Shogimen, Takashi. "Consent and Popular Sovereignty in Medieval Political Thought: Marsilius of Padua's Defensor pacis." *Democratic Moments: Reading Democratic Texts*. . London: Bloomsbury Academic, 2018. 49–56. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781350006195.ch-007>>.

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CHAPTER SIX

Consent and Popular Sovereignty in Medieval Political Thought: Marsilius of Padua's *Defensor pacis*

Takashi Shogimen

The primary human authority, simply speaking, to pass or institute human laws belongs to that from which alone the best laws can result. But this is the universal body of the citizens or its prevailing part, which represents the whole of that body: since it is not always easy or even possible for all persons to agree upon one opinion because some individuals have a stunted nature, which through singular malice or ignorance is out of harmony with the common view. But things that are to the common advantage should not be impeded or neglected because of the irrational objection or opposition of these people. The authority to pass or to institute laws belongs, therefore, solely to the universal body of the citizens or its prevailing part.¹

Marsilius of Padua (c.1275–c.1342) is undoubtedly one of the best known political thinkers in medieval Europe, along with Thomas Aquinas in the previous century and William of Ockham in his own time. In his academic

career Marsilius was trained as a physician before serving as rector of the University of Paris. His major political treatise, *The Defender of the Peace* (*Defensor pacis*), which was completed in 1324, drove him into a life of exile as the papacy regarded it as heretical. The work consisted of three parts or 'discourses': Discourse 1 presented his 'generic' theory of the political community, which relied on rational arguments derived from Aristotle and Cicero; Discourse 2 turned to a critique of the contemporary papacy's interventions in secular affairs with a recourse to biblical and patristic authorities; and Discourse 3 summarizes the preceding arguments, serving as a manifesto or a call for action. Discourse 2 was clearly problematic, to say the least, from the viewpoint of the papacy.

But one might wonder why a chapter on medieval European political thought is included in this volume on 'democratic moments' in the history of political thought. Historians of political thought are often skeptical about the existence of political thought in the European Middle Ages because political thought is typically a theory about the state that did not exist in the Middle Ages. Even those who are not so skeptical would associate medieval political thinking with hierarchical authoritarianism and theocracy rather than with democracy. Indeed, democracy was not an idea that medieval political thinkers endorsed. To be sure, medieval intellectuals were aware of the concept of democracy through Aristotelian categories of political constitutions. In the Book 5 of his *Politics*, Aristotle posited that there are three legitimate constitutions that serve the common good, monarchy, aristocracy and polity, while there are, correspondingly, three illegitimate constitutions that do not serve the common good: tyrannical monarchy, oligarchy and democracy. Democracy was not counted among the legitimate political constitutions.

So where can we find any 'democratic moments' in medieval political thought? Walter Ullmann once argued that the rediscovery of Aristotelian political science in the middle of the thirteenth century secularized and democratized European political thinking: from Aristotle came the new idea of the citizen as an active participant in politics. The entry of this concept onto the stage of thirteenth-century political thought undermined the Christian hierarchical model of government.² This thesis, widely known as Ullmann's 'Aristotelian revolution' thesis, has since been subjected to criticisms and is now largely discredited.³ Perhaps we find a better guide for medieval 'democratic moments' in Alexander Passerin d'Entrèves. He wrote: 'it was only when the idea of consent finally came to be associated with that of an equal right in each individual to share in the establishment and exercise of power, that the distinctive features of modern democratic theory began to emerge into full daylight'.⁴

Again, it was not in the Middle Ages that the association between the idea of consent and that of human equality first occurred in the European political tradition. However, both ideas were definitely present in medieval political conceptions. The notion of human equality, which was foreign to

the rediscovered political philosophy of Aristotle, belonged to the Stoic and patristic traditions. The doctrine of the natural equality of human beings was expounded by Cicero and Seneca and was later inherited by the early Christian Fathers, thus constituting an essential part of the natural law tradition, which was not at all new to medieval intellectuals. What was more original to medieval European political thought was the other central idea: consent. Marsilius was a key thinker who viewed consent as the cornerstone of his political theory. The purpose of the present chapter is to show how Marsilius's discussions of consent constituted a democratic moment in the history of medieval political thought.

