Constitution and Coordination
Law, Democratic Consolidation, and Economic Development in the Aftermath of War in Classical Athens

Federica Carugati
Ostrom Workshop
Political Science Department
Maurer School of Law
Indiana University - Bloomington

ABSTRACT: At the end of the 5th century BC, a prosperous imperial democracy embarked on a long and demanding war. The conflict severely strained Athens’ resources, compromised her commitment to democracy, and plunged the city into civil war. Within a few years, Athens was again a prosperous democracy. How did the polis manage to rebound so decisively? This article explores the dynamics of institutional change in ancient Athens by analyzing how beliefs affected institutional change, and how institutional change shaped long-term political and economic outcomes. I argue that, during the late 5th century crisis, the Athenians articulated the notion of patrios politeia (i.e., the constitution of the fathers), as a commitment to the laws of the polis. After the civil war, the commitment to law was weaved into the structure of a new, self-enforcing constitution. The constitution fostered political stability and economic recovery by enabling investments in institution building and infrastructure.
1. Introduction

The focus of our attention, therefore, must be on human learning—on what is learned and how it is shared among the members of a society and on the incremental process by which the beliefs and preferences change, and on the way in which they shape the performance of economies through time.

Douglass North,

At the end of the 5th century BCE, the world’s first large-scale democracy failed.1 Under the pressure of a long and demanding war, weakened by military defeats and by an unprecedented human and financial crisis, one-century-old democratic institutions began to crumble. In the span of a decade, a prosperous, stable, imperial democracy lost its major sources of revenues (i.e. an Aegean empire; mineral resources), half of its citizen population, succumbed (albeit temporarily) to oligarchy, and ultimately devolved into civil war.

Contrary to the predictions of ancient constitutional theory, Athens’ political crisis did not lead to permanent regime change in the direction of a more authoritarian form of government.2 Contrary to the predictions of modern political science, the city’s economic recovery was fast, robust, and long lasting.3 Within a few years after the end of the civil conflict, Athens was again a prosperous democracy, and it remained so until the Macedonian conquest of Greece eighty years later.

1 All dates in this article are BCE, unless otherwise specified.
2 In ancient Greece, as in ancient Rome, civil war was perceived as a major driver of constitutional degeneration and political instability. This view emerges in Thucydides, Plato, Aristotle, Polybius, Sallust, and Lucan, among others. Modern analyses of ancient civil wars support the perceptions of ancient constitutional theorists. See Brunt, 1972; Ruschenbusch, 1978; de Ste. Croix, 1981; Lintott, 1982; Fuks 1984; Gehrke, 1985; Berger, 1992; van Wees, 2007. For an in-depth discussion of the ancient and modern literature, see Carugati, 2015, ch. 2.
3 I discuss the modern literature on the negative economic impact of civil war below. Measures of Athenian economic development in the classical period: Ober 2008; 2015.
Why was democracy reestablished, after it had failed? Why was the new democracy stable, after a decade of instability? And how did the polis manage to recover so quickly from such a profound shock to its economic structure?

These questions have received little attention from classical scholars. Because oligarchy was short-lived, the reestablishment of democracy in Athens has been regarded a given outcome of the late 5th century constitutional struggles. Moreover, because the discovery of economic growth in ancient Greece is of recent vintage, the question of Athens’ remarkable post-war economic performance has rarely been addressed.

To explore the roots of Athens’ democratic consolidation and economic resilience in the aftermath of war, I combine historical approaches to the ancient sources and frameworks drawn from the field of political science.

The late 5th century crisis undermined the Athenians’ trust in democracy. The shock created a window of opportunity for constitutional change. As the window opened up, alternatives to democracy were tested. But the relentless pressure of war made pivoting toward a new equilibrium difficult. During a decade of constitutional struggles, as oligarchic and democratic governments rose and collapsed, the Athenians articulated a collective consensus on how Athens ought to be ruled. The consensus, enshrined in the notion of patrios politeia (i.e., the constitution of the fathers), expressed a commitment to law as a bulwark of constitutional stability. At the end of the civil war, the consensus on patrios politeia was weaved into a self-enforcing democratic constitutional structure though a series of reforms. The new constitution laid the foundation for long-term

---

stability and economic recovery by fostering investments in institution building and infrastructure. Institution building revolved around the creation of robust institutional channels to redress personal and economic grievances. Investments in infrastructure targeted the critical sectors of defense and commerce. These investments contributed to lower the threat of protracted violence by raising its costs, thus enhancing the potential for long-term growth.

Methodologically, my aims are twofold. First, I show that the tools and techniques of political science allow us to explain, rather than just describe, Athenian institutional development. Second, because the institutions enabling the provision of democracy and prosperity in Athens differed considerably from their modern counterparts, this study helps enrich the range of empirical evidence available to political scientists.

The story of Athens’ rise, fall, and recovery offers a window into the dynamics of institutional change (North, 1990; Ostrom, 1990). Recent contributions have focused on constructing broad frameworks to analyze the impact of institutional change on long-term political and economic outcomes (e.g., North, Wallis and Weingast, 2009; Acemoglu and Robinson, 2012). Other contributions have focused on the question of where institutions come from, emphasizing the role of beliefs in shaping institutional change (Mokyr, 1990; North, 2005; Schofield, 2006; Alston et al., 2016). This article addresses both branches of the literature: it offers a detailed out-of-sample test case for analyzing how beliefs affect institutional change, and how institutional change shapes long-term political and economic outcomes. In particular, the Athens’ case illustrates the power of ideas and meaning to indicate an agreement that is enforced by the parties to the agreement without the need of a third party enforcer.
beliefs in shaping political realities and behaviors in a time of crisis, and the mechanisms whereby ideas get purchase on behavior through credible commitment, coordinating the creation of new institutions.

