# MARSILIUS OF PADUA: THE SOCIAL CONTRACTARIAN

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*This article aims to demonstrate that Marsilius of Padua's Defensor Pacis (1324) encompasses the basics of the social contract theory. Marsilius arrives at the social contractarian theory drawing upon both his past and present political engagements, and the theoretical legal-political debates of his time. He reconciles his background in the city-state of Padua, which struggled with the Holy Roman Empire to keep its autonomous legal order of republican liberties, with his political tendency to and his engagement with the imperial order. Yet, in constructing his political thought, he benefits immensely from the legal and political debates that had been going on since the beginning of the 10th century with the emergence of the Bologna law school, as well as the revival of both Aristotelian scholarship and Ulpian's contribution to the Digest. All of this had a decisive impact on the scope of the debates. The legal debates sought the legitimate origin of the Holy Roman Emperor's sovereignty. However, by breaking sovereignty into parts as executive power and legislative power, Azo Portius introduced the possibility of the separation of powers into the debate. Armed with his engagement with the Aristotelian 'doctrine of the wisdom of the multitude' and the renaissance of the Codex, Marsilius was able to further what Azo had dismantled by shifting the power that underlay the sovereignty from a bundle of legislative and executive powers to merely legislative ones. Through a convention that he derived from lex regia, he constituted the first version of the social contract. However, he applied to his newly formed conventio* (contract) *the prevailing legislative authority of the populus.*

**Keywords:** Marsilius of Padua, modern state, *lex regia* (royal law), *iurisdictio* (authority to give law), *populus* (people), *multitudo* (multitude), *valentior pars* (prevailing part), sovereignty, Holy Roman Empire

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## I. INTRODUCTION

In this paper, I make two claims. My central claim is that the Italian medieval scholar, Marsilius of Padua's (1275-1342) political thought encompasses the basics of the template of civil social contract theory (SCT). Further to this point, I claim that instead of assigning a corporate independent body a collection of powers to govern, Marsilius's social contractarian theory declares the Primary Human Legislator a corporate body, thus appointing the legislative body as the sovereign that can use coercive power, rather than a body that reflects a fusion of powers.

Marsilius's arrival at SCT was a response to the political and legal considerations of his era. The prevailing political and legal debate, namely the *lex regia* (royal law), centered around the legitimacy of the ruler—a concept that had been subject to debate since the 10th century and particularly since the grouping of Bologna Lawyers through the revival of Ulpian's *Codex*. The *lex regia* debate reflected a contractarianism of the constitutional sort, a contract between the ruler and the *popolo* as a unity, and was similar to David's contract with the free people of Israel.[1] The debates were hastened and deepened by the Church's involvement as a claimant of sovereignty over *Regnum Italicum*, and as an agent that attempted to subordinate the imperial power to itself. Theories of republican liberties discussed primarily within the context of city-states regarding their struggle for the de facto autonomy also contributed to these debates.

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[1] Otto Friedrich von Gierke, *Political Theories of the Middle Age* (Cambridge University Press 1936) 39. On the contrary, the civil SCT reflected a contract among people that aimed to legitimately establish an independent body as a coercive political authority.

In the *Defender of the Peace* Marsilius aimed to offer a solution to the 12th century debates on the legitimacy of the sovereignty of the ruler.[2] He was politically engaged in the campaign of German claimant to the Holy Emperor, Ludwig IV, against the Church. Nonetheless, the republican discussions about the city-states also contributed strongly to Marsilius's thought. In his attempt to reconcile the sovereignty of the Holy Roman Empire in a manner that would embrace republican liberties, he drew upon the tools of existing *lex regia* debates from the newly revived Codex and Roman Law as well as Aristotelian thought, which was adopted in European lands through Averroes's translation.

In his narrative, Marsilius offered a civil contract for the members of a pre-existing yet quasi-lawless society, which established the law and civil society at the same time. Concurrently, this contract established an independent legislative and corporate body that acted on behalf of and in the name of the consenting *popolo* (free people), the Primary Human Legislator. The authority of the Human Legislator was irrevocable because it was established as a collection of wills of the *popolo*, and the unity that was formed through an Aristotelian idea of multiplicity was the only means to faultlessly execute the common good.

This body, the Primary Human Legislator, would be the sovereign. In that sense, instead of a constitutional SCT that drew on the *lex regia* debate, Marsilius offered a civil SCT that sought the legitimacy of the coercive political authority. By establishing the sovereign as the legislative body, Marsilius diverged methodologically from the medieval discourse regarding the holder of sovereignty. He went beyond the contextual quandary of the *lex regia* debate about the relationship between the *multitudo* (multitude) and the ruler in regard to sovereignty. Marsilius was, perhaps accidentally, a revolutionary who represented a dramatic break with the past.[3] His SCT can be better put in context through a consideration of the *lex regia* debate and particularly through the contribution of Azo of Bologna's (Azolenus) (fl. 1150-

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[2] Marsilius of Padua, *The Defender of the Peace* (Annabel Brett tr, Cambridge University Press 2005). I will refer to *The Defender of the Peace* as DP (as an abbreviation of *Defensor Pacis*) in the rest of the paper.

[3] Isaiah Berlin, *Against the Current: Essays in the History of Ideas* (The Viking Press 1955) 37.

1230). Marsilius's idea of the sovereign was not constituted through a contract between the ruler and the *popolo* in which the *irrevocability was a matter of contractual terms.*[4] In fact, Marsilius's was not a contract with a ruler at all. Instead it was a contract among the multitude that would establish the corporate personality of the Primary Human Legislator, which would then decide upon the institutions of the newly formed legal order.

In my attempt to reread Marsilius's theory as a SCT, I demonstrate that neither the Imperial nor the republican approach explains the entirety of his political thought. To explain this point, I demonstrate the extent to which he was influenced by his engagement with the Empire and his encounters in Padua and Paris. In the second section, I set out the legal debates of *lex regia* in the 12th century to present the differences between the lex regian contract and Marsilius's SCT. In the third section, I give a brief definition of SCT touching upon the basic elements that can be employed when comparing the SCT and lex regian contracts to Marsilius's theory. Accordingly, for this comparison, I elaborate on Marsilius's narrative of the origin of society, the establishment of civil society through a convention among the *popolo*, and lastly the creation of the Primary Human Legislator as the sovereign.

## II. Historical Context: The Politics of City-States and the *Lex Regia* Debate

The political structure and conflicts in the 12th and 13th centuries in Italian lands shaped the legal debates that dominated the main discussion concerning the origin of the legitimate power of the ruler. The beginning of the discussions corresponds to the early twelfth century, when a new autonomous political structure of the city-state was introduced in northern Italy, primarily with the consular government of Pisa in 1085.[5] By the end of the century, many northern Italian cities had declared their autonomy in order to adopt the city-state structure.

The main political conflict that led to discussions over sovereignty was between the Holy Roman Emperor, the Church and the city-states of

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4 Gierke (n 1) 146.

5 Quentin Skinner, *The Foundations of Modern Political Thought: Volume 1, The Renaissance* (Cambridge University Press 1978) 3.

