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CONSTITUTION AND FUNDAMENTAL LAW: THE LESSON OF CLASSICAL ATHENS

By John David Lewis

I. Introduction: The Constitution as Fundamental Law

One of the major innovations that the American Founders brought to constitutional thought was their conception of a constitution as a written, *fundamental law*—the supreme "law of the land" that defines the organization of government and serves as the ruling principle for the proper exercise of power by legislators, officials, and judges.[1] This conception of what a constitution should do stood against centuries of European history, in which constitutions were shaped by traditions, circumstances, and bloody warfare,[2] legislative acts and the decrees of kings had constitutional force,[3] and constitution-making usually involved upheaval by violence and revolution. With the American constitutional revolution, a written constitution was no longer a description of a political system, but a prescriptive plan of government and a law to govern its operation, enacted by rational deliberation and used as a legal standard.

This American legal conception also ran counter to the premises of Greek political thought, which defined basic constitutional forms and grappled with constitutional change, but never theorized about a written constitution as a fundamental law. Although the figure of the lawgiver

[1] U.S. Constitution, Article VI: "This Constitution . . . shall be the Supreme Law of the Land . . ." The phrase "law of the land" is in the Magna Carta: see G. R. C. Davis, *Magna Carta,* rev. ed. (London: British Library, 1985), sections 39, 42, 55. See also Paul Vinogradoff, *Villainage in England: Essays in English Mediaeval History* (Oxford: Clarendon Press, 1892; reprint, Clark, NJ: The Lawbook Exchange, 2005), 100 (for aspects of "the general law of the land, maintaining actionable rights of free persons"); and Richard A. Posner, "Modesty and Power" (review of Philip Hamburger, *Law and Judicial Duty*), in *The New Republic Online,* January 15, 2009, http://www.tnr.com.

[2] In *Federalist No. 1,* Alexander Hamilton asked "whether societies of men are really capable or not, of establishing good government from reflection and choice," or whether they will be forever dependent "on accident and force." Alexander Hamilton, James Madison, and John Jay, *The Federalist* (1788), ed. Jack Richon Pole (Indianapolis, IN: Hackett, 2005), 1.

[3] Ernst Freund, "Constitutional Law," in *The Encyclopedia of the Social Sciences,* ed. Edwin R. A. Seligman (New York: MacMillan, 1951), 4:247: any Act of Parliament is "legally superior to the constitution." Reflecting centuries of prior history, the German Weimar Constitution was amendable by the legislature, which produced "a formal confusion between constitutional and ordinary law" (ibid., 4:248). See also Ulrich K. Preuss, "The Political Meaning of Constitutionalism: British, French, and American Perspectives," in John Arthur and William H. Shaw, eds., *Readings in the Philosophy of Law* (Upper Saddle River, NJ: Prentice-Hall, 2001), 503 (in France, "the concept of an eternal, paramount, or supreme law never arose").

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looms large in ancient Greek political history, a Greek *polis* (city-state) grew largely from local customs or the customs of a colony's mother city, not from conscious design, and many of its constitutional provisions remained implicit, unwritten and customary.[4] Greek thinkers had understood a constitution—a *politeia*—to be the organization of a *polis,*[5] founded on the ethical nature of its citizens; the *polis* functioned according to the conception of justice that dominated it.[6] Aristotle developed a concept of *epieikeia* (roughly, "fairness" or "equity") to account for the influence of unwritten norms on the judgments of magistrates, which affirmed the moral foundations of the *polis.*[7] He wrote: "The goodness or badness, justice or injustice, of laws varies of necessity with the constitution of states. This, however, is clear, that the laws must be adapted to the constitutions (*politeiai*)."[8] The Greek conception of a constitution is an ethical conception, in which justice guides the development and use of laws, but in which there is no written constitution to serve as a fundamental law of the land.

Despite this disjunction with modern constitutional thought, ancient Athens offers an important lesson about the relationship between constitutions, laws, and political decision-making. During the fifth century B.C., Athens—the most culturally elevated of the Greek city-states—was brought

[4] Extant Greek "constitutions" are descriptive studies, not prescriptive plans; see, e.g., the Aristotelian *Constitution of the Athenians;* the *Constitution of the Theban Federation;* and the pseudo-Xenophonic *Constitution of the Athenians,* in J. M. Moore, trans., *Aristotle and Xenophon on Democracy and Oligarchy* (London: Chatto and Windus, 1983). See also Polybius, *Rise of the Roman Empire,* trans. Ian Scott-Kilvert (New York: Penguin, 1979), book 6. A few Greek constitutional laws are extant, e.g., the law code of Dreros, which set term limits for officials; and Chios, which established a council. "Foundation" documents for colonies, such as for Cyrene, do not specify a political system. See Charles Fornara, *Archaic Times to the Peloponnesian War* (Cambridge: Cambridge University Press, 1988), #11, 19, 18; and Michael Gagarin, *Early Greek Law* (Berkeley: University of California Press, 1989), 81–91. The seventh-century Constitution of Medina is a list of laws governing relations between groups: http://www.constitution.org/cons/medina/macharter.htm.

[5] The *politeia* is the *taxis* (arrangement or organization) of the *polis,* specifically its offices: see Aristotle, *Politics* 1289a15; *Constitution* 3.1, 4.1, 41.2, in *The Complete Works of Aristotle,* ed. Jonathan Barnes (Princeton, NJ: Princeton University Press, 1984).

[6] In cases where a *polis* did change its fundamental character, the early Greeks often relied upon the wisdom of a single lawgiver. See Gagarin, *Early Greek Law,* 51–80; and John David Lewis, *Early Greek Lawgivers* (London: Duckworth, 2007). The reforms of Solon (c. 594 B.C.) and of Cleisthenes (512–508 B.C.) involved major social and institutional changes. The constitution of Athens changed to a democracy in the middle of the fifth century, under the leadership of Ephialtes and others; a group of Athenians changed their constitution to an oligarchy in 411 B.C., probably with a written document, before turning back to democracy: see Aristotle, *Constitution* 21, 30. In *Federalist No. 38,* Madison wonders how "a people, jealous as the Greeks were of their liberty, should so far abandon the rules of caution as to place their destiny in the hands of a single citizen?" (Pole, ed., *The Federalist,* p. 200).

[7] For Aristotle on unwritten *nomos,* see *Rhetoric* 1374a17–20. He explains this as a matter of the generality of laws at *Nicomachean Ethics* 1137b26, and *Rhetoric* 1354a32–b22. The Spartans took this literally, and created an oral society in which it was unlawful to write the laws: see Plutarch, *Lycurgus* 13.1, in Plutarch, *Lives,* trans. John Dryden (New York: Modern Library, undated).

[8] Aristotle, *Politics* 1282b6–10; see also *Rhetoric* 1360a31–37 (knowledge of constitutions is good for lawmakers).

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into grave crisis by a democratic government that had abandoned its laws in favor of unrestrained popular rule. At the depths of the crisis, however, the people of Athens rose past the strictures of tradition and faction to develop a unique solution, which allowed them to control their political decision-making without reverting to tyranny, to define their laws hierarchically, and to subordinate the decrees of the citizen Assembly to fundamental laws. The Athenian people faced a number of crucial questions. What is the nature of these fundamental laws? Should the laws remain immutable, legitimated by claims to divine sanction and the authority of their ancestors—or should the laws be open to the changes desired by people living now? How far should those changes be allowed to go? In answering such questions, the Athenians developed a constitutional solution, with precise conceptual terminology and highly refined procedures, to a grave moral-political-legal problem.

II. The Athenian Crisis of the Late Fifth Century B.C.

In the aftermath of the Peloponnesian War with Sparta (431–403 B.C.), Athens was defeated, garrisoned by a foreign army, and brutalized by a ruthless dictatorship—the so-called "Thirty Tyrants"—that was imposed by the Spartans. Although this crisis threatened the very existence of Athens as a democratic *polis,* the Spartans were not the major problem; a group of Athenian democrats overthrew the dictatorship and restored citizen government in a few months. The deeper and longer-term problem was internal, political, and, in modern terms, constitutional. This problem struck to the very core of the reasons for Athens's ignoble defeat.