The story of Athens also brings new evidence to bear on a number of debates in political science. These debates address the institutional sources of democratic consolidation (e.g. Lipset 1959; Almond and Verba, 1963; Huntington, 1968; Linz and Stepan, 1996; Przeworski and Limongi, 1997; Diamond, 2008); the impact of civil war on political and economic structures (e.g. Alesina et al., 1996; Collier, 1999; Kang and Meernik, 2005; Miguel and Satyanath, 2011); and the role of constitutions in fostering political stability and economic development (e.g. North and Weingast, 1989; Persson and Tabellini, 2004; Elkins, Ginsburg, and Melton, 2009).

Finally, the positive analysis that I conduct in the following pages generates an important normative argument: political theorists, ancient and modern, often emphasize equality and freedom as the hallmarks of democracy. This article stresses legality as the third, fundamental attribute of democratic discourse and practice. Legality, however, ought not to be conceived as a set of rules emanating from a sovereign authority that is endowed with the coercive power to enforce such rules. The nature of law in Athens and the structure of the Athenian legal system were consistent with—and, I believe, fostered—an understanding of law and legality as a coordination device for collective action.

There are lessons to be learned from Athens’ recovery for both political theorists and institution builders. In terms of institution building, the story of Athens suggests that, in the aftermath of civil conflict, political stability and economic development require
robust mechanisms to channel private disputes through institutional bodies, and to prevent such institutions from collapsing under the weight of partisan resentment.

The lessons for political theorists are perhaps less heartening. In the aftermath of civil war, the Athenians reached what we may describe, in Rawls’ terms, as an overlapping consensus (Rawls, 1971; 1993). My analysis throws a dark veil on Rawls’ argument, in that it suggests that consensus may be a product of civil war, rather than peaceful public reasoning. Nonetheless, the bloodstained overlapping consensus on patrios politeia laid the foundation for political and economic recovery by fostering a commitment to legality that created the conditions for sustainable order, prosperity, and the protection of people’s liberty, equality, and dignity.

2. The Historical Context

When crisis struck at the end of the 5th century, Athens’ democratic institutions had a long and illustrious history. Established a century earlier (508/7), they were regarded by contemporaries as the key to the polis’ success.\(^5\)

In the words of the historian Herodotus,

> the Athenians grew in power and proved, not in one respect only but in all, that equality of speech (isegoria) is a good thing. Evidence for this is the fact that while they were under tyrannical rulers, the Athenians were no better in war than any of their neighbors, yet once they got rid of their tyrants, they were by far the best of all (Hdt. 5.78).

For Herodotus, as for many of his contemporaries, democracy was coextensive with equality of speech: that is, the power of the people to make decisions by

\(^5\) On the Athenian revolution and the establishment of democratic institutions in 508/7, see Ober, 1996.
participating in the polis’ deliberative institutions, namely the Assembly and its agenda-setting organ, the Council.

In the middle of the 5th century, under the leadership of Ephialtes and Pericles, Athens consolidated its democratic institutions ([Arist]. *Ath.Pol.* 27. 3). The process of consolidation focused primarily on the judiciary: first, the elite council of the Areopagus was deprived of most of its judicial powers, which were transferred to the popular courts; second, the introduction of pay for jury duty, which enabled people’s participation in the popular courts, increased the power of the people.

In the Assembly and in the lawcourts, the people of Athens made decisions concerning both domestic and foreign policy, debating issues and voting on them by simple majority rule. In the lawcourts, verdicts were final and unappealable. In the Assembly, no procedural mechanisms were in place to modify or reverse decisions.6

The development of Athens’ democratic institutions and culture in the 5th century cannot be fully understood by focusing solely on domestic reforms. In the aftermath of the Persian Wars (490 and 480-79), Athens found itself at the head of the multi-city alliance that had repealed the Persian *armada*. Soon after the end of the conflict, Athenian leadership began to morph into rulership, as allied cities that sought to defect from the alliance were brought back in line with the use of force.

---

6 The Mytilenean affair as reconstructed by Thucydides suggests that at least down to 427 a) the only way to repeal a bad decision made in the Assembly was to call another meeting of the Assembly; b) particularly when policies were time-sensitive, there were no guarantees that the second decision, rather than the first, would be implemented. At some point between 427 and 415, the Athenians introduced a procedure that allowed anyone in the Assembly to block a legislative proposal that contradicted existing laws – the so-called *graphe paranomon*. As Lanni and Vermeule have shown, in the absence of credible commitment, the *graphe paranomon* proved futile at least down to 406 (Lanni and Vermeule, 2013). I will return to the relevance of the *graphe paranomon* in the new constitutional structure in section 4 below. For an in depth account of how procedures to reverse a decision developed toward the end of the 5th century see Carugati, Calvert and Weingast (in progress).
Stanford historian Ian Morris (2009) has suggested that we should not refer to the alliance of poleis under Athens’ hegemony as an “empire,” as most classical historians do. Empires, Morris argues, are based on a logic of coercion that benefits the imperial power. Athenian hegemony, instead, promoted cooperation among city-states in ways that were beneficial to all members: cooperation allowed for the successful policing of commercial routes against pirates, and it created a central market with a common currency that facilitated exchange of goods and services.

Yet, the fact that the central market was in Athens, that the currency was the Athenian owl, and that attempts to leave the alliance were punished with violence suggests that Athens may have reaped more benefits than other, non-hegemonic poleis.

The empire brought wealth, prestige, and stability to Athens: it attracted revenues through both commerce and tribute-paying allies; it funded the polis’ democratic institutions, its military might, and conspicuous public building programs; and it justified democratic culture before the eyes of rich Athenians who may have preferred a different type of government.