Northern Italy. By that time, the German emperors had already obtained the right to rule *Regnum Italicum*. Thus, the newly formed city-states in Northern Italy posed a threat to the German claim to rule, since the autonomy and the self-governing model of the city-states did not comply with the Emperor's claims of dominion. Several German emperors expedited to Northern Italy to regain the full dominium, but the Papacy was ready to manipulate the conflict to suit its own interests.[6] Aiming to establish its own dominium over the newly-autonomous northern city-states, the Papacy prevented the Holy Roman Empire from gaining full command over the lands. By manipulating the internal politics of the city-states, and by supporting the German Emperor's possible but not-yet-decided heirs to the throne, the Papacy held the Holy Roman Emperor back from the northern Italian lands while succeeding 'in winning direct temporal control of a large area of central Italy, as well as considerable measure of influence over most of the major cities of Regnum Italicum'.[7]

Caught between two powerful institutions, the city-states fought back with arms; yet the theoretical attempt to legitimize the phenomenon of the autonomous city-state self-governing model was equally important in the fight. The theorists of the Italian city-states needed 'most of all [...] a form of political argument capable of vindicating their liberty against the Church without involving them in ceding to anyone else'.[8] *De iur*e liberation from the Holy Roman Empire was not possible, but the newly earned *de facto* autonomy of the city-states was at stake. Bartolus of Sassoferato (1314-1357) of the post-Glossator school of Commentators, seemed to have sought independence from the Empire,[9] and Marsilius apparently sought independence from the Church.[10]

Nevertheless, both the Commentators and Marsilius were students of the previous scholarship that debated the legitimate source of authority in the 11th and 12th centuries—the medieval *lex regia* debate that prevailed before and

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6 Ibid 12-13.

7 Ibid 14.

8 Ibid 18.

9 Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (Oxford University Press 2014) 48.

10 Skinner (n 5) 18.

during Marsilius's time.[11] These debates shaped the theoretical discussions over the autonomy of the Italian city-states, and the debates are important in understanding the background to Marsilius's idea of popular sovereignty and the idea of the Human Legislator.

*Lex regia*, or royal law, was an instrument in the Roman Empire's civil law tradition that enabled the transfer of plenary public authority from the Roman people to the Roman emperor. It was a form of social contract, a constitutional SCT, that corresponded to a contract between the *popolo* and one person as the ruler. As Lee suggests,

> its purpose was not to function only as a kind of enabling act whereby the powers traditionally held by the *populus* in the Republic would thereafter be exercised by the Emperor, or princeps, but also as a constitutional (re)foundation of Rome itself *de novo*.[12]

Originally *lex regia* was a concept of private law: 'it was a merely revocable grant made by the Roman people to the emperor'.[13] It was one of Ulpian's[14] greatest efforts to legitimize Augustus in giving law in the name of, on behalf of, and for the people, and was referred to in *Digest* as such: 'What pleases the emperor has the force of law: this is because, by *lex regia*, which has been enacted about his *imperium* (imperial authority), the people confer upon him, and to him, all their *imperium* and *potestas*'.[15] In Ulpian's time, the aim of *lex regia* was merely historical: it was a connection between 'otherwise disjointed eras of Roman constitutional history in one continuous narrative,' namely the Principate and the Republic.[16] Furthermore, it provided historical legitimacy to the Roman emperor.

However, when the *Digest* and Ulpian's *lex regia* debate were revived in medieval Italy and were applied to public law, the doctrine morphed into a

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11 Hwa-Yong Lee, *Political Representation in the Later Middle Ages: Marsilius in Context* (Peter Lang 2008) 64.

12 Lee (n 9) 27.

13 Walter Ullman, *Law and Politics in the Middle Ages: The Sources of History, Studies in the Uses of Historical Evidence* (Cornell University Press 1975) 250.

14 Joseph Canning, *A History of Medieval Political Thought* (Routledge 2005) 8.

15 Alan Watson (ed), *The Digest of Justinian* (University of Pennsylvania Press 1998) I.4.1.

16 Lee (n 9) 30.

more complicated one. The second life of Roman law, as Vinogradoff calls it,[17] had an end that Ulpian would likely never have foreseen. Led by Irnerius, the four jurists from Bologna pieced together Justinian's *Corpus Iuris Civilis* to come up with a tool to finally analyze the link between the Emperor and the people. At first sight, Ulpian's articulation in the book was simple: the Roman *populus* conferred their original lawmaking authority upon the Roman princeps by a general comitial act which thereby established the constitution of the Augustan Principate and legitimized, thereafter, the emperor's lawmaking authority over all Romans.[18]

The Glossators, on the other hand, did not take Ulpian's definition as simply as it was originally articulated. Two main camps emerged among Glossators:

> Two principal positions emerged among the Glossators in response to this interpretive puzzle in medieval legal thought. On the one hand, the lex regia could be understood as a translation imperii—an irrevocable transfer, conveyance, and even alienation of authority—such that the Roman populus divested itself completely of its original authority, and thus, retained no residual claim over the authority given to the princeps. On the other hand, the lex regia could be understood as a mere concession—a temporary or conditional grant of authority—such that princely authority was understood to be a revocable investiture and held and exercised theoretically only by the permissive will of the people.[19]

Surprisingly, the differences between the two interpretations of *lex regia* would prevail for centuries and would influence popular sovereignty doctrines. As Gierke commented,

> in the Middle Age the thought of Popular Sovereignty was connected in manifold wise with the thought of Ruler's Sovereignty, there was here a foundation on which the most diverse constitutional systems of an abstract kind could be erected: systems which might range from an Absolutism grounded on the alienation of power by the people, through Constitutional Monarchy, to Popular Sovereignty of the Republican sort.[20]

Both the translation theory and the concession theory accepted the basic assumption that the source of legitimate powers of ruling and law-making

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17 Paul Vinogradoff, *Roman Law in Medieval Europe* (Clarendon Press 1929) 13.

18 *The Digest* (n 15) I.4.I; Inst. 2.I.6; C. I.17.I.7.

19 Lee (n 9) 33.

20 Gierke (n 1) 38.

belonged to the people. However, the two theories differed in the revocability of the transferred rights. The translation theory (*translatio imperii*), in which the *populus* irrevocably renounced its power through the contract and thus stood down from any legislative power it had once had, seems to have been favored by the majority of the Glossators.[21] On the other hand, the concession theory, represented by Azo Portius,[22] stated that the transfer of the rights from *populus* to the prince was a mere *concessio*, 'whereby an office and a *usus* (right of the user) were conveyed, while the substance of the Imperium still remained in the Roman People'.[23] There is no doubt that the debate between the translation theory and the concession theory over the revocability of the transferred rights had a critical impact on Marsilius's thought. In addition to this debate was another equally important question that was embedded in the first: what was the essence of *potestas leges condendi* (the capacity/authority/power to make law)? In Roman classical law, the concept *populus liber* (free people) was derived from that of *ius gentium* (law of nations/peoples).[24] All law-making self-governing peoples (*populi*) were free people. According to Gaius, *ius gentium* was inherent in all *populi*. It was the *potestas* of the *populus* to legislate (as Gaius says, *potestas leges condendi,* 'the

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[21] Walter Ullman, *The Medieval Idea of Law as Represented by Lucas De Penna: A Study in Fourteenth-Century Legal Scholarship* (Methuen 1946) 48-49. It seems that *translation imperii* later evolved to the constitutional SCT, however this is only an intuition and must be researched thoroughly. It must be noted, however, that *translatio imperii* is not the same as the civil SCT, even though there is an irrevocability of the contract in both. While the *translatio imperii* establishes the irrevocability of a contract that gives power to an individual, the civil SCT theory establishes a corporate body with a distinct legal personality to transfer its potestas irrevocably.

[22] Azo Portius, *Summa Azonis,* Lyon, 1557, fol. 7 [on C.I.14. (17), §8]: 'For even after they had transferred their power to make laws, they were nevertheless able to revoke that transfer at a later stage, as it is reported in [D.I.2.2.3, I.2.2.14, I.2.2.24].' (Translation Lee (n 9) 37).

[23] Gierke (n 1) 43.