Over the three generations prior to the war, the people of Athens had instituted unprecedented political changes, in which property qualifications for offices were eliminated, the power of the established nobility was undercut, and political power was placed directly into the hands of the entire body of male citizens.[9] This development included a series of challenges to the traditional authority of the long-standing aristocratic Council of the Areopagus. In the last decade of the previous century, around 512 B.C., the lawgiver Cleisthenes had reformed Athens's traditional *politeia* (the so-called "ancestral constitution") by creating a new Council of 500, selected by lot from the entire citizen body, which, over several decades, assumed many of the powers of the Areopagus.[10] The

[9] Citizenship was limited to males born of two Athenian-born parents; women, slaves, and foreign workers did not participate. Pericles' citizenship law of 451 made this official; the law was reenacted in 403 when the Athenians reinscribed their laws: see Aristotle, *Constitution* 26.4; discussed by Peter J. Rhodes, "The Athenian Revolution," and John K. Davies, "Society and Economy," both in *The Cambridge Ancient History*, vol. 5, 2d ed., ed. David M. Lewis et al. (Cambridge: Cambridge University Press, 1992), 76–77, 299–300.

[10] Aristotle, *Constitution* 20. Herodotus, *The Histories,* rev. ed., trans. Aubrey de Sélincourt (New York: Penguin, 1996), 5.66–70, 6.131. See Josiah Ober, *The Athenian Revolution* (Princeton, NJ: Princeton University Press, 1996), on the rise of Cleisthenes as an assertion of the

result was a growing sense of confidence and efficacy among the citizens, who began to assert themselves directly in the running of the city. Athens's creation of a navy—and the success of the navy in repelling the Persian invasion in 480 B.C.—allowed the poor citizens to claim pride of place as rowers who defended Athens, which bolstered their political strength. In the decades after the Persian Wars, a nonviolent political struggle between the Areopagus and the citizen Assembly had led to the political ascendancy of the Assembly.[11] The Council of 500 became probouleutic—meaning it reviewed Assembly proposals prior to an Assembly vote—but the final decision lay with the citizens, gathered in their Assembly.

At the outbreak of the Peloponnesian War in 431, Athens was a radical democracy. This was democracy in its most consistent form: the direct exercise of political power by the citizens, in which every male citizen had the right to speak, to make proposals, and to vote on matters of common import. The decisions of the Assembly could not be appealed—even though the Council of 500 had the authority to preview and approve proposals before an Assembly vote—and there were few effective limits to the Assembly's power. To use a modern term, the Assembly became sovereign over Athens.

This system was, up to 411 B.C., remarkably stable. We know of no civil wars and no prolonged violence in Attica from the traditional founding of the unwritten "ancestral constitution" by the lawgiver Solon in 594/93 B.C. up to the end of the Peloponnesian War in 403. But this does not mean that the Assembly always functioned according to law. Evidence suggests that the Assembly acted throughout the war with increasing arrogance, including heavy-handed treatment of allies that bred discontent and revolt.[12] The Assembly had become what Aristotle would later describe as a "composite tyranny."[13] Aristotle's analysis was based not on the numbers who participated in decision-making, but on whether the Assembly or the laws were the final authority.[14] The vital question concerned the relationship between the Assembly and the fundamental laws of Athens. It was, in modern terms, a constitutional question: Were there lawful limits to the popular power of the Assembly, or was this power unlimited?[15]

Athenian people. For a view more focused on the leadership, see Charles Fornara and Loren J. Samons, *Athens from Cleisthenes to Pericles* (Berkeley: University of California Press, 1991). On the period after the Persian wars, see Peter J. Rhodes, "The Athenian Revolution," in Lewis et al., eds., *The Cambridge Ancient History*, vol. 5, pp. 62–95.

[11] Aristotle, *Constitution* 27.

[12] See Thucydides, *History of the Peloponnesian War,* trans. Rex Warner (New York: Penguin, 1972), 1.97–101, on the Athenian use of force against recalcitrant allies.

[13] Aristotle, *Politics* 4.4, 1292a10–13. See Aristotle, *Constitution* 26, on demagogues and the loss of control in political life.

[14] Aristotle, *Politics* 4.4, 1292a4–7, finds a fifth form of *politeia* when the decrees of the Assembly and not the laws are authoritative.

[15] See Martin Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (Berkeley: University of California, 1986), which hits the essence of the issue in its title.

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It is difficult to discern what the Athenians thought this relationship should be. The fifth-century intellectual revolution has left us almost no democratic theory.[16] In essence, the Athenians thought that to elevate any person, or body of persons, over the Assembly (e.g., to establish a council with the power to veto a decision of the Assembly) was to usurp the democracy and to establish tyranny.[17] There was no institutional separation of powers, and no checks against a vote taken by the Assembly. There was a rudimentary functional separation of powers based on procedures; proposals had to be considered by the Council of 500 before being voted upon in the Assembly, but the Assembly, if swayed by orators, did at times overrule this custom.[18] The use of lots in selecting jurors and council members may have been intended to prevent manipulations such as bribery, and to forestall the factional problems that could arise from the popularity contest that is an election.[19] This was the Athenian answer to tyranny, but as events would show, this solution was incomplete at best.

From the very establishment of the Athenian democracy there had been warning signs of a problem. Throughout the fifth century, for instance, the Assembly had become a forum for ostracism, a political mechanism by which a quorum of citizens could vote once a year to exile any man suspected of gathering too much personal power.[20] Although ostracism was not used regularly—there was no reign of terror—it became a means to eliminate political rivals, and drained Athens of its most capable leaders. Those exiled included Miltiades, the hero of the Athenian victory over the Persians at Marathon, who was tried while gravely wounded; his son Cimon inherited his father's ruinous fine, defeated the Persians in 466, and was himself ostracized. Thucydides son of Melesias (not the

[16] The closest we have to such theory is in Herodotus's Persian constitutional debate (*The Histories* 3.80f.); the Pseudo-Xenophonic *Constitution of the Athenians,* an antidemocratic pamphlet; and the funeral oration of Pericles as reconstructed in Thucydides, *History* 2.35f. Aristotle's *Constitution* does not treat the Assembly as an institution of government. To most Greek intellectuals, the Assembly easily became "the mob" (*ochlos*), which acted by popular opinion rather than reason; see, e.g., Thucydides, *History* 7.8 (see note 29 below).

[17] To usurp the democracy was a serious crime. See the oath of Demophantos, in Andocides 1, *On the Mysteries* 96–98, in *Minor Attic Orators I: Antiphon, Andocides,* trans. K. J. Maidment (Cambridge, MA: Harvard University Press, 1982); and the Heliastic Oath, in Demosthenes 24, *Against Timocrates,* in *Demosthenes III,* trans. J. H. Vince (Cambridge, MA: Harvard University Press, 1986), 149–51. The Athenians passed a similar resolution after the defeat by the Macedonians in 338 B.C. See Ilias Arnaoutoglou, *Ancient Greek Laws* (London: Routledge, 1998), 74–77.

[18] See Aristotle, *Politics* 4.14, for functional distinctions between deliberative institutions, offices, and courts.

[19] The practice of Athenian law focused more on the integrity of the procedures than on substantive rules. Stephen C. Todd, *The Shape of Athenian Law* (Oxford: Clarendon Press, 1993), 70–71.

[20] Aristotle, *Constitution* 22.1, attributes the ostracism law to Cleisthenes c. 508 B.C., but the first recorded ostracism, of Hipparchus, probably occurred in 487 B.C. According to Plutarch, *Aristides* 7, the last was Hyperbolus, killed in 411. Plato, *Gorgias* 516 d–e, sees ostracism as silencing undesired voices; only a few officials prevented the Assembly from throwing Miltiades into the pit. See *Plato: Complete Works,* ed. John M. Cooper (Indianapolis, IN: Hackett, 1997). On the personal rivalries, see Rhodes, "The Athenian Revolution," 62–67.

historian), politically allied with Cimon, was ostracized by Pericles. The opponents of this group included men such as Xanthippus (father of Pericles) who prosecuted Miltiades and was himself exiled in 484; Pericles, who was not ostracized although he was fined; and the son of Pericles, who was later executed by the Assembly along with other generals after winning the sea battle at Arginusae in 406.[21] Themistocles, who built and commanded the navy that beat the Persians in 480, was ostracized and fled to Persia.[22] Thousands of pottery fragments, bearing the names of politicians facing ostracism, have been found by archaeologists in Athens. Hundreds had the name Themistocles written by a very few hands, which suggests that these ballots may have been distributed to the voters in order to rig the voting.[23]

The Assembly could also audit officials by demanding an account of their actions when their term came to an end.[24] This was an important way to control officials without infringing on an official's ability to conduct his office as he saw fit—but it became a forum for revenge. The citizens also maintained control over the military by electing generals to fixed terms. This, along with the threat of prosecution, prevented the growth of personal authority of the kind that brought civil war to Rome in the first century B.C.; no Athenian general ever marched on Athens to attempt a coup. But these generals were also at the mercy of the Assembly's whims, a situation that affected their ability to make proper decisions, and that could induce a climate of fear among the commanders.