But more money, as the adage goes, more problems. As the historian Thucydides makes clear, the growth of Athens’ power became a matter of increasing concern in Greece, particularly for the only other polis endowed with the military means to counteract it: Sparta (Thuc. 1.23). Tensions between Athens and Sparta exploded in 431 in the Peloponnesian War. The conflict lasted twenty-seven years.

In 415, the Peloponnesian War was still ongoing when the Athenian assembly voted to send a massive military expedition to Sicily. Within two years, a large part of the conspicuous human, financial, and material resources accumulated over a century of
military and economic successes was lost. The defeat in Sicily plunged Athens into a severe crisis. The crisis, in turn, triggered political instability.

Between 411 and 403, a series of regimes replaced the democracy that had governed Athens for almost a century: the oligarchy of the Four Hundred was established in 411 and ruled Athens for about four months. When the Four Hundred collapsed, another oligarchy—the regime of the Five Thousand—took power for another handful of months.\(^7\) Democracy was restored in 410/9 and remained in power until the end of the Peloponnesian War in 405. After Athens’ defeat in the Peloponnesian War, Spartan interference in Athenian domestic affairs led to the establishment of the oligarchy of the Thirty, in the year 404. Efforts to rid the city of the oligarchs devolved into civil war. Democracy was reestablished, once and for all, in 403.

During this decade, political instability reigned and violence often erupted, notably in 411/10 and in 404/3.

Figure 1 provides a timeline of events.

![Timeline of Events](image)

**FIG 1.** Political instability in Athens, 413-403

---

\(^7\) For the purposes of this article, I do not discuss the fragmentary evidence concerning the rise and fall of the Five Thousand. However, it is worth noting in passing that the establishment of the Five Thousand after the fall of the Four Hundred suggests that the Athenians were less keen on reestablishing democracy after the experience of oligarchy than some classical scholars maintain (see e.g. Shear, 2011).
Classical scholars analyze the period from the Sicilian expedition (415-413) to the second restoration of democracy in 403 as a series of temporary and self-contained shocks to an otherwise relatively stable democratic equilibrium. Because the oligarchic governments were short-lived, scholars conclude that democracy was never really in jeopardy in Athens.

This view, however, overlooks a critical fact. When the Athenians began to question the viability of democracy (and then replaced it with oligarchy) under the pressure of an appalling military defeat, an increasingly threatening external war, and a severe financial crisis, they did so for good reasons.

The reckless invasion of Sicily devastated Athens’s human, financial, and material resources. The losses exposed the polis to an unprecedented level of danger by dwarfing her chances of prevailing over Sparta in the Peloponnesian War.\(^8\) Under these circumstances, it was not preposterous to suggest that democracy had to be replaced with a political system that could prove less prone to reckless decision-making. The options were limited: by the late 5\(^{th}\) century, the Greeks (at least those on the mainland) had rejected sole rulership, in the form of either kingship or tyranny.\(^9\) Would Athens be led by a democracy or by an oligarchy?

In the aftermath of Sicily, a window of opportunity for constitutional change opened up. The Athenians began to publicly debate how Athens ought to be ruled. In the course of this debate, both the supporters of oligarchy and the supporters of democracy

---

\(^8\) According to Hansen’s estimates, 10,000 (out of a total population of 40,000) Athenians may have died in Sicily (Hansen, 1988). Moreover, the disaster eroded most of the resources accumulated in the heyday of Pericles (Blamire, 2001).

\(^9\) Whereas kings had been done away with after the collapse of Mycenaean civilization in the 12\(^{th}\) century, tyrants had disappeared from the mainland by the end of the 6\(^{th}\) century (but continued to constitute an option in Sicily throughout the 4\(^{th}\) century). An obvious exception is the Spartan double kingship, which was however, by definition, not sole rulership.
appropriated the notion of *patrios politeia* (i.e., the constitution of the fathers) to legitimize constitutional change (Shear, 2011).

The notion of *patrios politeia* has been the object of much scholarly attention. But the fact that it was exploited by both oligarchs and democrats led many interpreters to dismiss it as an “empty slogan” (Hansen, 1999: 300). Against this tradition, I argue that the notion of *patrios politeia* provided instead a critical coordinating function as the Athenians sought to reestablish a stable government.

Throughout the constitutional debate, the Athenians progressively elaborated the notion of *patrios politeia* in response to the excesses of both democratic and oligarchic governments.\(^\text{10}\) When democracy was reestablished in the aftermath of civil conflict (403), the notion of *patrios politeia* articulated a commitment to the laws of the polis as a bulwark of constitutional stability. Such a commitment prompted a series of reforms of Athenian legislative and judiciary institutions, including the establishment of a new legislative institution, new procedures for introducing and amending laws, and mechanisms to enforce personal and property rights.

The next section reconstructs the evolution of *patrios politeia* during the constitutional debate.

---

\(^\text{10}\) I use the adverb *progressively*, because, as I argue below, the elaboration of the notion of *patrios politeia* as a commitment to law was a long process that occupied the entire last decade of the 5\(^{\text{th}}\) century. *Patrios politeia* was not a late 5\(^{\text{th}}\) century invention, but its use in the constitutional debate marks the beginning of a period in which the Athenians began to perceive the past as an age of stability and prosperity, a model to restore. This tendency stands in stark contrast with the 5\(^{\text{th}}\) century view (expressed most cogently by Thucydides in Pericles’ funeral oration) that the past was great, but the present is better. Thuc. 2. 35-46. On Athenian attitudes toward the past and the use of *patrios politeia*, see Hansen, 1989a.
3. The Athenian Constitutional Debate (413-403)

The Athenian historian Thucydides describes the decision to sail to Sicily as the product of the unrestrained power of an Athenian demos too often inclined to uncritically follow the lead of self-interested politicians. When the news of the Sicilian disaster spread in Athens, these politicians, and anyone else who encouraged the demos to vote in favor of the expedition, became the target of Athenian anger, “just as if they [i.e., the demos] had not themselves voted it” (Thuc. 8.1.1; see also Lys. 18.2; cf. Ober, 1998, ch. 2). Exposed to the dangers of collective decision-making, the demos rushed into an appalling military defeat. As the news spread to Athens, democracy began to vacillate.