[24] In the case of Marsilius, we are dealing with a populus-liber because the core of Marsilius's interrogation lies on the transfer of *potestas* of the *populus* through the contract. For a *populus* to be able to transfer their rights to an emperor or prince, they had to be free of an already established rule. Thus, Marsilius's *populus* corresponds to what Gaius and Cicero identify as the *populus liber*, due to *ius gentium*, not to *populus Romanus* who are already subject to the Roman Imperium.

capacity/authority to make law') that made a people free. This was the case for all the free people including, as Gierke suggests, the people of Israel, when they voluntarily and collectively made a convention with David in Hebron.[25] The Glossators accepted this stance, stating that according to the *ius gentium*, all free people may decide on a superior over themselves.[26] *Populus* seemed to be the rightful and natural holder of the *potestas*.

As Gierke states, the medieval doctrine was all about the element of limitation.[27] This limitation started with debates regarding the legal boundaries of the ecclesiastical, and extended to the temporal sphere of monarchy, especially the Holy Roman Emperor's powers. At the core of the limitation of the medieval idea of monarchy lay what Gierke calls the doctrine of rights of the community. Lothair, a representative of the majority among the Glossators, claimed that 'the Roman people no longer poses the *potestas* to make laws they originally possessed', for the reason that 'by the *lex regia*, the *populus* transferred to the emperor every right they possessed'.[28] Azo, on the contrary, claimed that neither the *merum imperium* (pure authority/absolute sovereignty), nor the *iurisdictio* (to declare what is law), belonged solely to one person, including the emperor. Through Azo's analysis, the Glossators redefined '*iurisdictio* in such a way that it became the conceptual cornerstone for medieval public law, by encompassing within it all types of powers, including the coercive power of the sword, the *merum imperium*'.[29] Azo claimed that the *potestas* of the *populus* (the authority/power of the people) in regard to *lex regia* manifested itself as *iurisdictio* (authority to give law), not as *merum imperium* (absolute power/pure authority) or *mixtum imperium* (mixed authority, the power that could be held by both public magistrates and private persons). Rather, he located the *iurisdictio in genere sumpta* (iurisdictio understood as a *genus*) above all else and made the *Imperium* (both *merum* and *mixtum*) and *iurisdictio simplex* (legally limited right to declare law) subordinate to it. Even though Ulpian's original explanation of *iurisdictio* implied merely an office entitled to produce legislation, its application to

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25 Gierke (n 1) 39.

26 Gierke (n 1) 146, ft. 139.

27 Gierke (n 1) 36-37.

28 Azo Portius, *Lectura Azonis et Magni Apparatus ad Singulas Leges Duodecim Librorum Codicis Iustiniani*, Paris 1581, I. XIV 11, 44.

29 Lee (n 9) 88.

public law in the medieval revival of Roman law was taken much further. *Iurisdictio* in medieval Italy was the legal function of any person to 'declare what law is', later articulated by Azo as 'the power introduced for the public arising from the necessity of making law, and of establishing equity'.[30]

Still, there was a problem with the holder of the *potestas*, and the scope of the *potestas leges condendi* (authority/power to make law). Azo's broad interpretation of *iurisdictio* stated that anybody could possess it. Lee summarizes:

> Just as the emperor can have iurisdictio over the whole world, so too could a king have iurisdictio over his kingdom and a magistrate over his civitas. Moving even further down the scale of jurisdictional authority, minor judges and officers could also, in theory, be said to have a share of iurisdictio, albeit to a lesser degree, in certain specified manners. Even private persons can be said to have iurisdictio—fathers over their children, husbands over their wives, even tutors over their pupils. As a general principle, then, Azo allowed a perfect correspondence between the holder of iurisdictio, on the one hand, and the type of iurisdictio thought to be 'proper' to that holder on the other. A father had his paternal species of iurisdictio; a magistrate had his magisterial species of iurisdictio; a king had his royal species of iurisdictio; an emperor had his *plenissima iurisdictio*—all coexisting alongside each other in a jurisdictional hierarchy of hierarchies.[31]

As Calasso states regarding Bartolus de Saxoferrato, the *iurisdictio* could not have been assigned as a mere *potestas de iure publico* (public law's power) to the individual as the *persona publica* (public person).[32] If that had been the case, Calasso remarks, there would have been no difference 'between the power of the husband, or of the owner, and that of the political community as such'.[33] There had to be a difference between private citizens who did not hold any office and those who held at least some kind of legislative office. Yet, this was not the only important difference. According to Azo, all the magistrates shared part of the *iurisdictio* with the legislative authority of the time – the

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30 Azo, *Summa Azonis*, columns 176-177.

31 Lee (n 9) 89.

32 Francesco Calasso, 'Jurisdictio nel diritto comune classico' in *Studi in onore di Vincenzo Aragio-Ruiz nel XLV anno del suo insegnamento*, IV (1953).

33 Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Eburon Delft 2007) 147-148.

prince or the emperor – and there was a need to distinguish between the emperor's *iurisdictio* given to him by a plenary grant of the Roman people through *lex regia*, and those from the jurisdictive authority of the magistrates, let alone an individual law-making practice over other individuals by means of a hierarchical social supremacy. Azo came up with this new definition, *plenissima* (fullest) *iurisdictio,* which implied the exclusive power transferred to the emperor through *lex regia*, and which included all powers in itself, the *iurisdictio*, 'declaration of what law is' as well as the *merus imperium*—the power of enforcement.

To conclude, *populus liberi* (free people) of the *ius gentium* (law of free people), namely *populus* who had not yet transferred their powers through *lex regia* to any emperor or ruler, held the *potestas leges condendi*—this was the definition of 'free people' both in Roman Law and in its medieval recovery. The *potestas leges condendi* produces the *iurisdictio,* the authority to declare what law is. It is true, referring to Azo's words, that every individual has the right to *iurisdictio*. However, this personal and individual authority affects only a personal sphere and does not correspond to a *civitas*-level authority to legitimately decide what the laws should be. In Azo's words, *iurisdictio* at the *civitas* level is the *plenissima iurisdictio* (fullest authority to declare law), and is different from both the 'lawful and rightful power over something or someone [*legitima potestas*]'[34] and the share of *iurisdictio* of the magistrates. It belongs to the Empire; it is the authority to make laws in such a way that all the other law-makers (such as the magistrates and notaries) have to abide by it. It additionally encompasses *merum imperium*, which is the right to enforce, and is given to the emperor through the will of the *populus* through *lex regia*. Skinner is thus right in this regard: no one can give someone else something that he does not possess.[35] Hence, the individual, the *persona publica*, cannot transfer a *potestas di plenissima iurisdictio* to the emperor because they do not possess it. It is only the collection of the individuals who hold the *postestas di plenissima iurisdictio* and, as such, it is only the *totus populus* that can transfer its rights to the emperor. Thus, Skinner refers to Azo's words from the *Lectura*: 'From this it follows that, although the emperor possesses greater potestas

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34 Referring to Fasolt, Lee (n 9) 89.

35 Quentin Skinner, *From Humanism to Hobbes: Studies in Rhetoric and Politics* (Cambridge University Press 2018) 36-37.

than any individual member of the people, he does not possess greater *potestas* than the *totus populus*, the people as a whole'.[36]

In place of a conclusion and before delving into Marsilius's theory, there are a couple of points to make in light of the historical debate regarding *lex regia*. These points constitute the backbones of Marsilius's theory and reflect his struggle with the existing explanations about the source of legitimate authority. The first is the fact that Marsilius's theory, while employing an Aristotelian explanation of popular sovereignty, heavily depends on bits and pieces of the *lex regia* debate. As will be seen below, Marsilius uses the elements and cornerstones of the *lex regia* debate to create a new system. He chooses to follow the *lex regia* debate in his path to legitimize the power of the authority. Thus, his point of origin is popular sovereignty. However, he seems to have agreed with Azo's idea that individuals by themselves are not enough to hold a plenary public authority and that the *potestas di plenissima iurisdictio* belongs only to the *totus populus* (the entirety of the populus). Marsilius seems to have blended this idea with the *persona ficta* of corporatist theory to create the fictitious person, the Human Legislator, as part of his political thought. Benefitting further from Azo, Marsilius dismantles the accumulation of *merum imperium* and *plenissima iurisdictio* in one body. Instead, he primarily assigns his fictitious sovereign corporate body, the Human Legislator, the *plenissima iurisdictio*. In that sense, he shifts the definition of the type of power entitled to create the *regnum* and assigns the legislative power as the primary source of authority.