The historian Thucydides—who had as much disdain for the mob as any other Greek intellectual—details many instances of the Assembly's irrationality during the war with Sparta.[25] The most ruinous was the Sicilian expedition. In 416 B.C., the Assembly voted to conquer Sicily, perhaps to disrupt Spartan trade with the west, even though the Athe-

[21] As a victim of such conflict one could name the democratic leader Ephialtes, an associate of Pericles, who was assassinated. But his killing was an anomaly—the only political assassination of which we know from fifth-century Athens prior to the end of the Peloponnesian War.

[22] Herodotus, *Histories* 6.136; Plutarch, *Themistocles* 22; Plutarch, *Cimon* 17; Demosthenes 23, *Against Aristocrates,* in Vince, trans., *Demosthenes III,* 205; *Diodorus of Sicily,* in *Library of History,* 12 vols., trans. C. H. Oldfather (Cambridge, MA: Harvard University Press, 1962), 12.55. See A. W. Gomme, et al., *A Historical Commentary on Thucydides* (Oxford: Clarendon Press, 1956–1981), comments to Thucydides 2.65.4, for a discussion of the prosecutions of Pericles and his associates. See also Aristotle, *Constitution* 22, 43.5; *Politics* 1284a17f.

[23] See Russell Meiggs and David Lewis, *Greek Historical Inscriptions to the End of the Fifth Century B.C.* (Oxford: Clarendon Press, 1980), #21, for inscriptional evidence.

[24] Aristotle, *Politics* 1274a15–18 and 1281b32–35, claims that Solon gave this power to the *demos; Politics* 1318b29 connects this to agrarian democracy. See Jennifer Tolbert Roberts, *Accountability in Athenian Government* (Madison: University of Wisconsin Press, 1982).

[25] In 429 B.C., the Athenian navy subdued Mytilene; the Assembly voted to kill all the men and sell the women and children into slavery. A ship was dispatched with the order—but the next day the Assembly repented and sent a ship to reverse the order. (The ship arrived in time.) Thucydides, *History* 3.36–49.

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nians had no idea of the size of the island or the scope of the operation.[26] The general Nicias, who had opposed the invasion and only reluctantly agreed to it, was chosen to lead it.[27] After arriving in Sicily, his co-general Alcibiades—who had promoted the expedition—got word of his impending prosecution in Athens for religious crimes. This was the so-called Profanation of the Mysteries in 415 B.C., when rumors swept Athens that Alcibiades and his friends had mocked the sacred Eleusinian mysteries. The religious nature of the allegations made it likely that the Assembly would usurp the courts and try him directly, a situation that could result in his swift execution. He fled rather than face the charges.[28] According to Thucydides, when Nicias's military situation in Sicily became hopeless he refused to retreat, citing fear of retribution by the Assembly for cowardice.[29] In the end, the Athenians suffered perhaps the worst per-capita military defeat in history—and they blamed their leaders, "as if they had not voted for it themselves."[30]

In his famous evaluation of political affairs after the death of Pericles in 429, Thucydides wrote that what was nominally a democracy was in fact the rule of one; Pericles had controlled the Assembly through sound leadership: "he led it rather than being led by it." Because Thucydides accepted the Greek idea that politics was primarily a matter of "who shall rule," he failed to see that if the limits to the actions of a political institution are found not in law but in a leader's ability to restrain that institution, then the government is not one of laws but of men. After Pericles died, he was followed by populists who took advantage of the Assembly's authority by appealing to the emotions of the crowd.[31] The stage was set for the Assembly to disregard the limits of the law, and to demand the right to act as it desired because it desired to do so. One of the results was the defeat in Sicily.

In 411 B.C., an oligarchic faction, opposed to the excesses of the democracy, developed proposals to permanently reduce the power of the Assembly. To pass these measures, the oligarchs first had to limit participation to wealthy citizens, who would be amenable to the oligarchic proposals. The oligarchs convened the Assembly at Colonus, outside the walls of Athens. Sparta had a fort on Athenian soil, and the military danger limited participation in the Assembly to citizens able to afford armor. Meanwhile the Athenian navy, along with thousands of rowers, was at Samos in the Aegean Sea; this further weakened the

[26] Thucydides, *History* 6.1.
[27] Thucydides, *History* 6.8–25.
[28] Thucydides, *History* 6.60–61. I say more about the so-called Profanation of the Mysteries below.
[29] Thucydides, *History* 7.48. Mistrustful of oral reports "to the mob," Nicias sent a letter to Athens (ibid., 7.8–15). See ibid., 4.65, on the three generals punished in 424 B.C. for failing to conquer Sicily.
[30] Thucydides, *History* 8.1.
[31] Thucydides, *History* 2.65.

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democratic voices in Athens. The oligarchs proposed nothing less than to do away with the Assembly and to establish a Council of 400 as the ruling authority in Athens.[32]

Paradoxically, the oligarchs were restrained by the one means that could prevent the Assembly from becoming a tyrant: a law that permitted any citizen to challenge the legality of an Assembly proposal prior to a vote. The *graphē paranomon*, a charge that a proposal was "contrary to law," was one of the central constitutional protections of the Athenian government.[33] Should any citizen challenge a proposal brought before the Assembly, a sworn jury would have to examine and accept the legality of the proposal before the Assembly could vote on it. The legality of the proposal was considered to be distinct from the question of its adoption, and this legality could be challenged even after the passage of the proposal. In principle, this allowed any citizen to act as a dampening force upon the Assembly, and to subject the Assembly to the limitations of law, as determined by a jury.

Under this law, any citizen, now or in the future, could challenge the proceedings taken at Colonus by bringing a *graphē paranomon* charge against the decision. This would force the Athenians to convene a jury to examine the decision. So when the Assembly was convened, among the first orders of business was to repeal the *graphē paranomon*. The Assembly voted to repeal this safeguard in order to eliminate legal challenges to the oligarchic clique.[34] Constitutional protections were eviscerated, dissent was stifled, and the Assembly turned Athens over to a council dominated by wealthy, armored citizens.

Among the other paradoxes of the so-called oligarchic counterrevolution of 411 were its attempt to limit the power of the Assembly by calling an Assembly to vote itself out of existence, and its attempt to reestablish the ancestral laws of Athens by eliminating the means by which Athenian citizens could challenge proposals on the basis of those laws. The resultant oligarchic government—the so-called Four Hundred—governed nonviolently, but the desire for democracy in Athens was too strong, and within months the Athenians reestablished the *graphē paranomon* and citizen government. But the fact that the Assembly had been able to repeal the *graphē paranomon* shows that, ultimately, there was no law above the Assembly. This was the constitutional flaw that had yet to be corrected.

[32] On the events of 411 B.C., see Thucydides, *History* 8.47–50, 53–54, 63–98. See also Aristotle, *Constitution* 29–33; *Diodorus of Sicily* 13.34–38. See also Gomme, *Commentary on Thucydides*, 5:184–256, along with Peter J. Rhodes, *A Commentary on the Aristotelian Athenaion Politeia* (Oxford: Clarendon Press, 1993), sections 29–33.

[33] On *paranomos* as "illegal," see Plato, *Apology* 31e, where Socrates claims to be preventing illegal happenings in Athens, as he had done at the trial of the generals (see note 35 below).

[34] Thucydides, *History* 8.67.2. Aeschines, *Against Ctesiphon* 3.191, reminisces that "in those days the *graphē* had to be put away to overthrow the democracy." See *The Speeches of Aeschines*, trans. Charles Darwin Adams (Cambridge, MA: Harvard University Press, 1988).