Because decision-making in the Assembly was subject to few procedural constraints, the Athenian elite began to fear that the demos would expropriate in a desperate attempt to fund the ongoing war against Sparta. Fear of expropriation led the elite to advocate for constitutional change ([Arist.] Ath.Pol. 29.1; Thuc. 8.47; 8.48).

Establishing an oligarchy in Athens after a century of democracy, however, was “no light matter,” as Thucydides remarked (8.67.4). To legitimize their claims to power, the oligarchic governments that were established after the collapse of the 5th century democracy—that is, the Four Hundred in 411/10 and the Thirty in 404/3—employed the notion of patrios politeia (lit. the constitution of the fathers, also referred to as patrioi nomoi, lit. the laws of the fathers).

According to [Aristotle], in the preliminary assembly that foreshadowed the rule of the Four Hundred, the leaders of the oligarchic party stressed their commitment to the “laws of the fathers:”

Cleistophon moved an amendment to the resolution of Pythodorus, that the commissioners elected should also investigate the laws of the fathers laid down by Cleisthenes when he was
establishing the democracy, in order that they might decide on the best course [of action]. ([Arist.] AthPol. 29.2-3)

Similarly, according to Diodorus, the oligarchy soon-to-be-known as the Thirty Tyrants came to power as a moderate regime, committed to restoring the “constitution of the fathers:”

At first, then, they [the Thirty] were moderate towards the citizens and pretended to be administering the constitution of the fathers. (Diod. 14. 3. 2-3)

As Julia Shear has recently shown, epigraphic evidence supports the literary sources in suggesting that the oligarchs’ appeals to patrios politeia were no mere slogans, but revealed a serious attempt at constitutional reforms in the direction of oligarchy (Shear, 2011).

Although both oligarchies came to power to establish a legitimate government inspired by the constitution of the fathers, their rule soon degenerated into violence. As Thucydides recounts, before the assembly that established the oligarchy of the Four Hundred,

the Assembly and the Council (…) still met notwithstanding, although they discussed nothing that was not approved of by the conspirators, who both supplied the speakers, and reviewed in advance what they were to say. Fear, and the sight of the numbers of the conspirators, closed the mouths of the rest; or if any ventured to rise in opposition, he was presently put to death in some convenient way, and there was neither search for the murderers nor justice to be had against them if suspected; but the people remained motionless, being so thoroughly cowed that men thought themselves lucky to escape violence, even when they held their tongues. (Thuc. 8. 66. 1-2)

Analogously, the Thirty,

when they got a firmer hold on the state, [the Thirty] kept their hands off none of the citizens, but put to death those of outstanding wealth or birth or reputation, intending to put that source of danger out of the way, and also desiring to plunder their estates; and by the end of a brief interval of time they had made away with not less than fifteen hundred. ([Arist.] Ath.Pol. 35, 2-4)

Why did serious attempts at constitutional reform in the direction of oligarchy morph into blood baths?
Discussing the reasons that led to the collapse of the oligarchic governments, the ancient sources emphasize the oligarchs’ failure to meet their foreign policy obligations. Both the Four Hundred and the Thirty utterly failed to deliver on the promises made to justify constitutional change: in 411, the Four Hundred failed to gain the support of Persia in the war against Sparta (Thuc. 8. 48), and failed to ratify a peace with Sparta (Thuc. 8. 70-1); in 404, the Thirty failed to secure the support of Sparta, the winner of the Peloponnesian War and now the foremost power in Greece (Diod. 14.33.6; Xen. Hell. 2.4.29; [Arist.] Ath.Pol. 38.4). Arguably, these foreign policy fiascoes played an important role in the rapid collapse of both governments.

The sources, however, also emphasize another reason: in both 411 and 403, the oligarchs came to power in the course of constitutional assemblies, but they proved unwilling to respect their mandate. First, they refused to share power with a larger constituency, as they were constitutionally bound to do.\(^\text{11}\) Second, as soon as they came to power, the oligarchs proceeded to do away with the polis’ laws as it befit them.\(^\text{12}\) In the absence of any check on their authority, the rule of the oligarchs degenerated into arbitrary violence and expropriations carried out against citizens and foreigners alike.

The violence perpetrated by the ruling oligarchs made it difficult for the Athenians to coordinate against them. Coordination however occurred when different groups opposing the oligarchs learned that there existed broad support to reestablish the

\(^{11}\) For the Four Hundred, cf. [Arist.] AthPol. 29-32; Thuc. 8. 67-9, 89. For the Thirty, see Diod. 14.4.1; Xen. Hell. 2.3.11; [Arist.] AthPol. 35.1. The Four Hundred refused to elect the Five Thousand; the Thirty either refused to draft a new constitution and promulgate new laws (Diod. 14.4.1; Xen. Hell. 2.3.11), or ignored the constitutional mandate ([Arist.] AthPol. 35.1).