As I wrote earlier, his *Defender of the Peace* consisted of three 'discourses'; many of the ideas that are relevant to what we today call political theory are found in Discourse 1, which opens with a discussion of the origin and the development of the political community. Marsilius considered that the end of the political community is peace and order because in the orderly society the citizens can 'live well (*bene vivere*)' – and a 'sufficient life', Marsilius argued, is achievable through the satisfaction of a wide range of human desires by the concerted activities of diverse functional groups in the community (I, iv, 5). The role of the government is, according to Marsilius, to envisage and enable the diverse functions of the political community through legislation in order to ensure the materialization of a sufficient life (I, iv, 4). To achieve this, the government regulates the 'human civil acts' of individuals based on private interests according to a 'standard of justice' (I, x, 1) – that is, law – thereby ensuring the maintenance of 'civil justice and the common advantage' (I, xi, 1). Indeed, the government – the 'judicial or princely' part – of the political community is the first to emerge in the making of the community (I, v, 7).

Marsilius maintained that those who create the diverse functional parts of the community are 'the legislator', which he equated with 'the people or the universal body of the citizens or else its prevailing part' (I, xii, 3). The opacity of Marsilius's notion of 'legislator' has long invited debate, but recent scholarship suggests that the 'legislator' is not coextensive with the whole community of citizens; rather, 'the community of citizens is the *legislator humanus* only when its members congregate for the express purpose of debate and decision about the common benefit'.⁵ And the key business of the 'legislator' is to institute laws to design how the community should be diversified and how the various functional parts should operate and cooperate with each other. Marsilius also viewed the function of law as regulatory and coercive. An important implication of this is that, for Marsilius, the type of law that occupies the most exalted status in this-worldly life is human law. Divine law only regulates spiritual matters that belong to the other world and Marsilius hardly discussed natural law. Human law is the unrivalled standard of justice in the civil community.⁶

So how is (human) law instituted? The quotation in the opening of this chapter epitomizes Marsilius's vision of the legislative mechanism. First, he acknowledges the difficulty in reaching a unanimous decision in collective

deliberation. Such an acknowledgement is predicated on the assumption that an essential requirement for collective decision-making about law is consent: the agreement of those who are concerned. Second, such decision-makers are 'the universal body of the citizens or its prevailing part, which *represents* the whole of that body' (emphasis mine): they may not be the entire body of citizens but their representatives. Third, Marsilius's vision is guarded against the intrusion of irrationality into collective decision-making about law through the 'malice or ignorance' of some individuals. The key issue here is how to ensure the rationality of the content of legislation. What follows will discuss these points in turn.

As I discussed earlier, human law is the only 'standard' that regulates human actions in this world. So what is the source of such an unrivalled status for human law? Marsilius's answer is unequivocal: the supreme authority of human law derives from the will of the people – the universal body of the citizens or its prevailing part. In referring to the will of the people, Marsilius did not have in mind the establishment and exercise of power in terms of the contractual association of equal individuals; rather, he was thinking of the whole people as a corporation (*populus*). The idea that the people as a whole is the source of legitimate power, according to Brian Tierney, derived from the twelfth-century Roman lawyer Azo. Azo argued that the people as a whole instituted imperial power by ceding, not transferring, power. Hence the people retain the power to legislate and abrogate laws. From this, Azo inferred that individual members of the people are less than the emperor but the emperor is less than the people as a whole.⁷

This idea of the corporate body of the people as the source of legitimate power has often been described as 'popular sovereignty' (or 'populism').⁸ However, this appellation may be misleading because the above notion of the popular corporate authority does not presume any involvement of the people in the public decision-making process. The term 'popular sovereignty' obviously entails modern connotations but the active participation of individuals in the public decision-making was typically not a part of medieval political thinking.⁹ So what did Marsilius mean when he attributed the source of legislative authority to the will of the people? The key to answer this question lies in Marsilius's idea of consent.

It is widely known that consent was integral to medieval political practice. Feudal vassalage is based on mutual consent between lord and vassal. Parliaments were summoned by the king to obtain consent for taxation. In the European tradition of political theory, Cicero envisioned that a political community was a multitude associated by consent.¹⁰ The Ciceronian notion that through linguistic communication individuals consented to enter collective life forms a sharp contrast to the Aristotelian model that humans entered a collective life by nature. Medieval political thinkers were often aware of both Ciceronian and Aristotelian arguments, and Marsilius was no exception.