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A few years later another event occurred that showed even more starkly the constitutional problem that bedeviled Athens. By 406 B.C., Athens was losing the war in the Aegean Sea. The Athenian navy was blockaded on the island of Lesbos, and Sparta was about to cut Athens's jugular vein, the grain routes to the Black Sea. In a state of desperation, the Assembly appointed ten new generals, who manned the last of the city's ships and rowers, won the battle against Sparta, relieved the blockaded navy, and secured the grain routes.

The response of the Assembly was to recall the generals on the charge of failing to pick up dead sailors in the water, to try them as a group, and to execute the six who returned.[35] This violated at least three Athenian legal customs: that trials had to be before sworn jurors and not the Assembly; that each individual had a right to a separate trial; and that each had the right to speak in his own defense.[36] The writer Xenophon claims that a *graphē paranomon* challenge was raised, but that voices in the Assembly threatened to try anyone who challenged the charges along with the generals. A voice rose from the back of the crowd: "it is monstrous if the people cannot do whatever they wish."[37] The right to challenge a proposal legally was not officially repealed; it was simply shouted down, by a mob that accepted no limits to its power.[38]

After two contentious meetings of the Assembly, in which opposing voices could not prevail, the six generals, including Pericles' son, were condemned and executed. With the best of her commanders destroyed, no ships left, and her treasury bankrupt, Athens was at the end of her resources. Within two years she starved and surrendered.

III. The Deeper Cause of the Crisis

The political context for the crisis in Athens had been established decades earlier, with the assertion of unlimited authority by the assembled citizens over long-standing aristocratic institutions and standards. But the intellectual cause was rooted in a certain attitude toward ideas, expressed in rhetorical arguments in which ethical and political concepts were disconnected from fixed principles. *Nomos*—a singular noun meaning the customs and norms of Athens as well as its laws—was increasingly seen

[35] This affair is narrated by Xenophon, *A History of My Times,* trans. Rex Warner (New York: Penguin, 1979), 1.7. Plato, *Apology* 32b, has Socrates recall his opposition to the trial.

[36] Xenophon, *History* 1.7.5, says the generals were not given the time allowed by law. The connection of group trials to tyranny may also be seen in the trial of Charias and three accomplices a century later, c. 300 B.C. See Christian Habicht, *Athens from Alexander to Antony,* trans. Deborah Lucas Schneider (Cambridge, MA: Harvard University Press, 1997), 84.

[37] Xenophon, *History* 1.7.10.

[38] Xenophon wrote that the citizens later regretted their actions, and shunned one of the prosecutors, who starved to death—an instance of the Assembly acting irresponsibly and then denying its own responsibility.

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as a set of human conventions, with no basis in reality other than that which human beings asserted. In these terms, the decisions of the Assembly established what was proper—and those decisions were the product of rhetoric, the art of public speaking for persuasive purposes.

During the war with Sparta, rhetoric was studied and taught in Athens by a loosely connected group of thinkers known to us as the sophists. The sophists were united not by a single content to their teachings—there is no "sophistic" school of philosophy—but rather by a common concern for rhetoric, and by a willingness to teach for a fee. At the foundation of their thought they rejected absolute principles of morality and politics, and accepted that all principles were relative to a particular situation, malleable by the skillful use of language, and dependent on the particulars of the moment. A successful argument was not a true one that proved a case logically, but rather one that used words in a crafty way to create an image of reality, in order to induce an audience to make the desired decision.

The triumph of the demagogues during the war with Sparta and the resulting actions of the Assembly were contemporaneous with the rise of rhetoric as an art in Athens. The sophist Protagoras of Abdera was likely in Athens by 443 B.C.; and by 427 B.C. rhetorical teaching had been imported from Sicily, by Gorgias and perhaps by Thrasymachus of Chalcedon.[39] In the political speeches recreated in the *History* of Thucydides, in the surviving fragments of fifth-century forensic oratory, and in the scraps of rhetorical handbooks, we find the idea that right and wrong have no fixed meaning, but can be understood only in terms of probabilities, determined by the expediency of the moment. Antiphon's *Tetralogies*—twelve speeches, arranged in three groups of four—are rhetorical exercises that argued opposite sides of the same case, in terms of probabilities rather than truth.

Such argumentation is proper, sophists maintained, because there are no absolute standards in truth, morality, or law. In the words of one anonymous sophist, in the *Dissoi Logoi* or "Opposing Arguments," moral values are relative to any particular moment:

> Two-fold arguments are put forward in Greece by those who philosophize. Some say that the good is one thing and the bad another, but others say that they are the same, and that a thing might be good for some persons but bad for others, or at one time good and another time bad for the same person. I myself side with those who hold the latter opinion.[40]

[39] On Gorgias, see Thucydides, *History* 4.86.3; *Diodorus of Sicily* 12.53.2. See also Martin Ostwald, "Athens as a Cultural Center," in Lewis et al., eds., *The Cambridge Ancient History*, vol. 5, pp., 341–69.

[40] Rosamond Kent Sprague, *The Older Sophists* (Indianapolis, IN: Hackett, 2001), 279.

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For those who accepted these views, all standards and all conclusions were left without anchor, as floating products of whim. Having rejected divine inspiration as the source of such standards, they took the first steps toward skepticism: the idea that there is no knowledge, only opinion, and that an idea is true only in relation to a person who accepts it. Aristotle described the views of the sophist Protagoras in this way:

> Protagoras said that man is the measure of all things, meaning that what appears to each person also *is* positively the case. But once this is taken to be so, the same thing turns out both to be and not to be, and to be bad as well as good, not to mention other opposites, since often what seems noble to this group of people will seem opposite to that group, and since what appears to each man is taken to be the measure.[41]

According to Protagoras as he is portrayed in Plato's work, these moral views are based on a dichotomy between experience and being, which requires the manipulation of appearances as a means to establish validity:

> But the man whom I call wise is the man who can change appearances—the man who in any case where bad things both appear and are for one of us, works a change and makes good things appear and be for him.[42]

These are the kinds of ideas that gained prevalence in Athens during the war with Sparta. The orator's job—and the specialty of the sophists—was the ability to change appearances in order to win an argument. In his play *The Clouds,* a biting satire directed at such teachings, the Athenian comic playwright Aristophanes dramatized the sophistic method of arguing with his allegorical characters "Good Argument" and "Bad Argument." Bad Argument can prevail over Good Argument by slippery forms of persuasion that can make the worse case look better, and thus allow the bad to triumph over the better.[43] In his *Rhetoric,* Aristotle attributed such argumentation to Protagoras, and noted many critical objections to the training the sophist had offered.[44]

In the sophists' view, social, political, and legal principles, which most Greeks understood to be aspects of ethical thought, are arbitrary human constructs that cannot be derived from the facts of nature. Because the sophists could not find immutable moral standards in nature (*phusis*),

[41] Aristotle, *Metaphysics* 1062b13.
[42] Plato, *Theaetetus* 166d.
[43] Aristophanes, *The Clouds* 1039–40, 1075–78, in Aristophanes, *Lysistrata and Other Plays,* trans. Alan H. Sommerstein (New York: Penguin, 1973).
[44] Aristotle, *Rhetoric* 1402a22–28.

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many decided that such standards were a mere convention (*nomos*). Given this view, there is no way to judge the truth of an argument, only its effectiveness, and a method of reasoning will be judged as appropriate if it is convincing.[45] Such views were strengthened and complicated by an influx of philosophical ideas into fifth-century Athens. Archelaus, for instance—the earliest philosopher of whom we know in Athens—merged early physical theories with social theories, in an attempt to bring *phusis*—concerned with natural phenomena—into line with *nomos,* the humanly created customs and laws that vary with particular times and localities.[46]

The orators who were trained in such theories were concerned less with the truth of their arguments than with their ability to sway the audience. Thus, the historian Thucydides, in the introduction to his *History,* bases his reconstruction of political speeches on *ta deonta*—the things necessary for each speaker to make his case. In doing so, Thucydides shows that the cause of the Peloponnesian War was to be found in certain matters of human nature—a desire for security, honor, and interest—which allowed the Athenian Assembly and other bodies to be led by cunning speakers.[47] Thucydides was describing the unalterable *phusis* of men, in a world of political interactions defined by the shifting standards of *nomos.*

All of this was immediately and directly applicable to matters of law. The Greek word for a law or custom is also "*nomos*"—the same word used to describe the norms that many sophists saw as arbitrary. In the view of the sophists, the laws are also subjective human constructs that are not better or worse in any absolute sense, but can be manipulated to bring a desired result. In such a climate, the arguments presented to juries became increasingly bent on success rather than truth, and it became acceptable to twist the laws if necessary to prevail. Logic often gave way to arbitrary arguments and appeals to character. The standard for rhetorical excellence was not truth; it was effectiveness at inducing a decision by the crowd.[48]

The sophists' concern for rhetoric implied active engagement with political affairs, not philosophical withdrawal for the sake of contemplation. The democracy of Athens allowed aspiring political actors to bring their rhetorical skills directly into political discourse before the Assembly and the courts. The major sophists were legal orators as well as political speakers and actors. Major political figures—including those connected to the regime of "The Thirty Tyrants" imposed by Sparta after the defeat of Athens—were associated with the sophists, as teachers or as students,

[45] See Plato, *Protagoras* 337d, on *phusis* and *nomos.* Aristotle, *Sophistic Refutations* 173a7–19, understands *nomos* as the opinions of the many, and *phusis* as the truth according to the wise.