\(^{12}\) The Four Hundred abolished the graphe paranomon and eisangelia during the constitutional assembly held at Colonus (Thuc. 67.2; [Arist.] Ath.Pol. 29.3). The Thirty too abolished the graphe paranomon (Aesch. 3. 191). On the unchecked power of the oligarchs to abolish whatever laws they wanted see Thuc. 66; 70 (Four Hundred) and [Arist.] Ath.Pol. 35.2 (Thirty). Cf. Shear, 2011.
**patrios politeia**. Critically, the opposition encompassed both supporters of democracy and supporters of oligarchy who had grown weary of the abuses of the ruling oligarchs. Under the banner of *patrios politeia*, these groups coalesced to remove the ruling oligarchs from power: in 411/10, coordination yielded a broader, but fragile oligarchic regime (the oligarchy of the Five Thousand) that soon collapsed, enabling the restoration of democracy; in 404/3, coordination led to the militarization of the conflict between the ruling oligarchs and their opponents, and to the second restoration of democracy in the aftermath of the civil war.¹⁴

*Patrios politeia*, then, facilitated coordination throughout the constitutional debate, as it was deployed both to rally support for constitutional change in the direction of oligarchy, and to respond to the excesses of the ruling oligarchs. But what did *patrios politeia* precisely mean?

As the Athenians sought to identify the features of the best constitution for their polis, they increasingly rejected both the excesses of democracy and those of oligarchy. Since at least the first democratic restoration, and increasingly afterwards, *patrios politeia* began to be associated with the laws of the polis.

Between 410 and 405, under the first restored democracy, the Athenians embarked on a wide-ranging program of revision and publication of the laws of the city. The collection encompassed legislation enacted since archaic times, but it by no means

---

¹³ Coordination under *patrios politeia* against both the Four Hundred and the Thirty occurred in the context of explicit bargaining, that is when a group knew that the other group knew that there was widespread support for a *patrios* government. For a distinction between explicit and tacit bargaining, see Schelling, 1960.

¹⁴ For the purposes of this article, I do not delve into these lengthy episodes. For coordination against the Four Hundred, cf. Thuc. 8.76.6; 92.11. For coordination against the Thirty, cf. Xen. *Hell.* 2.3.17; [Arist.]* Ath.Pol.* 36.1; Diod. 14.4.5. For a detailed account of both episodes, cf. Carugati 2015, ch. 3.
made up a complete code.\textsuperscript{15} Thanks to this process, a conspicuous body of Athenian laws became available for consultation in the central archive, the Metroon (Sickinger, 1999, ch. 4). Other laws remained scattered around the city: inscribed on stone slabs (stelai), they were sometimes conveniently located in front of the courts that administered them (Shear, 2011: 89-96). These efforts indicate that, after the collapse of the first oligarchic government, the reestablished democracy turned to the polis’ laws for guidance on how to rebuild a stable politeia. Notably, the restored democracy attributed the polis’ established laws to the archaic legislators Solon and Draco – the fathers of the Athenian constitution.\textsuperscript{16}

When the Thirty came to power after Athens’ dramatic defeat in the Peloponnesian War, the connection between law and legitimacy was well enough established that the Thirty had to respond to the democracy’s appropriation of patrios politeia, and to the connection forged between patrios politeia, legitimacy, and law.

As a result, the Thirty busied themselves with a sui generis revision of Athens’ laws. The revision aimed directly at curtailing the power of the people’s courts, the “most democratic” of Athens’ institutions ([Arist.] \textit{Ath.Pol.} 9.2).

According to [Aristotle],

They [i.e. the Thirty] removed from the Areopagus the \textbf{laws of Ephialtes and Archestratus about the Areopagites}; they also repealed such of the statutes of Solon as were obscure, and \textbf{abolished the authority vested in the jurors}. ([Arist.] \textit{Ath.Pol.} 35. 2)

After the Thirty, and after the civil war that was fought to remove them from power, the emphasis of the restored democracy on law and legality became paramount.

\textsuperscript{15} Scholars debate the degree of completeness of the new law code, but the fragmentary state of the evidence can only lead to hypothetical conclusions. For recent discussions of the process of revision of the laws, see Shear, 2011, ch. 3; Carawan, 2013, chs. 8 and 10.

\textsuperscript{16} Eventually, the Athenians will settle on Solon as the embodiment of their commitment to legality (see below, section 4). However, the fact that Solon was often not the author of the laws attributed to him never quite bothered the Athenians. Cf. Carugati, 2015, ch. 4; Carugati, Calvert and Weingast (in progress).
As Shear has extensively documented, literary, epigraphic, and archaeological evidence suggests that the elaboration of *patrios politeia* throughout the constitutional debate was a highly public, extremely visible, and forcefully staged process. Such a process featured public debates in popular assemblies (and presumably in the agora – the city’s central marketplace), inscribed documents, construction projects, rituals, and even changes to the city’s physical appearance (Shear, 2011). The sources thus indicate that the elaboration of *patrios politeia* was not a mysterious process of collective will formation, but rather an agreement that emerged in the course of a very public debate in the context of an ongoing series of crises in which the core agreement on the basic contents of the consensus were hammered out.

The next section analyzes how the Athenians weaved their commitment to law into the fabric of a new self-enforcing, democratic constitution.

4. The Athenian Self-Enforcing Constitution

When the ashes of the civil war settled, the Athenians were exhausted, broke, and divided. Passions ran high and civil discord was rife. The advocates of democracy had won the civil war, defeating the Thirty and their supporters. After the violence perpetrated by the “tyrants,” revenge was the easiest path.

The Athenians, however, did not go down that path. Instead of turning against their fellow citizens to vindicate the abuses they endured, the victors of the civil war
brought the losers to the negotiating table, granted them an amnesty, and drafted a series
of constitutional and legal reforms.\textsuperscript{17}

Classical scholarship has tended to romanticize the events that followed the end of the civil war, grounding the ratification of the Amnesty on a collective desire to “forgive and forget” (\textit{me mnesikakein}), which they viewed as the most striking product of Athens’ democratic culture.\textsuperscript{18} Other scholars analyzed these events in a more disenchanted way, emphasizing instead either the threat of Sparta—which forced the parties in Athens to come to the negotiating table—or the role of legal and constitutional reforms.\textsuperscript{19}

Whereas the strength of Athens’ democratic culture is a hypothesis that cannot be tested, the role of Sparta is not supported by the ancient evidence (Carugati, 2015). Finally, merely describing constitutional reforms fails to explain where the reforms came from, what challenges to constitutional stability they were supposed to fix, and why such fixes proved so remarkably successful.

