was held to discuss specifically the application of the principle of secularism in the public affairs of the nation of France in regards to the students being expelled, during which Stasi himself voiced concern over the idea that the veiled women were only veiled because it offered them a certain level of protection in their communities, protection that should only be guaranteed by the Republic itself. This statement thus complicates the idea of making the particular common. While the girls that were being expelled were appealing to their right to be able to wear religious clothing in public spaces, taking that which is deemed private into the public space, the state was concerned about the way these religious symbols challenged the authority of the state. It is not just that religion should be a private affair in a secular state, or that religion might be deemed divisive in a secular state, but the protection and community that they believe the veil holds is directly at odds with the work of the state; it invalidates the state and gives what only the state is supposed to guarantee. Whether or not Stasi's assertion that women only wear the veil because of the protection it gives is true does not matter, it only matters that this is the way in which the state perceives it. This aligns with Rousseau's concept of Civil Religion and a "civil profession of faith", how does one make the particular common when this particularity is seen as a threat to the overall sociability and validity of the Republic? How does one resolve these tensions? Do these tensions even need to be resolved, or are they part of the process of fugitive democracy that the clash of political refoundings causes? These

²⁷ Bernard Stasi, "Commission for reflection on the application of the principle of laïcité in the Republic," (Report, National Assembly, Paris, July 3 2003).

are the questions, elements, ideas, and subjects I had intended to expand on if circumstances had been different.

A particular moral dilemma my own research has brought to my attention is the nature of the modern lawgiver. Because of my own optimism and utopian views, I have always considered the nature of the modern lawgiver to be that of a valiant revolutionary, a dreamer, the type of person who witnesses the wrong in this world and attempts to change society for the better. However, political refoundings and redefinitions of the people can be either more inclusive or more exclusive. Political refoundings aren't always necessarily progressing towards a larger, more universal definition of who the people are; political refoundings can make inclusion into the people an even more selective process than before. If this is true, how then can I relate the modern lawgiver back to fugitive democracy? If the modern lawgiver works to create a more exclusive vision of the people, is that still a democratic moment? To accept this as true would mean that revolutionary democracy is not inherently good or inherently progressive at all. The modern lawgiver, insurgent universality, and fugitive democracy all have the potential to create a more unified and just future, but they also have the potential to bring about an oppressive and totalitarian regime. There is no inherent morality or ethicality to these concepts. Democracy is not always on a linear progression because history itself does not follow a linear progression. The only moral nature the modern lawgiver holds is the morality they attempt to propagate throughout their society.

Going forward, I'd like to not only make progress on case studies that show this theory in practice but also consider the stakes involved if something like the ideal of democracy is believed to have no inherent morality or just quality about it. How exactly would that reshape

the way we view democratic praxis, political refoundings, and political localism? If the spirit of democracy can be evoked to cause both great harm and great benefits to a society, should we be more wary of it? What are the political implications of acknowledging that a modern lawgiver could very well lean towards fascism, and what are the political implications of acknowledging the tensions and clash between a ruling institution and a fascist rabble could still qualify as a democratic moment? There is so much yet to be explored on these subjects, although I believe this thesis qualifies as a good start.

Bibliography

- Benhabib, Seyla. *Democracy and Difference: Contesting the Boundaries of the Political*. Princeton: Princeton University Press, 1996.
- “Citizenship, n.” *Oxford English Dictionary*. Located at www-oed-com.ezprox.bard.edu/view/Entry/33521?redirectedFrom=citizenship#eid
- Derrida, Jacques. *On Cosmopolitanism and Forgiveness*. London and New York: Routledge, 2001.
- Isin, Engin F. “Citizenship in flux: The figure of the activist citizen.” *Subjectivity* 29, 2009.
- Norton, Anne. *On the Muslim Question*. Princeton: Princeton University Press, 2013.
- Nussbaum, Martha C. *For Love of Country?* Boston: Beacon Press, 1996.
- Rousseau, Jean-Jacques. *The Social Contract*. Edited by Jonathan Bennett. Ebook. 2017.
- Sassen, Saskia. “Towards Post-National and Denationalized Citizenship.” *Handbook of Citizenship Studies*. London: Sage, 2002.
- Stasi, Bernard. “Commission for reflection on the application of the principle of laïcité in the Republic,” Report, National Assembly, Paris, July 3 2003.
- Tomba, Massimiliano. *Insurgent Universality: an Alternative Legacy of Modernity*. New York: Oxford University Press, 2019.
- Walzer, Michael. “Membership,” in *Spheres of Justice: A Defense of Pluralism and Equality*. USA: Basic Books, 1983.
- Wolin, Sheldon S. *Democracy Incorporated*. Princeton: Princeton University Press, 2008.
- Wolin, Sheldon S. “Fugitive Democracy” from *Constellations Vol. 1, No. 1*. Cambridge, MA: Blackwell Publishers, 1994.

Young, Iris Marion. "Polity and Group Difference: A Critique of the Ideal of Universal
Citizenship" *Ethics* vol. 9 no. 2. Chicago: University of Chicago, Jan. 1989.