[46] Reported anecdotally in Diogenes Laertius 2.16. See Ostwald, "Athens as a Cultural Center," 340, 352.

[47] Thucydides, *History* 1.22–23.

[48] Aristotle, in his *Rhetoric,* later offered a corrective, distinguishing a rhetorician—one skilled at rhetoric—from a sophist, on the basis of the latter's choices. The difference is between the real, and the apparent, means of persuasion: *Rhetoric* 1355b15–22.

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including Callicles, Theramenes, Charmides, Critias, and Alcibiades. They practiced their methods, and conveyed their ideas, directly before the Assembly.

In the end, the turn away from the ancestral laws by the Assembly was part and parcel of the turn away from the traditional moral standards by the sophists and their students. As the sophists thought that such norms were the product of arbitrary conventions, so the Assembly acted as if whatever the people decided for the moment defined what was right—and as if the decision-making capacity of the assembled citizens should be unlimited. On one level, the sophists identified a philosophical basis for this development, in the form of subjective moral theories that denied absolute moral standards. On another level, the formation of these theories strengthened the underlying subjectivism that was influencing many of those speaking before the Assembly. The change in Athens's unwritten ethical constitution had warped its legal constitution, and had brought the *polis* to the brink of political and military disaster.

IV. The Athenian Response to the Crisis

The defeat of Athens brought to a climax a powerful two-pronged reaction against such ideas, a reaction that had begun two decades earlier. The first reaction was by those associated with traditional religious cults, who were appalled at the challenge to the gods posed by the sophists and other intellectuals. A fragment by the playwright Euripides—or perhaps by the political leader and student of the sophists, Critias—claims that the gods were invented by men to induce fear and obedience.[49] The three best symbols of the reaction to such thinking may be (1) the recall of Alcibiades from the Sicilian expedition in 415 B.C.; (2) the exile of Diagoras of Miletus, who was likely prosecuted for questioning religion, although his reputation as an atheist is probably overblown; and (3) the execution of Socrates, ostensibly for teaching the youth in ways that denied the existence of the gods accepted in Athens.[50] These attacks on religion were connected to criticisms of scientific thinking, and were parodied in

[49] For the Euripides "Sisyphus" fragment, see the English text in Richard Winton, "Herodotus, Thucydides, and the Sophists," in Christopher Rowe and Malcolm Schofield, eds., *The Cambridge History of Greek and Roman Political Thought* (Cambridge: Cambridge University Press, 2000), 89–90. See also Sprague, *The Older Sophists,* 259–60; and Ostwald, "Athens as a Cultural Center," 357.

[50] Diagoras is alluded to in Aristophanes' *Clouds,* 830, perhaps to tarnish Socrates with atheism. Aristophanes' *Birds* 1071–75, has a price on Diagoras's head. The date of his exile was likely c. 431 B.C., or c. 415, after the massacre of Melos; see Leonard Woodbury, "The Date and Atheism of Diagoras of Melos," *Phoenix* 19 (1965): 178–211. For other reactions to science and philosophy, see John Lewis, "Oh Mist! Science, Religion, and History in Aristophanes' *Clouds*," in *Themes in European History: Essays from the Second International Conference on European History,* ed. Michael Aradas and Nicholas C. J. Pappas (Athens: The Athens Institute for Education and Research, 2005), 33–47. Aristophanes, *The Birds and Other Plays,* trans. David Barrett (New York: Penguin, 1986).

Aristophanes' *Clouds,* where the existence of justice is denied, the gods are reduced to physical principles, and philosophical education is a means to subvert justice in the law courts.

The second reaction was constitutional and began with the commitment to rediscover, and to reinscribe, the ancestral laws of Athens.[51] These were the norms and principles, embodied in laws, that could set proper limits to the actions of the Assembly, but would not require the establishment of a political body superior to the Assembly. Athens had fallen into problems, many could have claimed, because the Assembly had failed to follow the traditional laws established by Solon and other lawgivers. This was, in the minds of many "conservatives," connected to the rejection of the gods, whom they considered to provide both sanctions for the ancestral laws and moral points of focus for the Athenians. In the late fifth century, the laws had fallen out of use, and had become scattered and disorganized, a process that had begun with the Persian sack of Athens in 480, when the laws, arranged in public displays, may have been destroyed.[52]

Under the oligarchic government of the Four Hundred in 411 B.C., a board of lawmakers (*thesmothetai*) had been charged with researching these traditional laws and with reinscribing them into stone for public viewing. The very approach was legalistic and intellectual in nature; rather than electing new officials and hoping for a good man to lead them, the Athenians opted for a solution in law, which required public knowledge of the laws.[53] Nearly a decade later, after their defeat by the Spartans in 403, the Athenians continued to grapple with how to maintain their laws, in a tense atmosphere that came at times close to violence. Exiles and others who had fled Athens were trying to return, and whether and how they could regain their citizenship was a hot issue. Tensions were high between supporters of the democracy—who established a fortress on the Munychia, a hill near the Peiraeus—and those who had aided "The Thirty" (the despotic clique, first installed after the Spartan victory, that had waged a campaign of terror that killed some fifteen hundred Athenians). In a battle at the Munychia, the oligarchs were defeated and fled; the democracy was restored. But the desire for vengeance was high, and the Athenians had to decide how far the law could be used to avenge past crimes.

To end the vengeance, the restored democracy would ultimately enact, as law, an *amnēsia* (a "forgetting-ness") that made it illegal to prosecute political enemies for past grievances. In addition, the traditional laws of

[51] Draco's homicide law was reinscribed in 409/8: Meiggs and Lewis, *Greek Historical Inscriptions,* #86.

[52] Herodotus, *History* 8.51–54 (on the sack of the Acropolis).

[53] Hedrick thinks the Athenian epigraphy was intended to make knowledge available. See Charles W. Hedrick, "Democracy and the Athenian Epigraphic Habit," *Hesperia* 68, no. 3 (1999): 387–439.

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Solon were reinscribed, and applied only to crimes after 403 B.C.[54] This task, which took years, may have culminated under the leadership of Euclides, in 403/402 B.C., when the Ionic alphabet was made the standard for official communication. A distinct office, the *nomothesia,* was created, and the *nomothetai* were the officials responsible for preserving the integrity of the publicly inscribed laws. Procedures to maintain the authority of the laws were introduced.[55]

Along with the standardized alphabet, the reinscribed laws, and the new offices, the Athenians reinforced a conceptual and procedural distinction between a written law (*nomos*) and a decree of the Assembly (*psēphisma*).[56] *Nomos* meant custom and law, but after 402 B.C. the term came to mean a *fundamental* law that was inscribed in public view.[57] A *nomos* was understood to be a stable standard that was, ideally at least, not subject to the shifting arguments of orators. In contrast, a *psēphisma* was a decree passed by a vote of the Assembly, directed against a particular situation.

Evidence strongly suggests that Athenians were conceptually precise about the distinction between a decree of the assembly (a *psēphisma*) and a written law (a *nomos*). Mogens Herman Hansen supports this contention first with fourth-century epigraphic evidence: some five hundred inscriptions refer to *psēphismata,* and some six refer to *nomoi.* Despite the disparity in the amount of evidence, Hansen observes the strict institutional distribution between the two political acts: "There is no example of a *nomos* passed by the *demos* [the Assembly] or of a *psēphisma* passed by the *nomothetai* [the officials charged with maintaining the written laws]." Literary sources are also consistent; of some two hundred *psēphismata* passed by the Assembly that are cited in the work of orators and historians, there are only five cases in which an enactment by the Assembly is

[54] Christopher J. Joyce, "The Athenian Amnesty and Scrutiny of 403," *Classical Quarterly* 58, no. 2 (2008): 507–18.