Marsilius considered consent to be the cornerstone of the legislative procedure. He argued that the universal body of the citizens has the final say

about legislation as the expression of their 'common advantage', and what gives legitimacy to legislation procedurally is the consent of the citizens.¹¹ What underpins Marsilius's emphasis on consent is his division of legislative process into two stages: the first stage is the *discovery* of law and the second is the *authorization* of law. He attributed the discovery of law only to those who have legal expertise and prudence, while he insisted that the law discovered by the experts must be authorized by the consent of the entire body of the citizens. Marsilius held that citizens, who are not equipped with legal expertise, were generally rational and sufficiently capable of judging whether or not the law in question would serve their common advantage.

But how does the universal body of citizens make a collective decision? This leads to two further questions: first, did Marsilius think that each and every citizen must participate in the authorization of legislation? Second, if each and every citizen is expected to give consent unanimously, what if a collective decision-making process fails to reach a unanimous decision? Both questions allude to the possibility of representation.

Representation may be viewed as a second salient feature of the Marsilian 'democratic moment'. As is already noted, Marsilius maintained that in the political community legislation derives from the consent of the whole community or its 'prevailing part (*valentior pars*)'. He wrote that the prevailing part 'represents the whole of the community (*totam universitatem repraesentat*)' (I, xii, 5). As he conceptualized the political community in generic terms, he did not only discuss representation within the civil community but also with reference to the Church. The general council consisted of priests and experts in divine law who are elected by all the communities in the Church, thus 'representing the universal body of the faithful through the . . . authority granted them by those other universal bodies' (II, xx, 2). His argument for conciliar supremacy in Discourse 2 of the *Defender of the Peace* was anchored in his generic theory of the political community in Discourse 1. But before we investigate what Marsilius meant by 'representation', we need to clarify his notion of the 'prevailing part'.

Marsilius did not define the 'prevailing part' explicitly. In order to highlight key issues, we might first examine another similar concept that is widely used in the context of collective decision-making in medieval texts: *maior et sanior pars*, which may be translated as 'a greater and wiser part'.¹² Historians have explored this concept, along with the Marsilian 'prevailing part', in relation to the historical origins of the majoritarian principle.¹³ The 'greater' could of course have either a quantitative or a qualitative meaning: one could interpret the 'greater' part as a numerical majority whose decision is presumed to carry weight. This understanding can be warranted by the fact that the electoral process within the medieval Church often adopted the principle that two-thirds of the entire number of votes determined the outcome of ecclesiastical elections. However, one could also interpret 'greater (*maior*)' in a qualitative sense because the medieval concept of *maioritas* could mean not only majority but also

authority. The qualitative interpretation of 'greater' would be reinforced by the subsequent phrase 'and wiser (*et sanior*)'. In this case, the 'greater and wiser' part would underscore the authoritative and prudent, not the numerically 'greater', nature of the decision-makers. The ambivalence of the idea of the 'greater and wiser part' can be witnessed in medieval canonist scholarship on ecclesiastical elections. The early-thirteenth-century canon lawyer Johannes Teutonicus advocated a clear numerical majority, while the contemporary canon lawyer Bernardus Parmensis and Pope Gregory IX rejected the majoritarian interpretation.¹⁴ A survey of the history of the concept of the 'greater and wiser part' does not suggest that majoritarianism had gained wide support in the Middle Ages.¹⁵

Viewed in this light, it would be rather imprudent to surmise that the Marsilian idea of the prevailing part is a manifestation of majoritarian rule. Indeed Marsilius noted: 'I say "prevailing part" taking into consideration both the quantity and quality of persons in the community upon which the law is passed' (I, xii, 3). Clearly *both* the number of votes *and* prudence and expert knowledge carry weight in his conception of the 'prevailing part'. This seems to imply that for Marsilius a majority is collectively a rational decision-maker. The rationale for singling out the 'prevailing part' as representatives of the universal body of the citizens is that they should collectively reach a common decision on 'common advantage'; the reverse side of this is that it is necessary to exclude some individuals of 'a stunted nature' from the public decision-making process because they, due to their malice or ignorance, might obstruct decision-making for the 'common advantage' (I, xii, 5). The prevailing part represents the voice of rational individuals, which can prevail if the noise of irrational voices is eliminated.