Instead of analyzing the Amnesty and other post-war reforms in isolation from one another, I examine them as the integral components of a self-enforcing constitutional structure. The stability of the new structure rested on two main factors: first, the constitution was designed to address the root causes of the late 5\textsuperscript{th} century instability;

\begin{itemize}
  \item \textsuperscript{17} According to the extant sources, members of the oligarchy of the Thirty were included in the amnesty as long as they successfully passed scrutiny ([Arist]. \textit{Ath.Pol.} 39.6).
\end{itemize}
second, the constitution was grounded on a self-enforcing commitment to legality that bestowed the responsibility to police violations equally on every citizen.

The new constitution rested on a series of reforms to the legislative process. First, the reforms introduced the principle of coordination in lawmaking by instituting boards of *nomothetai* (lit. lawmakers) that joined the Assembly as legislative organs. Second, the division of legislative power spurred a distinction between laws (*nomoi*, passed by *nomothetai*) and decrees (*psephismata*, passed in the Assembly) whereby no decree could prevail over a law. Third, a series of legal procedures came to regulate how new laws were to be introduced and old laws amended.\(^\text{20}\)

The new democracy was therefore different from the one that had led Athens in the 5\(^{\text{th}}\) century and collapsed after the Sicilian disaster. The reforms imposed limits on the previously unrestrained power of the Assembly to make laws by introducing another legislative institution (the *nomothetai*) and by coordinating the relative spheres of influence of the two institutions. The Assembly maintained the power to pass decrees, subject to the provision that decrees could not contradict existing laws. Laws were the domain of the *nomothetai*, but their power to draft legislation was in turn limited by the provision that the *nomothetai* could only be convened by the Assembly. Moreover, both decrees of the Assembly and laws of the *nomothetai* had to conform to the body of existing laws, which had been collected and republished between 410 and 405. In the 5\(^{\text{th}}\) century, the Assembly monopolized the power to make law. In the 4\(^{\text{th}}\) century, legislation

---

\(^{20}\) On Athenian *nomothesia* see Hansen, 1995; Pierart, 2000; Rhodes, 2003; Canevaro and Harris, 2012; Carawan and Harris, 2012; Carawan, 2013; Carawan, 2013, pp. 269-70. The *locus classicus* for the distinction between laws and decrees is Arist. *NE* 1137b13-32. For Aristotle, laws are general rules, whereas decrees apply to particular cases. This distinction was customary in 4\(^{\text{th}}\) century Athens, see e.g. MacDowell, 1978, pp. 43-6. On the new procedures for introducing and amending laws and how they changed over time see, most recently, Carawan, 2013.
became the product of a complex and highly regulated mechanism of checks and balances among decision-making institutions.

But reforming legislative institutions was only one aspect of Athens’ response to instability. The Thirty had displaced people and seized property. The civil war had stained those violations with blood. The risk was that institutions, new as well as old ones, would crumble under the weight of personal resentment.

The Amnesty that the victors of the civil war ratified in 403 was not rooted in a moral obligation to forgive and forget past wrongs. As Carawan (2013) argues, the Amnesty focused instead on defining and enforcing personal and property rights: the agreement included a right of return clause whereby Athenian citizens—that is, Athenians who were citizens before 403, including the supporters of the Thirty—could reclaim political and legal rights if they so wished, and whereby both citizens and non-citizens who suffered from expropriation and displacement under the Thirty and during the civil war could reclaim their property.

Along with enshrining these rights, the Athenians also established additional procedures to enforce such rights in court. To protect the legal system against a wave of litigation that threatened to crush it, the Athenians passed legislation aimed at determining which claims could, and which couldn’t, go to court.21

These procedures surely created winners and losers, but the lack of episodes of violence indicates that, all in all, the new system provided sufficient incentives to choose

---

21 Among these procedures were a distinction between arrangements concluded under the first restored democracy and those concluded under the oligarchy of the Thirty, whereby the former were valid and the latter were not; a distinction between private claims and liabilities to the city, whereby the former are valid if concluded under the democracy (subject to a bar against suits in matters that the parties had already decided) and the latter are valid from the year 403; and finally, a distinction between offenders and informers, whereby offenders were liable, while informers were not (Carawan, 2013, chs. 4, 5 and 7).
settlement over revenge, and that the institutional channels proved resilient to the pressure of personal hatreds.

Why did the new constitution succeed, where others had failed?

The resilience of the new constitutional structure was not merely a product of its internal structure. The high stakes of the political game also played a role. After the defeat in the Peloponnesian War and after the civil war, many Athenians may have realized that escalating the conflict further could have only meant plunging the city deeper into ruin.

The financial crisis that began in the aftermath of Sicily had never been so dire. Between 413 and 403 the Athenians lost their walls, ships, and allies. The Thirty had compromised the infrastructure of Athens’ harbor, Piraeus, in an attempt to weaken the democratic opposition (Carugati, 2015). The Laurion silver mines, a conspicuous source of revenues in the 5th century, were shut down and their slave workers gone. The countryside lay idle, after a decade of Spartan occupation. The emergency fund that the 5th century democratic leader Pericles had put aside for rainy days was long gone. Since the beginning of the Peloponnesian war, Athens had suffered a plague, 27 almost consecutive years of war, and a civil war: the casualties had decimated Athens’ adult male citizen population. The losses compounded each other: without men (and slaves), Laurion and Piraeus were useless; without Laurion and Piraeus resources were scarce. Choosing to abide by the new democratic rules must have appeared to many a leap of faith, but the price for not jumping was prohibitive.