[55] Thucydides, *History* 8.97.2 (on the *nomothetai* of 409 B.C.); Demosthenes 24, *Against Timocrates* 21–30 (on the "legislative committee"). Andocides 1, *On the Mysteries* 81–87, claims that laws before the archonship of Euclides were invalid. K. Clinton, "The Nature of the Late Fifth Century Revision of the Athenian Law Code," *Hesperia* Supplement 19 (1982): 27–37, challenges the idea that laws before 410 were invalid. F. B. Tarbell, "The Relation of ΨΗΦΙΣΜΑΤΑ to NOMOI at Athens in the Fifth and Fourth Centuries B.C.," *American Journal of Philology* 10 (1889): 79–83, stresses that with the institution of the *nomothesia,* the Assembly "was deprived of its sovereign character and became, to speak in modern terms, subject to a written constitution." On Euclides as archon, see *Diodorus of Sicily* 14.12.1.

[56] Hansen has offered the strongest arguments supporting this distinction. See Mogens Herman Hansen, "Graphē Paranomon Against Psēphismata Not Yet Passed by the Ecclesia," in Hansen, *The Athenian Ecclesia II* (Copenhagen: Museum Tusculanum, 1989), 271–81; Hansen "*Nomos* and *Psēphisma* in Fourth-Century Athens," in Hansen, *The Athenian Ecclesia I* (Copenhagen: Museum Tusculanum, 1983), 161–76; and Hansen, *The Sovereignty of the People's Court in the Fourth Century B.C. and the Public Action Against Unconstitutional Proposals* (Odense: Odense University Press, 1974).

[57] Martin Ostwald, *Nomos and the Beginnings of Athenian Democracy* (Oxford: Oxford University Press, 1969), traces the concept of *nomos* through the fifth century.

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referred to as a *nomos*.[58] Nor is any measure referred to by both terms. Given the looseness with facts for which the orators are famous, this distribution of terminology is evidence for a strong conceptual distinction between the two terms, as well as for a strong distinction between the institutions responsible for each type of enactment.

One essential attribute of a *nomos* was to be written. The Athenians understood that to write a law is to preserve it in a way that is not subject to the vagaries of memory. Because a *nomos* was written and carried the force of tradition, it was more stable than a decree, and less susceptible to the winds of whim that blew through the Assembly and its votes. The Assembly could break a written law if it wished—there was no institutional authority above it—but the written laws were available for all to see. A person making proposals before the Assembly who tried to undermine the written laws would face opposition from those who valued the laws. Although the legal orators of the fourth century were notorious for inventing laws—not everything was written—there is good reason to think that the original laws of Solon, written in the first two decades of the sixth century and lost after the sack of Athens by the Persians in 480 B.C., had regained their moral and legal force. The mere mention of Solon's name in fourth-century Attic law speeches was a powerful claim to legitimacy.[59]

A *nomos* was also more general than a *psēphisma:* a written law was a generalization of wider scope than an Assembly decree. Like a law-court, a meeting of the Assembly generally dealt with particular issues. Should we go to war against Chios? Should we send aid to the Corcyraeans? Should we make friends with the Thebans? Who should fund the next tragic chorus? Should we build a new building? Assembly decrees (*psēphismata*) passed for such purposes could have far-reaching effects, as did the decision in the 480s to build a navy rather than distribute the wealth of the Laurion silver mines, but the decisions were for the most part *conceptually* less general than *nomoi.* A *nomos* was of wider application than a *psēphisma;* the former applied to more particular cases than the latter.[60] It is important, however, not to elevate the issue of generality to a position of fundamental importance; decrees of the Assembly could be

[58] Hansen, *Ecclesia I,* 163–67, shows that the five exceptions were all in the fifth century. He finds no exceptions after 400 B.C. Hansen also shows that, with one exception, the "*demos*" is never credited with passing a *nomos* in the fourth century. The sole exception, Demosthenes 59, *Against Neara* 88f., may hinge on the sense in which *"demos"* is used, and is not sufficient reason to consider the pattern broken.

[59] On Solon in fourth-century speeches as a moral reproach, see, e.g., Demosthenes 19, *On the False Legation* 256, in *Demosthenes II,* trans. C. A. Vince and J. H. Vince (Cambridge, MA: Harvard University Press, 1999).

[60] This was also understood by Aristotle; see *Nicomachean Ethics* 5.10, 1137b11–32 (a *nomos* is a general, standing rule; a *psēphisma* applies to the facts of the moment). In my view, the "open texture" of Athenian law is the use of generalizations applied to particular cases, and the issue turns on this philosophical point. "Open texture" is a phrase from Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961). On the application to Athens, see Robin Osborne, "The Law in Classical Athens," *Journal of Hellenic*

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quite general. The basic issue at stake is not the degree of generality of a decree, but rather the requirement that it be consistent with the written laws; that is, the basic issue is its constitutionality.[61]

Most important to preventing the usurpation of the laws, the Athenians established a legal hierarchy between *nomos* and *psēphisma.* In essence, a *psēphisma* was never to be more authoritative than a *nomos.* In any discrepancy between a *psēphisma* and a *nomos,* the *nomos* had precedence. This served to set limits on the Assembly; it could not pass decrees that countermanded written laws. This rule is cited in the speech of the orator Andocides (*On the Mysteries*), where he states that *psēphismata* must accord with *nomoi:*

> In no case shall a magistrate enforce a law that is unwritten. No decree of the council or of the Assembly shall override a law. No decree shall be imposed on an individual that does not apply to all the Athenians, unless an Assembly of 6,000 shall so vote in a secret ballot.[62]

To further place the written laws outside the reach of the Assembly, the authority to change a *nomos* was made procedurally, institutionally, and conceptually distinct from the procedure used to enact a *psēphisma.*[63] In a direct parallel to the process for amending the American Constitution, which cannot be done by an act of the legislative or executive branches, the procedures for passing an Assembly decree were different from those required to change the written laws. In essence, the fundamental laws of Athens—its written *nomoi*—were placed beyond the reach of the Assembly. All changes to the written laws were subject to legal review by a jury sworn to uphold the laws. Any citizen could initiate a challenge to any proposal.

The law courts are the key to understanding how the Assembly was brought under the control of the laws. An Athenian jury was a group of several hundred citizens selected by lot, who heard two sides of a case and then decided without deliberation by a vote. The fundamental difference between the Assembly and the jury was a juror's sworn obligation to judge a case according to law. The so-called Heliastic oath reads, in part:

> I will give verdict in accordance with the statutes [written laws] and decrees of the people of Athens [the Assembly] and the Council of

Studies 105 (1985): 40–58; and Edward Harris, "Open Texture in Athenian Law," *Dike* 3 (2000): 27–79.

[61] This was noted by Tarbell, "The Relation," in 1889.

[62] Andocides 1, *On the Mysteries* 87.

[63] For a description of passing a *nomos,* see Demosthenes 24, *Against Timocrates* 20–23.

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> 500. . . . I will not allow private debts to be cancelled, nor land nor houses belonging to Athenian citizens to be redistributed. . . . I will give impartial hearing to prosecutor and defendant alike, and I will give my verdict strictly on the charge named in the prosecution.[64]

Juries did not, of course, always function legally—but the Assembly was not limited by such an oath, and could, on principle, pass any measure at any time. The lack of a law that was firmly authoritative over the Assembly is the factor that Aristotle identified as having allowed the democracy to become a composite monarchy, and a tyranny.[65]

Should any citizen challenge an Assembly proposal with a *graphē paranomon*—literally, a charge that a proposal was "beside the law" or "illegal"—debate in the Assembly would stop, and the case would be transferred to a jury, which would be sworn to consider the legality of the proposal. If an existing *psēphisma* were found to be in conflict with a new *nomos,* or a new *psēphisma* with an existing *nomos,* then the *psēphisma* was repealed. The jury had to agree that the proposal was not contrary to the laws.[66] Thus, the written laws—the *nomoi*—became the authority against which the decrees of the Assembly were measured, and such a written standard provided a check against attempts to manipulate the decisions of the Assembly using emotional appeals.[67]

To further protect the *nomoi,* the Athenians also had a way for any citizen to challenge proposed changes to the *nomoi.* This was expressed in the descriptive phrase *graphē nomon mē epitedeion theinai,* a charge (*graphē*) that an unfit written law (*nomos*) had been proposed.[68] The ability of any citizen to charge that a speaker had proposed an unfit *nomos* was similar to the *graphē paranomon* for a *psēphisma.* Procedurally, however, a *psēphisma* was turned over to legal review only if challenged; a proposed *nomos* required a legal review in every case. The standard by which the sworn jury considered the fitness of the proposed *nomos* was the existing written laws, as well as the general fitness and consistency with accepted standards that a law must possess.