## III. Marsilius's Reception: Between the Empire and the Republic

As Lewis puts it, 'perhaps no important publicist has baffled in interpretation more persistently than Marsilius of Padua'.[37] The diverse pallet of available interpretations mostly originates from different identifications of the historical contexts within which the *DP* is placed.[38] One of the two main camps, led by Rubenstein, Gewirth and Skinner, puts Marsilius's political

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[36] Ibid 36-37.

[37] Ewart Lewis, 'The 'Positivism' of Marsiglio of Padua' (1963) 38 Speculum 541.

[38] Cary J. Nederman, *Community and Consent: The Secular Political Theory of Marsiglio of Padua's Defensor Pacis* (Rowman & Littlefield 1995) 2-5.

thought on the side of the republican values in the northern Italian cities of the 13th and 14th centuries.[39] According to Skinner, the central concept of Marsilius's thought is his practical interest in minimizing the risk of factious disturbances among the city-states, apart from the threats from the Church and the Empire.[40] Hyde takes the republican interpretation to an extreme, arguing that *DP* provided a 'virtual blueprint of the inner workings of Italian (or more especially Paduan) communal government'.[41] Skinner accuses Lagarde, Wilks and Quillet for being 'in virtual isolation from the circumstances in which it [*DP*] was composed'.[42] To Skinner, it was 'evident that Marsiglio was not merely writing an abstract work of constitutional thought [...] [but] a new and radical answer to the question of how these liberties might be secured'.[43]

The opposing scholars, mainly those who believe that Marsilius was an Imperialist, believe that when Marsilius spoke of a defender of the peace, he had the Holy Roman Emperor in mind. While it was a curious relationship between them, it is an apparent fact that Marsilius of Padua was devoted to the German king and imperial claimant, Ludwig of Bavaria. There are, of course, varying narratives about the exact beginning of their relationship, but the differences between these narratives do not lead to diverse interpretations: Discourse III of *DP*, one way or another, was devoted to the king, as were Marsilius's consultancy services.[44] Further, it is a fact that Marsilius found refuge at Ludwig's court in 1325 after leaving Paris and with John of Jandun, Marsilius accompanied Ludwig in his campaign between 1327 and 1328 to Rome. Nederman even claims that what looked like an escape

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39 Joseph Canning, *Ideas of Power in the Late Middle Ages: 1296-1417* (Cambridge University Press 2011) 84-85.

40 Skinner (n 5) 60.

41 John Kenneth Hyde, *Padua in the Age of Dante* (Manchester University Press 1966) 210-212.

42 Skinner (n 5) 51-52.

43 In ibid 52: 'We have already considered the second of the two Discourses into which the book [*Defensor Pacis*] is divided, in which Marsiglio seeks to defend the liberty of the City Republics against the encroachments of the Church.'

44 George Klosko, *History of Political Theory: An Introduction* (Oxford University Press 2012) 297.

from Paris together with John was not an escape at all.[45] It was, for both of them, a calculated and deliberate decision to join Ludwig's service.[46] Finally, when Ludwig's venture failed, his papal candidate, Nicholas V, fell. After Ludwig's excommunication, Marsilius returned to Munich with the king and remained under imperial service until his death. The close relationship is, perhaps, insufficient in proving the point made by the pro-Imperialist scholarly camp that Marsilius's thought does not involve any elements of a city-state political model. However, it does imply that, in choosing the side of the Empire against the Church, Marsilius's political theory in *DP* was influenced heavily by his close relationship with the king.

Yet, neither the pro-Imperial nor the republican explanations seem to refer to Marsilius's political thought. In a search to pull Marsilius to either side, either as an advocate of republican liberties or of the Imperial power, both approaches fail to engage with Marsilius as a whole, both in regard to his political biography and in regard to the legal debates of the time. While Skinner claims that the pro-Imperialist approach stands 'in virtual isolation from the circumstances in which it [*DP*] was composed',[47] the republican approach that Skinner represents omits Marsilius's continuous political engagement with King Ludwig. As such, the pro-Imperialist approach, claiming that Marsilius's only purpose was to defend the Empire against the Church, failed to address the legal and political debates that influenced Marsilius both in Padua and in Paris in a more republican manner. In that sense, this paper aims to reconcile both approaches and attempts to form a new approach that takes into consideration everything that influenced Marsilius, particularly in regard to the social contractarianism that his theory encompassed, which is elaborated in the next section of the paper.

There is a third point to consider. In the midst of newly acquired theoretical tools and revived Roman Law and Code to help re-interpret the teleological

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45 Cary Nederman, 'A Heretic Hiding in Plain Sight: The Secret History of Marsiglio of Padua's Defensor Pacis in the Thought of Nicole Oresme' in Ian Hunter, John Christian Laursen, Cary J. Nederman (eds), *Heresy in Transition: Transforming Ideas of Heresy in Medieval and Early Modern Europe* (Hants 2005).

46 According to Nederman, Marsilius left Paris to Ludwig's court even before he was declared a heretic; and Marsilius's excommunication by the Pope was not directed at him, but at discrediting Ludwig.

47 Skinner (n 5) 51-52.

assumptions of the princely power, as Lagarde commented, we are still not sure where Marsilius stands with regard to the limits of his knowledge.[48] The two essential reasons for this inaccessibility, according to Lewis, are that Marsilius was not a jurist and that he did not always cite his sources, as he liked to put things in his own words. If we limit his sources to those he cited, as Prévité-Orton did, it is easy to conclude that Marsilius was unaware of a significant part of the preceding political-legal thought.[49] The same vagueness is also present in Marsilius's lack of engagement with the Averroist interpretation of Aristotle, which he encountered both as a student and as the rector of the University of Paris. He was present in the Averroist-Parisian circles, but as Lewis states, 'attempts to trace the major features of his thought to Averroist influences have revealed differences far greater than similarities'.[50]

Nederman points out that 'the available biographical evidence about Marsiglio is consistent with either of these interpretations of Marsiglio's intentions in composing the *Defensor Pacis*'.[51] Garnett was probably right when he said '[t]hey [many of the modern historians] have substituted their own modern words for Marsilius'.[52] As Skinner highlighted, Marsilius was more than aware of the fact that before the Empire, 'the cities had no means of investing them with any legal force',[53] and before the Church only the Empire could stand, by the means of its armed forces. Perhaps not the direct connections to the Galen, but the logic that Kaye presents would reflect Marsilius's stance the best: an attempt for balance.[54]

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48 Georges de Lagarde, *La naissance de l'esprite laique au éclin du moyen age, II: Marile de Padoue*, Saint-Paul-Trois-Chateaux (1934) 60-94.

49 Charles William Prévié-Orton, 'The Authors Cited in the Defensor Pacis', in HWC Davis (eds), *Essays in History Presented to R.L. Poole* (Oxford University Press 1927).

50 Lewis (n 37) 545.

51 Nederman (n 37) 9.

52 George Garnett, *Marsilius of Padua and the Truth of History* (Oxford University Press 2006) 3-14.

53 Skinner (n 5) 7.

54 Joel Kaye, *A History of Balance, 1250-1375: The Emergence of a New Model of Equilibrium and its Impact on Thought* (Cambridge University Press 2014) 303-314.