How did the Athenians credibly commit to enforcing the constitution?
The new constitutional structure revolved around the principle of coordination in lawmaking. Coordination could only be preserved by policing the integrity of the corpus of laws, to which both assembly decrees and *nomothetai’s* laws had to conform: if the assembly or the *nomothetai* passed new decrees and laws that contradicted existing statutes, then the institutional balance of power would crumble, allowing the proposers of contradicting measures to elevate themselves above the laws. Such lawless behavior, associated with the experience of oligarchy, was precisely the threat that the Athenians sought to inhibit.\(^{22}\)

To police the integrity of the corpus, the Athenians brushed up an old procedure that allowed any adult male citizen to challenge measures that contradicted existing laws: the *graphe paranomon* – a public action against a legislative proposal that was considered either against the laws (*paranomon*) or inconvenient (*asymphoron*) to the interests of the Athenian demos. Because the new reforms had introduced a distinction between laws and decrees, the Athenians maintained the old *graphe paranomon* to challenge decrees, and devised a new procedure to challenge laws: the so-called *graphe nomon me epitedeion theinai* – a public action against an unsuitable law.

Credible commitment thus rested on the mandate bestowed equally on every adult male citizen to police the corpus of the city’s laws, on which the stability of the new constitutional structure rested.

But this was a risky move.

First, the two procedures allowed whoever wished (*ho boulomenos*) of the roughly 6000 Athenians sitting in the Assembly to bring a public action against the

---

\(^{22}\) A parallel development, emphasized in Teegarden (2012; 2014), is the emphasis on anti-tyranny legislation.
proposer of a new legislative measure. Second, the grounds for indictment were rather loose: although one had to show that the new proposal contradicted an existing statute, the vague substantive nature of Athens’ laws left ample room to debate the inconvenience or unsuitability of new proposals.\textsuperscript{23} Third, these types of public actions slowed down the legislative process: if someone brought an indictment, the whole procedure had to be transferred from the Assembly to the People’s court for adjudication.\textsuperscript{24}

Especially at a time when the city was divided and personal resentments were heightened by the recent experience of protracted political instability and civil war, the chances that people would use the \textit{graphe paranomon} and \textit{graphe nomon me epitedeion theinai} to prosecute proposers, rather than proposals, was extremely high.\textsuperscript{25} Because indictments could be brought against just about any proposal (including various highly time-sensitive policies, such as military actions), had the Athenians frequently used the \textit{graphe paranomon} and the \textit{graphe paranomon me epitedeion theinai} to pursue personal feuds, the legislative process would have ground to a halt. Systematic abuse, in sum, would have jeopardized the entire constitutional structure.

How did the Athenians coordinate to prevent and punish abuses?

\textsuperscript{23} On vague laws see Gagarin, 2005; 2008; Sickinger, 2008; Rubinstein, 2008; \textit{contra} Harris, 2009/10.

\textsuperscript{24} In court, the man who brought the indictment acted as the prosecutor, while the proposer of new legislation acted as the defendant. The litigants were allotted equal time to speak in favor of (the defendant) and against (the prosecutor) the new procedure. A large panel of Athenian citizen jurors, usually numbering 501, judged the dispute.

\textsuperscript{25} Classical scholars have long debated whether the \textit{graphe paranomon} performed the function of political or judicial review. Political arguments: Cloche, 1960. Legal arguments: Goodell, 1893-4; Goodwin, 1895; Bonner and Smith, 1938; Wolff, 1970. Most interpreters recognize that the \textit{graphe paranomon} performed both functions at once, though the relative emphasis varies: Hansen, 1974; 1987; 1999; Yunis, 1988; Sundahl, 2000; 2003; Carawan, 2007 (suggesting a shift between primary political arguments in the 5\textsuperscript{th} century to primarily legal arguments in the 4\textsuperscript{th} century); Lanni, 2010; and Schwartzberg, 2013. Throughout this debate, the notion that political review (that is, the use of these procedures to pursue personal feuds) could lead to legislative failure has never been analyzed. The lack of evidence for legislative failure suggests that personal enmities did not dominate the use of these procedures.
In part, the Athenians relied on institutional design. The use of the *graphe paranomon* and *graphe nomon me epitedeion theinai* was regulated through a system of fines and other forms of punishments for those who initiated frivolous litigation: as in other public cases (*graphai*), punishment awaited a litigant who failed to gather one fifth of the votes. The fear of punishment thus acted as a deterrent for those who sought to abuse the procedure to pursue personal feuds. But the one-fifth rule was quite lax, in that it set the bar for failure close to unanimity (80%).

The evidence suggests that institutional design was not the only mechanism to prevent abuses. In order to coordinate to effectively police the corpus of law, the Athenians relied, as they had done throughout a decade of constitutional struggles, on the notion of *patrios politeia*, which provided a bright line to judge the constitutionality of proposals.

The ancient sources suggest that *patrios politeia*—variously identified with the ancestral constitution, the ancient laws (*patrioi* or *archaioi nomoi*), or, more straightforwardly, the ‘laws of Solon and Draco’—stood at the very heart of the new democratic constitution (e.g. [Arist.]* Ath.Pol.* 39.5; [Xen.]* Hell.* 2.4.42; and [Andoc.]* 1.81-2*). There, *patrios politeia* expressed a broad (because devised by both oligarchs and democrats) consensus on the basic features of the best *politeia* for Athens: a *politeia* committed to respecting those principles whose violation at the hands of the oligarchs

---

26 Deterrence, in turn, worked because enforcement was incentive-compatible for punishers, see Carugati, Hadfield and Weingast, 2015.
27 For a more in depth discussion of the dynamics of Athenian constitutional litigation and the role of the ancestral constitution in the 4th century, see Carugati and Weingast (in progress); and Carugati, Calvert and Weingast (in progress).
(and of the 5th century democracy, albeit only in potentia) had caused the worst of all evils – civil war.  