The procedure to change a law worked something like this: at the start of the year the people in Assembly would consider whether they wished

[64] Demosthenes 24, *Against Timocrates* 149–51, dated 355 B.C. The oath was dramatized a century earlier in Aeschylus's *Eumenides.* See Todd, *The Shape of Athenian Law,* 54–55, for sources.

[65] Aristotle, *Politics* 1292a11–12; 1305a7–9 (popular leaders became tyrants).

[66] See Hansen, "*Nomos* and *Psēphisma,*" 170, for six examples. Hansen notes as "astonishing" the idea that a new *nomos* would repeal existing *psēphismata,* but this is what Demosthenes 20, *Against Leptines* 44, states, and it is supported by a law on silver coinage. *Demosthenes III,* trans. J. H. Vince (Cambridge, MA: Harvard University Press, 1998). Ronald S. Stroud, "An Athenian Law on Silver Coinage," *Hesperia* 43 (1974): 157–88.

[67] Aristotle, *Rhetoric* 1354a24–25.

[68] For citations of this or a similar phrase, see Aristotle, *Constitution* 59.2; Demosthenes 24, *Against Timocrates* 1.

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to permit the introduction of new laws that year. If they agreed, then a citizen could propose to change a *nomos,* which required the introduction of a new *nomos* to take its place. No *nomos* could be repealed without a new *nomos* to replace it. If such proposals came forth, they were posted in public. A board was appointed, along with a commission of jurymen, to conduct a trial of the proposal. The commission indicted the law, and a jury heard arguments for and against it in the light of existing laws, which were defended by chosen advocates. The point is that the legality of the law had to be examined and cleared before the Assembly could even consider whether the law was desirable. The legal question was to be largely separated from the political question—and the *nomos* was off-limits to changes by the Assembly without legal review.[69]

Orators who argued cases before Athenian juries were not legalistic as in a modern courtroom; their citations of laws and of earlier law-givers (especially Solon) were often intended to smear their opponents morally. Epichares is "one most debased of all" (*ponērotatos pantōn*), said Andocides of an opponent, "and desiring to be that way."[70] But a city is like a man, thought Demosthenes, who said that "debased laws" (*hoi ponēroi nomoi*) injure a community.[71] This again suggests the strong connection between moral values and laws. The standardization of the laws, and their inscription in a central place in the *polis,* amounted to a rejection of the sophistic approach to moral standards, as applied to the rhetorical approaches of public speakers. This rejection was not complete, of course; there was still great latitude for argument, and speeches preserved from the next century are full of obfuscations and rhetorical ambiguities. But the Assembly did not again take the city over the cliff as it had during the war with Sparta—and the sophists did not regain the kind of intellectual or political strength they had held in the late fifth century.

Ultimately, the integrity of the fundamental laws—the anchors for Athenian political life—depended upon the commitment of individual Athenian citizens to those laws, and their willingness to take self-motivated, self-generated action to challenge attempts to violate those laws. The beauty of the system was that it took a jury review as well as a majority vote in the Assembly to pass a proposal, but any citizen could stop the voting with a legal challenge. One rational man could bring the issue to legal review, while no one person or group could pass a proposal. The all-too-frequent examples of the Assembly taking an action and then regretting it later were, to some extent, alleviated by these challenges and the closer, more deliberate, examination afforded to any particular issue.

[69] Demosthenes 20, *Against Leptines,* offers evidence about how a challenge to a law would work.

[70] Andocides 1, *On the Mysteries* 95.

[71] Demosthenes 20, *Against Leptines* 49.

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V. Fundamental Law, Ancient and Modern

The Athenian reforms provide a series of parallels to the American Founding, as well as to our own day. The parallels begin with the recognition of the need for fundamental laws, to which political institutions must conform. In *Federalist No. 78,* Alexander Hamilton defined the American conception of a constitution as embodying fundamental laws that are enforceable by an independent judiciary:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[72]

The American Founders understood the need to resolve potential conflicts between the legislators and the political principles on which the nation was founded, even though they left open the specific means to accomplish this. They also had to define the terms of popular consent, in order to prevent inappropriate attempts by the people to tamper with the principles of the constitution. The "intention of the people" does not mean the people's agreement with the *particular* acts of the legislature as determined by regular popularity contests, but rather the original consent to fundamental principles—the *fundamental* laws upon which political action is founded.[73] The so-called supremacy clause in the Constitution itself (Article VI) establishes the Constitution as the "supreme Law of the Land," and binds the judges in every state to the Constitution. The courts have assumed the authority to define and protect those principles, through judicial review of legislation.[74] Although the Founders did not define the procedures for federal judicial review of state legislation, they did establish a conceptual, political, and legal hierarchy to govern the relationships between legislation and the fundamental laws. In their late-fifth-century reforms, the Athenians recognized all of these hierarchies, as they applied to their *nomoi.*

The central lesson from the Athenians as to what a constitution should do is that it should stand above the popular and legislative winds of the

[72] Hamilton, *Federalist No. 78,* in Pole, ed., *The Federalist,* 415. See *Federalist Nos. 78–83* for Hamilton's ideas concerning the role of the judiciary.

[73] *Federalist No. 49* speaks against too often referring to the decisions of the people, and *Federalist No. 50* rejects both periodic and particular appeals to the people.

[74] See *Marbury v. Madison,* 5 U.S. 137 (1803).

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moment and hold firm to its principles. One essential similarity between the Athenian and American systems, as each developed over time, is that the *particular* enactments of the popular institutions must not be allowed to supersede the *fundamental* principles written into the laws. Should legislation—or popular referenda—contradict the constitution, those enactments are invalid.

In other words, the Athenians tell us that the whims of popular opinion—either in public assembly or through the decisions of legislators—must not be made superior to the fundamental laws. In a similar vein, Hamilton continues his discussion of the judiciary in *Federalist No. 78,* explaining both the nature of the people's consent and how legislative acts are to be evaluated:

> [W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those that are not fundamental.[75]

This statement establishes a hierarchy between the fundamental laws, written in the Constitution, and the nonfundamental laws enacted by the legislature. By urging judges to follow the fundamental laws, the statement implies that legislative acts that are contrary to the fundamental laws ought not be enforced. The Athenians offer a lesson here as well. In Athens, the citizen Assembly, the council, and the juries were the same people—every citizen was eligible for all—and (despite political machinations) they all had to accept the objective supremacy of the laws to some degree, or face a legal challenge from any concerned citizen. It was in the Assembly that decrees could be passed to handle particular cases not addressed by the laws—and those decrees had to be consistent with the generalized laws. Such an approach is inconsistent with the modern claim that "the Constitution is what the judges say it is," just as it is inconsistent with any shout from the Assembly that the people may do whatever they wish and call it lawful.[76]

The Americans and the Athenians attempted to preserve their fundamental laws in different ways. The American system upholds a separation of powers by granting the courts no role in passing legislation, and allowing the legislature no power to intervene in legal judgments.[77] Yet

[75] Hamilton, *Federalist No. 78,* 415.

[76] David J. Danelski and Joseph S. Tulchin, *The Autobiographical Notes of Charles Evans Hughes* (Cambridge, MA: Harvard University Press, 1973), 143. The shout from the crowd was recorded by Xenophon at the trial of the Arginusae generals: Xenophon, *History,* 1.7.12. (See note 36 above.)