It seems that Marsilius never gave up the republican belief in which he was raised; even though he was not schooled in law, he was aware of the revival of the Roman Laws and the *lex regia* debate to some extent; and he certainly knew the Aristotelian principles. He was active in Parisian-Averroist circles, but his knowledge also derived from the then mainstream rediscovery of the main corpus of Aristotle's works, together with William of Moerbeke's translation of the *Politics* from 1250. Never had anyone in his era had such a diverse pallet of tools and sources to reconcile, but in doing just that, Marsilius came up with his theory of the social contract.

## IV. MARSILIUS: THE SOCIAL CONTRACTARIAN

The agents, the aims and the elements of SCT vary greatly and thus it would be unwise to attempt to give 'an operational definition of something so heterogeneous', but a brief definition of what Boucher and Kelley define as 'civil contractarianism' can be given.[55] Civil contractarianism 'is a form of social compact [...] whose role is either to legitimize coercive political authority, or to evaluate coercive constraints independently of the legitimization of the authority from which they drive'.[56] Through civil SCT, moral and rational constraints that go beyond mere preferences are consolidated, extended or transformed. Boucher and Pelley make a distinction between civil SCT and constitutional contractarianism, which is crucial for our purposes. Constitutional contractarianism, which is an essentially juridical conception of medieval jurisprudence, is what corresponds to the debates in *lex regia*:

> In this respect, civil society itself is not necessarily posited to rest upon consent, it is instead the relationship between the ruler and the ruled that is said to be contractual, explicitly or implicitly, and which specifies or implies the respective rights and duties of the contractees.[57]

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[55] Davide Boucher and Paul Kelley (Eds) *The Social Contract from Hobbes to Rawls* (Routledge 2005) 2-3. It must be noted that this paper does not claim to have covered the whole debate of social contractarianism, but rather is an attempt to use a definition that suits the purpose of better analysing Marsilius.

[56] Boucher and Kelley (n 55) 4.

[57] Ibid 10.

In that sense, the origin of authority is the *popolo* in both constitutional and civil SCT. Nonetheless, there are three differences between constitutional SCT and civil SCT in terms of the contracting parties who are eligible to sign the contract, the irrevocability of the contract, and the establishment of a legal personality.

As a template, the distinctive features of civil SCT can be classified in four ways: the presence of a convention, the establishment of a civil community, the establishment of an independent corporate body to govern, and the irrevocability of this convention.[58] The convention, which expressed the general will of the people, had to be made through the consent of the entirety of the people.[59] The contract itself was the origin of the political community and civil society, through which the consenting *populus* established the legitimacy of the authority of the ruler over themselves. Since this convention represented the uncontentious collective will of the people, it had to be irrevocable. In turn, the *populus* had to give up its *potestas* to act as a corporate and independent body. A close reading of Marsilius's narrative, though not as widely circulated as the works of other social contractarians, corresponds to the basics of the SCT template.

In order to fully understand Marsilius's *convention* as an element of civil SCT, we have to look at the origins of the abstraction of his social contract. A student of Aristotelian tradition, Marsilius's contemplation on the origins of the city reflects at first sight a natural historical sequence. Its historicisation resembles Aristotle's narrative of the origins of the civil community.[60] For both Marsilius and Aristotle, the village was 'the first community arising from several households and for the sake of non-daily needs', reflecting the ultimate goal of the city, which was being able to live a self-sufficient life purely for the sake of living well.[61] The difference between Marsilius and his conciliar was that while Aristotle synchronised the birth of law with the birth

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58 Michael Lessnoff, 'Social Contract Theory' in William Connolly and Steven Lukes (eds), *Readings in Social and Political Theory* (New York University Press 1990).

59 Peter McCormick, 'Social Contract: Interpretation and Misinterpretation' (1976) 9 Canadian Journal of Political Science 22.

60 According to Aristotle (Book I252b/25-30) 'the complete community, arising from several villages, is the city'.

61 Aristotle, Book 1252a/10-15.

of the household, for Marsilius the village was still ruled by quasi-natural law, and was thus close to but not yet a perfect civil community.[62] He agreed with Aristotle that the first communities could also be called civil,[63] but they were bound by the fate of natural law and thus could never achieve the true meaning of law.[64] The perfected civil community was the city.[65] This perfection not only stemmed from the concurrent birth of law itself but also the *civilitas* (politics), an adaptation of Aristotle's *politeia*, namely, the civil order. For Marsilius, the civil order was the legal order, in other words, it was the order of the civil community exercised through the implementation and execution of (earthly) law.

However, there was a crucial divergence in Marsilius's theory and the uninterrupted Aristotelian development of the city. This is mostly because Marsilius did not provide the same natural order in the birth of law. For Marsilius, law was not a natural outcome or an inevitable conclusion in the formation of civil society. It is true that the perfect community was the only way to fulfill the desire to live well and was thus the inevitable conclusion. However, this continuation was merely a logical one, not a methodological

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62 Marsilius, DP, I.3.IV:

63 Marsilius, DP, I.3.IV: 'Now as long as human beings were in one single household, all their actions, and especially those we shall later call 'civil', were regulated by the elder among them as by the more discerning: without, however, any law or custom, in that these could not yet have been discovered.'

64 See Brett's footnote 5 on p. 16: 'For Marsilius's rejection of a natural law in the true sense of law.'

65 However, it must be noted that, Marsilius did not really want to call the first communities (household and the village) 'civil'. The distinction between the civil community and the perfect civil community was only once made in DP I.3.IV. In the rest of the book, he uses 'community' for the civil community and 'civil community' for the perfect civil community. In other words, in the rest of the book when he uses 'community' in regard to the formation of the origins of the city, he means the household and the village that were run by the elders due to the precepts of natural law; however, when he uses 'civil community', he means the city that was regulated by proper, human-made law. Thus, I am going to ignore the distinction made in DP I.3.IV and employ the easier/shorter distinction, where community is the household and the village, and the civil community is the city. See Cary J. Nederman, 'Private Will, Public Justice: Household, Community and Consent in Marsiglio of Padua's Defensor Pacis' (1990) 43 The Western Political Quarterly 699.

one that could necessarily provide a causal link. According to Marsilius, for the city to be established, an intervention was inevitable.

At the beginning of *DP*, Marsilius says, 'men gathered to form a civil community and to ordain the law'.[66] The multitude, presumably in the form of villages or households, was scattered. In this order governed by quasi-law, the division of labor that rendered life not only as livable, but worthy of living, was missing. As the number of people grew, the wisdom and the consciousness of expertise grew, eventually changing the conception of a good life for the village residents. The growth in both numbers and expertise led the way to a division of arts and crafts, which required proper governance. Yet the need for proper governance due to the expansion of the division of labor in society was not the only reason that Marsilius's idea of *populus* opted for a legal order. There were no states of war in the pre-city communities, but the residents living in the households and villages were certainly vulnerable to both the partial and unfair rule of the patrons and elders, as well as attacks from other united groups.[67] Pre-*civitas*, there was nothing preventing the rulers from making decisions that suited them and only them. In contrast to this distribution of authority, the basis for a tranquil and peaceful city was, for Marsilius, fairness, and it could only be achieved through law.[68] Eventually, in the face of these threats and the possibility (or most probably, a reality) of disorder, wise, resourceful and heroic men called in the *populus* to work together towards creating the perfect community. The men of the villages answered the call of the wise, resourceful and heroic men, and agreed to create the perfect community that would be called the city.

This calling and gathering resulted in the creation of political society. Since the perfected legal order could not be 'retained except by their mutual communication',[69] they created the *communitas* through a *communicatio ad invicem*, a communion between one another.[70] This creation of communion was acted upon through a *conventio:* 'Convenerunt enim homines ad civilem

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66 DP I.9.II; DP. II.22.XV.