Thus, it becomes clear that the 'representative' nature of the 'prevailing part' is different from the modern democratic conception. What the political philosopher Hannah Pitkin calls 'political' representation is predicated on the idea that representatives need to act at the behest of the body they are representing in the context of negotiating the conflicting interests and desires of various groups that constitute the entire community.¹⁶ Cary J. Nederman relies on Pitkin to argue that the concept of 'political' representation is absent from medieval political thought. At the heart of the 'political' idea of representation is that representatives must concern themselves simultaneously 'with the interests of constituents (regardless of their wishes) and the wishes of constituents (regardless of their interests)'.¹⁷ 'Political' representatives, therefore, who act at the behest of the constituents, have discretionary power in order to act for the interest of the constituents, which may be against their wishes. The Marsilian notion of representation, by contrast, envisages that laws, which embody the common advantage, emerge not from negotiations between representatives who represent diverse interests and desires but largely by excluding individuals of 'a stunted nature'. The Marsilian 'representatives' are rational enough to discover laws that serve the common good of the community; human interests and desires are rather

the objects of legal control, and legislation is not viewed as a process where diverse and often mutually conflicting interests and desires are negotiated.

It is clear by now that identifying a 'democratic moment' even in a radical medieval thinker such as Marsilius requires caution. The passage cited at the opening of this chapter has prompted intellectual historians to suggest a similarity to the modern language of democracy. However, what Marsilius meant by 'the representation of the entire body of citizens by the prevailing part' still remained within the orbit of medieval political culture that did not view democracy in a favourable light. Yet Marsilius's recognition of the intellectual capabilities of a multitude, perhaps even a majority, for judging the suitability of proposed legislation for the common advantage certainly points to a democratic future. In this, the Marsilian emphasis on human consent – a significant departure from the traditional reliance on divine authorization¹⁸ – constituted an important 'democratic moment'.¹⁹

Notes

- 1 Marsilius of Padua, *The Defender of the Peace*, ed. and trans. Annabel Brett (Cambridge: Cambridge University Press, 2005), I, xii, 5 (which refers to Discourse 1, chapter 12, section 5), 68. The original Latin text of this English translation is: *Defensor pacis*, ed. C. W. Previté-Orton (Cambridge: Cambridge University Press, 1928).
- 2 Walter Ullmann, *Principles of Government and Politics in the Middle Ages* (London: Methuen, 1961), 232 and Ullmann, *A History of Political Thought: The Middle Ages* (Harmondsworth: Penguin, 1965), chapter 2.
- 3 An up-to-date reappraisal of Ullmann's scholarship is found in Cary J. Nederman, *Lineages of European Political Thought: Explorations along the Medieval/Modern Divide from JoŸ of Salisbury to Hegel* (Washington, DC: Catholic University of America Press, 2009), chapter 1.
- 4 Alexander Passerin D'Entrèves, *The Notion of the State: An Introduction to Political Theory* (Oxford: Clarendon Press, 1967), 197.
- 5 Cary J. Nederman, *Community and Consent: The Secular Political Theory of Marsiglio of Padua's Defensor Pacis* (Lanham: Rowman & Littlefield, 1995), 69–70.
- 6 Francis Oakley, *The Watershed of Modern Politics: Law, Virtue, Kingship, and Consent (1300–1650)* (New Haven: Yale University Press, 2015), 189–90.
- 7 For example, see Brian Tierney, *Religion, Law, and the Growth of Constitutional Thought, 1150–1650* (Cambridge: Cambridge University Press, 1982), 56–60.
- 8 Tierney, *Religion, Law, and the Growth of Constitutional Thought*, 56–60.
- 9 Nederman, *Community and Consent*, 74–5.
- 10 Tierney, *Religion, Law, and the Growth of Constitutional Thought*, 40.
- 11 Nederman, *Community and Consent*, 77.

- 12 See L. Moulin, 'Senior et Maior Pars: Note sur l'évolution des techniques électorales dans les Ordres religieux du Vie au XIIIe siècle', *Revue historique de droit français et étranger*, 4th ser., 36 (1953): 368–98, 491–530.
- 13 J. H. Burns, 'Majorities: An Exploration', *History of Political Thought* 24 (2003): 66–85.
- 14 K. Pennington, 'Representation in medieval canon law', in *Repraesentatio: Mapping a Keyword for Churches and Governance*, eds Massimo Faggioli and Alberto Melloni (Münster: LIT, 2006), 21–40 at 26.
- 15 See Burns, 'Majorities: An Exploration'.
- 16 See H. F. Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967).
- 17 Nederman, *Lineages of European Political Thought*, 102.
- 18 Francis Oakley, *The Mortgage of the Past: Reshaping the Ancient Political Inheritance (1050–1300)* (New Haven: Yale University Press, 2012), 222.
- 19 I am grateful to Stephen Conway for his help during the preparation for this chapter.