[77] Although the line has blurred in the past century—for example, through the regulatory powers delegated by Congress to administrative bureaucracies of the executive branch.

the system allows judicial review of laws in particular cases, in which the courts may rule a law unconstitutional if it contradicts the Constitution. In contrast, the Athenians interjected judicial review at the level of legislation, allowing any citizen to initiate a review of any proposal prior to passage. American judges always hear particular cases, which can reveal contradictions between a provision of the law and the Constitution. The Athenians put the proposed law itself on trial, subjecting it to prosecution and defense before a sworn jury. The American Constitution forbids bills of attainder—legislative acts that single out individuals or groups—as well as *ex post facto* laws.[78] The Athenians forbade decrees that did not apply to all, and, in crisis, stopped *ex post facto* decrees and trials against supporters of the former government (the *amnēsia*).[79]

The Athenians and the American Founders also recognized that their fundamental laws had to be written by a few select men, and then accepted by the people as written. The early Athenian lawgivers Solon and Draco were models for the establishment of the many offices, boards, and commissions established in the fifth and fourth centuries to study, define, and inscribe the laws. The moral sanction of the early lawgivers provided an important source of legitimacy for the laws. In *Federalist No. 43,* James Madison observed that one of the defects in the original Articles of Confederation was that "in many of the States it had received no higher sanction than a mere legislative ratification." Not only did the Articles fail to meet the standards for popular consent (thereby failing to rise above the status of treaties), but they were open to legislative and popular manipulations. To remedy this flaw and to place the nation's fundamental laws and principles off-limits to popular and legislative fiat, the American Founders designed specific and distinct procedures for constitutional ratification and amendment. The Constitutional Convention of 1787, the state ratifying conventions, and the processes of constitutional amendment were the processes by which the original Constitution was to be formulated and debated. The supreme authority of the Constitution—the standard against which other laws would be evaluated—provided ongoing legal checks against the state and federal legislatures. The parallel in Athens was in the use of jurors, sworn to follow the written laws, to evaluate Assembly proposals.

The Athenians of the late fifth century and the Americans of the twentieth century were both societies in which certain philosophical positions shaped political practice and the interpretation of the laws. The various American progressive and populist movements suggest parallels to both the democratic and sophistic movements in Athens.

[78] U.S. Constitution, Article I, section 9. See Madison, *Federalist No. 44*: "Bills of attainder, ex post facto laws, and laws impairing the obligations of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation" (in Pole, ed., *The Federalist,* 244).

[79] Andocides 1, *On the Mysteries* 87. I discussed the *amnēsia* in Section IV above.

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Politically, the progressives—like the Athenian democrats—lobbied for greater direct exercise of power by the people, through, for instance, the direct election of senators, and the primary system that has largely replaced the party conventions. The idea that the United States is a federal republic is largely lost today amid the triumph of the populist agenda. In Athens, the Assembly arrogated to itself the function of legislature, ratifier of the popular will, and even judge—the latter when it assumed the functions of the courts, dispensed with the need for oaths, and tried the six generals after they had won a naval battle against the Spartans at Arginusae (discussed above in Section II).

Intellectually, the Greek sophists were counterparts to the modern subjectivists, who rejected religious dogmatism and supernatural morality, but replaced them with skepticism and moral relativism. The political manifestation of such views is pragmatism, which considers every issue to be an isolated particular case, finds normative standards only in relation to particular situations, and eschews the use of firm principles. The legal counterpart to pragmatism is in the philosophy of Oliver Wendell Holmes, who sought to balance various claims rather than to evaluate them using principles in the law. He wrote famously, "All my life I have sneered at the natural rights of man."[80] Value choices, he wrote, are "more or less arbitrary. . . . Do you like sugar in your coffee or don't you? . . . So as to truth."[81] "[A] thing might be good for some persons but bad for others, or at one time good and another time bad," said the anonymous sophist twenty-four hundred years earlier. Each took his views into the interpretation of the law, and each then saw fit to determine that the law was what he said it was.

In classical Athens—as today—there were many who opposed such subjectivism. Seeing the sophists as destroyers of the moral foundations of society, they demanded a return to the standards associated with the traditional gods. The characters in Aristophanes' *Clouds* react against sophistic thought by burning down Socrates' school—a chilling presage to the historical death of Socrates. He remains the preeminent symbol of those who investigate matters in heaven and earth, question the gods, and purport to teach—and then fall victim to those who see such actions as crimes. The reactionaries in Athens also have counterparts today: the conservatives of the religious right, who decry the loss of moral standards among the modern sophists, and call for a return to religious standards—replacing skepticism with tradition and divine moral commandments, and wanting law and order over mob rule. A similar desire motivated some who favored the reinscription of the ancestral laws of Athens. But this approach threatens to leave the laws subordinated to tradition—a

[80] Oliver Wendell Holmes, letter to Harold Laski, September 15, 1916. See First Amendment Center website, http://www.firstamendmentcenter.org/analysis.aspx?id=20074.
[81] Oliver Wendell Holmes, letter to Lady Pollock, September 6, 1902. See ibid.

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primitive form of "original intent" that depends upon some view, drawn from tradition, of what that "intent" might have been.

Throughout history intense debates have often raged between traditionalists and those who challenge tradition by thinking independently—debates over the ethical foundations of a nation's political health and the relationship between ethics, law, and the exercise of power. In Rome during the second century B.C., for instance, the conservative Cato the Censor was appalled by the openly skeptical method of argument used by visiting Greek philosophers, and the implications this kind of thinking had for the survival of the republic.[82] Philosophers such as Carneades had adopted a relativistic approach to moral questions, with striking similarities to certain "living constitution" views today.[83] The story is that Carneades argued one side of a case and won; then he took the other side and won again. In Cato's vision, such arguments could undercut the authority of Roman laws by elevating political expediency over adherence to fundamental truths; as the Roman youth abandoned the certainties of the past, the Roman political order would be vulnerable to potentially fatal changes. By inducing the Senate to order the philosophers out of Rome, Cato could claim to have saved the republic, by rescuing its moral character and its constitutional foundations from such skeptical assaults.

Aristotle came closest to providing an alternative to the skeptics and the sophists, as well as to religious traditions. He viewed laws neither as dogmas inherited from a divinely inspired past nor as subjective constructs, but rather as objective generalizations by which jurors judge particular cases. This approach starts with facts, since "the underlying facts do not lend themselves equally well to the contrary views."[84] The jurors should be concerned with the facts, and the laws should provide the means to evaluate those facts: "Properly formulated laws should define as much of a case as they can, and leave as little as possible for the jurors to decide."[85] As well as reducing the influence of passions and individual interests on judgment, Aristotle's claim reflects the nature of the lawmaking process—to produce general rules without knowing the particular facts of the future—and the process of judgment, which has evidence but needs rules about how to judge the facts. Laws are objective principles that can be used to guide our decisions about particular matters. This is all the more true in matters of constitutional interpretation, which deals

[82] Carneades (214–129 B.C.), head of Plato's Academy, visited Rome in 155 B.C., along with Critolaus (a Peripatetic) and Diogenes (a Stoic). See Plutarch, *Marcus Cato* 22. This does not imply that Carneades was a sophist.

[83] See William H. Rehnquist, "The Notion of a Living Constitution," in Arthur and Shaw, eds., *Readings in the Philosophy of Law,* 520–25.

[84] Aristotle, *Rhetoric* 1355a36–37.

[85] Aristotle, *Rhetoric* 1354a32–b22. Aristotle, *Constitution* 9.2, defends Solon's laws by noting the difficulty involved in formulating general principles applicable to particular cases. *Politics* 1272b5–7 is clear that the rule of good laws is superior to the rule of men. Aristotle says that passion warps the decisions of kings at *Politics* 1286a17–20.

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with the most abstract and general rules for a nation, and which serves to guide lower levels of legislation. At the level of constitutional interpretation, the issue of rule by laws versus men is of greatest importance.

VI. Conclusion

It would be improper to exaggerate the institutional and conceptual precision of the classical Athenians in solving their problems. They were certainly not aware of a need for a written plan of their government, and no ancient prescriptive "constitution" as detailed as that of the United States has ever been found. But the essential identification the Athenians made—the need for a law that is superior to the actions of the people and their agents, and which can be changed only by a procedure that differs from routine political actions—is essentially the same as the identification made by the American Founders. What constitutions should do must be determined within the broader identification of a constitution as the fundamental law of the land.

Philosophy, Politics, and Economics Program, Duke University

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