67 DP I.9.IV.

68 DP I.11.I.

69 DP. I.4.IV.

70 Michael Wilks, 'Corporation and Representation in the Defensor Pacis' (1972) 15 Studia Gratiana 251.

commnicationem propter commodum et vitae sufficientiam consequendam et opposite declinandum'.[71]

The accumulated result of the convention is interesting. The obvious and expected creations were the law and the *civitas*. Likewise, Marsilius openly states that by virtue of the contract, the political community would be created. However, the Human Legislator was created as the political body itself, as the sole body that could exercise sovereignty that belonged to the *totus populus* in the form of *auctoritas* (as *merum imperium*) and *potestas di plenissima iurisdictio*. Thus, it was the citizens that form the political community. In other words, the political community is a collective of each person in the newly formed *civitas*. Citizens are those among the multitude who are reasonable, good and right enough to actively participate in the primary political act, which would be the convention. Through participating in this primary political act, they would create their own representative persona of 'citizenship'.

However, the political body authorized by the citizens to make law, namely the Human Legislator, as Marsilius repeats over and over again, is not a collective but a unity of this political community: 'the 'legislator, i.e. the primary and proper efficient cause of the law, is the people or the universal body of the citizens or else its prevailing part', *universitas civium*.[72] As Brett notes in her translation of *DP*, *universitas* is derived from its corresponding term in Roman law: 'In Roman law, it is equivalent to our idea of a 'corporation' or a 'corporate entity,' i.e. a number of people forming one body, and this is the sense in which it is used in medieval Roman and canon law'.[73] The *universitas*, then, is the Human Legislator itself, which is the embodiment of the united and collective wills of the citizens in a council, which is the *valentior pars*. This Human Legislator is the primary and efficient cause of the law, the primary human authority to pass laws, and law is above

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[71] DP I.12.VII. Annabel Brett's translation does not consider the 'convention' aspect of the gathering: 'For men gathered into a civil community in order to pursue their benefit and the sufficient life and to avoid their contraries'. The original sentence was taken from Marsilius of Padua, *Defensor Pacis*, ed. R. Scholz: 2 vols (Hanover 1932-1933). Marsilius refers to the convention again in DP II.22.XV: 'Sicut enim ad civilem communitatem et legem ordinandam convenerunt homines a principio'.

[72] DP. I.12.III; DP I.12.V; DP I.13.I; DP I.13.II; DP I.13.III; DP I.15.II and so on.

[73] Brett, Notes on the translation, *The Defender of the Peace*, 1-2.

everything else in the city. The Primary Legislator is the first Human Legislator, and the decisions taken after the contract ought to be in accordance with its decisions.[74]

There is an obvious question about whether or not the legal personality of the Human Legislator actually reflects a form of sovereignty in the *civitas*. According to Ullman, Marsilius's breakthrough was his introduction of people's sovereignty to political philosophy, while according to Wilks, Marsilius promoted 'a totalitarian democracy of the type later to be preached by the revolutionaries in France'.[75] It is true that neither a Rousseauian nor a Westphalian theory of sovereignty can be expected from Marsilian theory. Yet, there is no doubt that the foundation of the birth of modern sovereignty theories are rooted in medieval jurisprudence.[76] As such, Skinner claims that Marsilius cannot be accepted as 'a theorist of state sovereignty'.[77] Rather, he sees Marsilius as merely a continuation of the *lex regia* debate of constructing a convention that would let the *populus* give power to someone to rule over

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74 DP I.12.III: 'This is so whether the said body of the citizens...commits the task to another or others who are not and cannot be the legislator in an unqualified sense but only in certain respect and at a certain time and in accordance with the authority of the primary legislator.'

75 DP I.12.III: 'This is so whether the said body of the citizens...commits the task to another or others who are not and cannot be the legislator in an unqualified sense but only in certain respect and at a certain time and in accordance with the authority of the primary legislator. '

76 Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Eburon Delft 2007). London Fell argued that von Gierke looked at secular and national prototypes, deeming theocratic ideals as an obstacle. He traced von Gierke's position back to the political ideology supporting the edification of the Prussian and Bismarckian Reich, characterized by the tendency to make the sovereign legally omnipotent.' See A. London Fell, *Origins of Legislative Sovereignty and the Legislative State* (Praeger 1991).

77 Skinner, *From Hobbes to Humanism* (Cambridge University Press 2018) 41: 'But the legal person to whom these theorists refer is never the persona civitatis, the person of the state; it is always the persona populi, the person constituted by the body of the people...none of these writers, in other words, is a theorist of state sovereignty. The question they address is never about the Powers of the civitas, but always about the disposition of power between populus and princeps, the people and the prince.' Skinner also states that, in the ft. 206, 'It is thus misleading to associate these discussions of legal personality with Hobbes, as I did in Skinner 2002a.'

them; this view was adopted by the Monarchomach or the king-killing writers of the French religious wars.[78] The two parties of the convention, according to Skinner, would still have the legal status of a party to enter a contract with each other because the government in *lex regia* acquired a legal persona that was different from that of the *totus populus* (the entirety of the people). Thus, after the contract, there were two legal personalities: the governmental legal personality and the *totus populus*.[79] Marsilius, deriving his terminology from the legal theory of corporations, which took its origins from the school that used '*universitas*' for the *populus*, ascribed a *populus* a legal personality.[80]

Yet, Marsilius's construction of the concept of the Human Legislator, and the citizen body advances a completely different proposition than either Gierke or Skinner contemplate. It is true that many aspects of Marsilius's convention were not unheard of. As both Wilks reminds us, it was

> highly unlikely that Marsilius remained unaware of the highly artificial nature of the 'People' and the popular will in the bulk of medieval legal discussion. The idea of the populus or the universitas as a single juristic person, its government by laws seen as an expression of the will of this corporate personality...all were common features of Roman corporation law.[81]

However, Marsilius's convention diverges greatly from the ways in which both Azo and the translation theorists viewed *lex regia* in regard to the transfer of the *potestas di plenissima iurisdicti*o. Firstly, Marsilius's convention shifts the body that receives the powers from the *populus,* from a monarch to a legislative body. In *lex regia*, the emperor receives the *merum imperium* and the *plenissima iurisdictio* together. In this regard, Skinner is right because even with Azo and the other canonists, the transfer is always about the power

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78 Quentin Skinner, *The Foundations of Modern Political Thought, Volume II: The Age of Reformation* (Cambridge University Press 1978) 302-348.

79 These are to be derived from Quentin Skinner, 'Hobbes and the Purely Artificial Person of the State' (1999) 7 Journal of Political Philosophy 1.

80 Quentin Skinner, *Visions of Politics, Volume II: Renaissance Virtues* (Cambridge University Press 2002) 390-393.

81 Wilks (n 68) 255. See also Arthur P. Monahan, *Consent, Coercion, and Limit: The Medieval Origins of Parliamentary Democracy* (McGill-Queen's University Press 1987) 255.

disposition between the *populus* and the emperor. In *lex regia*, the united will of the *totus populus* represents both *merum imperium* and *plenissima iurisdictio* and they are both manifested in the *populus*. Yet, Marsilius does not consider the transfer of *merum imperium* worthy of mentioning when he explains the convention. On the contrary, he highlights the transfer of legislative power and authority. It is clear that the element of enforcement and enforceability is central to his conception of law and, further, it is the main argument excluding the papal claims from an earthly legal order. The reason for this is that law, given by human agency, is above everything else. Thus, because it is the utmost power that the *populus* can hold, it also includes and creates both the terms of the *merum imperium* and the body that exercises it. Because the *dominium* is associated with the right to legislate, for Marsilius the power of legislation is the origin and the executive power is derived from the decision of the legislative body. In that sense, Marsilius diverges from medieval jurisprudence by shifting the sovereign body from one that holds both legislative and enforcement powers to one that is assigned legislative authority to decide upon everything else. In this way, Marsilius also shifts from the prince as the legislator, to the people as the legislator.[82]

Further, by locating the Human Legislator and the law it makes through a convention at the top of the hierarchical power of the city, he introduces an interrupted historiography. In *lex regia*, the contracts are mainly decisions of the *populus* on the appointment of the ruler, then the *lex regia* contract is one about the formation of the body of the ruler. Yet Marsilius's convention is one that interrupts the natural historical course by serving not only as an appointment of a ruler, but as a foundational agreement which introduces a set of new rules that can range from the regime of the *civitas* to the limitations to the authority of the prince. In this regard, while *lex regia*'s social/communal agreement is a temporary appointment, Marsilius's convention is one that establishes—or provides the Human Legislator with the legal tools to

[82] Monahan (n 79) 222-223.

establish—a new system of governance and legislation.[83] It is, as Skinner remarks, 'a sovereignty by Institution, not a sovereignty by Acquisition'.[84]

Moreover, a ruler who comes to power through *lex regia* is temporary and is always prone to be brought down by the *populus*. The power of *lex regia* kings is revocable by the *populus*, and thus the contract resembles the Monarchomachs and the king-killers of the Huguenots.[85] In Azo's view, on the other hand, the *populus* can always reclaim power from the ruler in the case of injustice or bad governance: because the *populus* is the original holder of power, it will remain as such even if it transfers its rights to a ruler for a limited amount of time. Thus, power is for the *populus* to reclaim whenever it wishes. Marsilius's city, on the other hand, was established with the aim of avoiding strife, and as the opposite of the strife. This is why the book is titled 'The Defender of the Peace'. Strife, as shall be discussed in the next part, is the opposite of the ultimate aim of the city, which is to achieve tranquility. However, it must be noted that Marsilius's political thought, even though it sought a secular understanding of the law and state, was not rooted in an amoral sphere. Marsilius's political theory finds its justifications in *reason*, not in pure positive law theory. Hence because the city would dissolve due to strife, 'which threatens no little harm to all communities', 'anyone who has the will and the ability to perceive the common advantage is duty-bound to devote attentive care and painstaking labour to this end'.[86] Since the city is established through the collective and united will of the *populus*, everyone in the city already tries to sustain and maintain this tranquility. Thus, Marsilius's sovereign body, contrary to that of *lex regia*, by definition cannot be in an act of bad governance and thus cannot be reclaimed and revoked.

There was another reason, besides the impossibility of Marsilius's Human Legislator to do wrong, for the irrevocable character of the contract. Another equally crucial reason is that the Human Legislator is the embodiment of the

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[83] It is important to note that Marsilius avoids dictating what the best regime is to his mind. He actually avoids saying anything about what he thinks is best for the *populus* at all. This is because of his firm belief in the foundational aspect of the Primary Legislator. See DP I.11.I. (n 66).

[84] Skinner (n 77) 10.

[85] Skinner (n 76) 310-340.

[86] DP I.1.4.

*populus*: it is 'the corporate personality as a single juristic person' that aims to have a 'government by laws as an expression of the will of this corporate personality'.[87] As with Cicero and Augustine, *res publica* is a *People* rather than the people—it is a public thing as opposed to the general public.[88] However it is not, as said before, distinct from the body of the *populus*.[89] Instead, it is the fictitious corpus of the united personality of the collective of individuals.[90] It is important what Skinner touches upon in the case of David contracting with the *universitas* of Israel: the king and the *universitas* of the *populus* entered the contract as different parties. This is a typical form of *lex regia*—the *populus* can reclaim its rights from the ruler because it is party to the contract. Thus, if the contract is not fulfilled by one party through the negligence or malpractice of duties, the other party has the right to terminate the contract, in this case by reclaiming the powers from the ruler. However, in Marsilius's treatise, there is no second party to the contract: the men gather and they collectively decide to establish a Human Legislator. The contract they enter into is not with another party but with each other and the established representative body is thus not party to the contract but a product of the contract.

On this point, Wilks agrees with Skinner: 'The initial grant of authority by the people to the pars principans is revocable and the *legislator humanus*, as the name implies, retains the right to make law, even though in practice most of

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87 Wilks (n 68) 255-256.

88 Cicero, *De re publica*, I.25.XXXIX.

89 Skinner (n 77) 18. Here Skinner is speaking about Hobbes's institution and Hobbes's establishment of the artificial personality of the collective: 'The only means by which they [the multitude] can do so [institute a legitimate commonwealth or state], he argues, is by transforming themselves into an artificial person by way of authorizing some natural person or persons to represent them. This is not in the least to say that the multitude acts in the manner of a single persona in agreeing to set up a government...The author of the *Vindiciae*, Contra Tyrannos, for example, had argued in discussing the exemplary case of Israel that the king had acted as one party to the covenant and the people as the other. Both were able to contract as single persons, the king because he was a natural person, the people because they constituted a universitas and 'were therefore able to play the part of a single person'.

90 Wilks (n 68) 258-259.

the administrative work of government falls into the hands of prince'.[91] This analysis of the application of *lex regia* to Marsilian political thought might have been meaningful only if Marsilius accepted the prince as party to the convention, but the prince is not party to the convention. Furthermore, even the corporate body of the Human Legislator is not party to the convention: it is a purely fictive representative body that has the authority to legislate and to make legislation. If there is an irrevocability in Marsilian thought, contrary to Skinner's and Wilks's understandings, it would not be between the prince and the Human Legislator or the *populus*. Rather, it would be between the Human Legislator and the *populus* because the *potestas* of the *populus* is given to the Human Legislator, not the prince. Although it is true that the princely office is revocable in Marsilian thought, this does not imply a revoking of the *potestas di plenissima iurisdictio* of the *populus*, because the *populus* as a *totus* never transfers its *potestas* to the prince in the first place. It is the Human Legislator that grants the prince the authority to rule. The possibility of a revocation does not have a place in the Marsilian contract.

## V. An Analysis of Marsilius's SCT

What defines civil SCT is how it differs from the contract offered by *lex regia*, namely constitutional SCT. The 12th century's sovereignty debates revived Aristotelian contractarianism and the Codex, where the *multitudo* as a unity contracted with a ruler to transfer *potestas*. The definition of *potestas dei populi*, which is defined using different terminology by both Aristotle and the jurists after the 10th century, corresponds to a bundle of executive and legislative powers collected in a body that is authorized to rule by the *populus*. This is the core of the *lex regia* debate in 12th century: the emperor was seeking to legitimize his rule in the face of the newly formed autonomous units in northern Italian city-states. As Skinner states, the limits of imagination of the jurists who participated in the *lex regia* debate never went beyond a question addressing 'the disposition of power between populus and princeps, the people and the prince'.[92] It is indeed the case, as seen in several examples,

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[91] Michel Wilks, *The Problem of Sovereignty in the Later Middle Ages* (Cambridge University Press 1964) 186.

[92] Skinner (n 75) 41-44.

that the jurists refer to similar examples, one being the contract between David and the Israeli free folk.

Three elements were distinctive about the *lex regia* contract. The first element was the *popolo* holding the legal status of being a party to a contract. In other words, the *populus* was party to a contract to something that was not represented by the *populus* itself. The *populus* contracted with some other party, the ruler, who was not a part of the *populus*. The second element was the right of rescission. The free folk, as a unity, entered into a contract with a natural person in order to transfer the *potestas* it had as a unified *populus*. Both David and the Israeli free folk were covenants of that contract, which, particularly due to a strong private law tradition that was demonstrated in *Digest*, implies that the right of rescission existed for both parties. In other words, since the *populus* as a unity was a covenant of the contract, if there was a breach, the *populus* had the right to an annulment and to ask for restitution. In this case, restitution implied reclaiming the *potestas*. The third element was the temporary unity that the *populus* demonstrated only during the signing of the contract, without transferring its rights to a legal personality other than the ruler. This is where the corporation theory is embedded in the *lex regian* contract: the *persona ficta* status of the *populus* in both the corporation theory and *lex regia* starts when the *multitudo*, the free folk, unify together to give consent to a ruler to rule over them. During the actual act of signing, the *multitudo* is a corporate, fictive person, but only temporarily. Once the contract is completed, the *populus* possesses neither the *potestas* nor the corporate personality anymore, until or if they are to reclaim their *potestas* back again.[93] On the other hand, the ruler, as a contractor, never possesses the

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[93] Skinner (n 87) 18-21. Skinner here proposes a fourth element of the lex regia contract. Or rather, he defines a fourth element of the *lex regia* contract by taking Hobbes's theory as the central point. He accuses the *lex regia* of never addressing 'the powers of the civitas', because the legal person of the *populus* in the *lex regia* contract 'is never the persona civitatis, the person of the state, it is always the persona populi, the person constituted by the body of people'. Thus, the fourth element of lex regia appears through a converse reading of this page: not sustaining the possession of a legal personality as a *civitas* after the contract. Yet, there are two problematic points of this interpretation. The first corresponds to what the modern law calls retrospectivity: the evaluation of the contract itself cannot be done by evaluating what happens after the contract. In other words, the legal entitlements of the multitude after the contract has very little to do with the

right to be the *popolo* itself, but is limited by the contract. To summarize, the three elements of the lex-regia contract are: the *populus* being a party, the *populus* having the right to rescission, and the *populus* having a temporary corporate, fictitious personality.

Let us return to Marsilius's theory. First of all, Marsilius's contracting parties did not involve a ruler. The covenants gathered together, answering the call of the wise men who were already the opinion leaders of the pre-existing legal order, but that is the end of the role of the wise men. The covenants of Marsilius's contract were not a ruler and a *populus*, but individuals who were eligible to enter into a contract. Thus, the parties to the covenant were the individuals of the multitude, and they contracted with one another. Further, since it was a contract among individuals, Marsilius's contract did not, by its nature, stipulate a unity of the *populus* that existed before the contract. On the contrary, Marsilius's *persona ficta*, the Human Legislator, was constructed through the contract together with the legal order itself. While in *lex regia* the order was established after the contract by the ruler due to the transfer of *potestas*, in Marsilius's theory the sovereign body was established with a distinct legal personality through the contract itself. Lastly, rescission of the contract was not possible because anything that was constituted after the contract had to correspond to what the Primary Legislator had set out.[94]

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characteristic of the contract. Thus, not leaving the multitude with an entitlement of a *persona civitatis* once it's signed cannot be considered as one of the characteristics of a *lex regia* contract. The second problem is the interesting similarity between the *lex-regia* theory and the Hobbesian contract, which Skinner places at the center of all his argument.

94 This, I am aware, requires more explanation. This claim has a lot to do with how Marsilius identifies the Primary Legislator, its prevailing part, as well as Marsilius's perception of the common good and a tranquil city. According to Marsilius, as Janet Coleman remarks, the Human Legislator cannot be understood similarly to 'Rousseau's will of all, made up of individual, free, self-interested wills which, when summed, produce majority opinion'. Instead, the will about the common good of those who are eligible to legislate is the same because there is only one sensible and truthful choice to make. It is likely Wilks's definition that best grasps what a citizen really is when he states that 'Marsilius thought that anyone who dissents from or refuses to recognize the common benefit withdraws himself from his status of citizen'. See Janet Coleman, *A History of Political Thought: From Middle Ages to the Renaissance* (Blackwell Publishing 2000) 154; Wilks (n 68) 251-292. Thus, in

Correspondingly, Marsilius's contract has very little in common with what *lex regia* has to offer in regard to the legitimate source of the *populus*'s sovereignty.

The characteristic of the civil social contract that Marsilius's theory demonstrates is not the limit of his revolutionary political proposal. As mentioned above, a very primitive notion of the separation of powers was not unheard of at that time. Azo, by then, had already established the *iurisdictio*, assigning to it a much broader scope than the *Digest* did. Azo developed the conceptual understanding that even if it was accepted that the emperor had all the legislative and executive powers to himself, as long as judges existed, such a claim would be false at best. Thus, *iurisdictio*, the authority to rule, was already distributed among the magistrates and, at worst, that implied the distribution of the power to legislate. The idea of the separation of the emperor's power from local governing activities, in other words, *merum* and *mixtum imperii*, were already debated before Azo. However, Marsilius, in my opinion as a direct interpretation and application of Azo's *iurisdictio*, re-organized the way that this supposed separation of powers served for the legitimization of sovereign power. According to Black,

> this was a revolution in scholastic political theory, a direct expression of the communal tradition. It was made possible by Marsiglio's carefully argued distinction between legislature and executive, which also had roots in communal civic practice going back over two centuries.[95]

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Marsilius's theory, the non-existence of rebellion or revolt is not due to state sovereignty, but to the very nature of political agency that every good and sound person wishes for the common good. As such, Marsilius, DP I.13.2: 'On the contrary, those not-willing the polity to survive are counted as slaves, not citizens, as are certain foreigners; hence Aristotle in Politics VII, chapter 13: 'For together with the subjects are all those throughout the region whose will is to rebel', and he then argues 'and that they should be of such a multitude in the political order', sc. the rebellious, or those who do not care to live in a civil manner, 'that they are prevalent over all of these', viz. those who want to live a political life, 'this is impossible'...If therefore the prevailing multitude of men wills the polity to survive (as seems soundly said), then it also wills that without which the polity cannot endure'.

95 Anthony Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present* (Methuen & Co 1984) 91-92.

The type of regime or governmental processes does not influence the fundamental distribution of authority 'since the ruling part is subordinated to the whole citizen body'.[96] In that sense, ultimate political authority does not seem to have been located in any government, but in the law, 'which is made by the corporation of citizens or some agent responsible to it'.[97] At this point, I believe that he combined his Aristotelian understanding of popular sovereignty with a transformed approach to forming the social contract that he acquired from the *lex regia*, and assigned the sovereignty legislative power. The Primary Legislator was the first Human Legislator, who emerged at the same moment as the emergence of a legal order which was the perfect community.

## VI. Conclusion

On the basis of the foregoing analysis, it can be confidently claimed that Marsilius's complex understanding was not rooted in any one of his pro-Aristotelian views, his republican city-state past, or his political engagement in the emperor's campaign. If he succeeded in managing the methodological shift he applied on the right-transferring aspect of *lex regia*, it is because he was surrounded by the Averroist Aristotelian tradition that gave him the idea of the *populus* as a sovereign to substitute the 12th century's concept of a ruler as the holder of all political power. As such, if he managed to create an understanding of *regnum* in which the emperor was accountable to the *civitates*, it was the ideological outcome of his past in the participatory structure of the Italian city-states. Likewise, if he was one of the prominent thinkers who struggled to find a legitimate way to free earthly affairs from the ecclesiastical, it was because he was the head of a university immediately following the *lex regia* jurists' debate about the legitimate source of sovereignty. Overall, Marsilius may be considered the first social contractarian of medieval jurisprudence to condition sovereignty on a covenant among individuals to form a legal entity with the authority to rule.

Being the first is, of course, only mildly significant in and of itself. Yet, Marsilius's theory is crucial because of its implications for state sovereignty,

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96 Ibid 91.

97 Ibid 95-97.

which aimed to unify the will of the multitude not as an authority to rule, but to make law before everything else. The displacement of the act of ruling with *iurisdictio* seems to imply analyzing the modern state of today as the continuation of a Hobbesian state and, further, approaching and evaluating the possible power that a multitude can hold.