What were these principles?

If we focus on the post-war legislation and reforms, we can distill a series of juridical and right-based principles. These principles included the integrity of the corpus of laws; the primary role of law in protecting the democratic constitution from the threat of civil war and oligarchy; the role of the Athenian people, in their capacity as jurors, to judge the conformity of new laws and policies with existing statutes. But besides these juridical principles, the constitution of 403 also enshrined critical rights—or, with Ober (2000), quasi-rights—including personal security and dignity and protection of one’s property against expropriation (which emerge with particular force in the Amnesty).

The notion of patrios politeia, the focal point of the Athenian constitutional debate and the pillar of the new constitution, thus suggested to all Athenians that any new measure that contradicted these fundamental principles could, indeed ought to, be indicted as paranomon—illegal or inconvenient—and me epitideion—unsuitable to foster the interests of the Athenian demos. By the same token, any measure that could not readily be shown to contradict constitutional principles was not to be attacked in the courts: anyone who did attack, for example attempting to disguise a frivolous private feud as a constitutional issue, was liable to severe legal and social censure.

In the course of the 4th century, as the crisis receded, Athens recovered, and the stakes of the political conflict got lower, repeated interactions in the law courts built trust

---

28 On the connection between the constitution of the fathers and the integrity of the corpus of laws see also Carawan, 2013, ch. 11, pp. 270-1 and ch. 12, esp. pp. 277-8.
29 With the label “quasi-right,” Ober (2000) distinguishes between the modern definition of right as “natural, innate and inalienable,” and the Athenian notion of rights as “performative and contingent.”
around the principles of the Athenian constitution, solidifying the consensus around them. As they did throughout the constitutional debate, so during the 4th century, the Athenians looked toward the “constitution of the fathers” to collectively define what amounted to constitutional violation. Instead of the term *patrios politeia*, which bore negative associations with the political instability that had characterized the period of constitutional debate, the Athenians began to deploy the figure of Solon to facilitate coordination on matters of constitutionality.30 Exactly how the replacement was effected is a story for another time; the important point here is that a reference to “Solon,” just as a reference to “the laws of the fathers,” served as a focal point for determining when a legal challenge to a law or decree was or was not legitimate.31

5. Conclusion

In response to a dire military and economic crisis, the citizens of the world’s first large-scale democracy lost trust in their political system. For the first time in almost a century, the belief that democracy was the best form of government for the polis was put to question. In the course of a decade of constitutional struggles, the Athenians articulated a new belief – the belief that a stable government is a government committed to respecting the law.

30 On Solon as a trope in 4th century courts and extra-legal discourse, and on the negative associations of *patrios politeia* with the late 5th century experience of oligarchy, see Hansen, 1989a.
31 In Carugati, 2015, ch. 4, I show that the notion of *patrios politeia* operated in 4th century litigation as a *What-Would-Solon-Do?* rule of thumb that fostered coordination among jurors in the law-courts and helped evaluate the constitutionality of competing proposals in ways that were conducive to both stability and innovation in law- and policy-making (see also, Carugati, Calvert and Weingast, in progress).
At the end of the civil war, the Athenians weaved their commitment to law into the fabric of a new, self-enforcing constitution. The constitution fostered stability by addressing the root causes of the protracted instability that had lacerated the polis in the previous decade. Against the dangers of unrestrained popular decision-making crystallized by the Sicilian disaster, the Athenians introduced the principle of coordination in lawmaking. Against the lawless behavior of the ruling oligarchs, the new democracy defined personal and economic rights for all citizens, created robust institutional channels to enforce those rights, and bestowed the responsibility to protect the constitution on everyone who freely chose to subject himself to it. Everyone else had ten days to leave ([Arist.] Ath.Pol. 39.4).

These investments in institution building contributed to the city’s economic recovery by lowering the threat of violence in the aftermath of the civil war. Although the financial input for robust economic recovery, at least in its earliest stages, owed largely to exogenous causes—namely, an influx of much-needed cash from Persia—the way in which the democracy used the money also contributed to the city’s long-term growth. Investments ranged from the rebuilding of the city’s walls and fleet to the infrastructure of Piraeus, Athens’ foremost military and commercial resource. Like the investments in institution building, the investments in infrastructure raised the costs of fighting, thus enhancing both the polis’ stability and its potential for growth.\(^32\)

The 4th century was not a peaceful time, but the Athenian constitution proved robust to endogenous and exogenous shocks (Carugati, 2015). By the 330s, in the absence of the imperial structure that had made Athens great in the 5th century, Athens

\(^32\) The evidence suggests that had Athens been ruled by an oligarchy, the oligarchs would not have employed Persian money to invest in any resource that could be connected with the democracy – namely, Piraeus. I demonstrate the validity of this counterfactual in Carugati, 2015, ch. 2.
soared back to, and probably exceeded, 5th century levels of prosperity (Ober, 2008; Carugati, 2015). All things considered, then, Athens fared quite well out of war.

Bibliography


Bonner, R.J. and Smith, G. 1938. The Administration of Justice from Homer to Aristotle, Chicago.


______. 1989a “Solonian Democracy in Fourth Century Athens,” CM XL.


______. 1987 “*Graphe Paranomon* Against *Psephismata* Not Yet Passed by the *Ekklesia*,” in *C&M* 38, 63-73.


______. 1979a “Did the Athenian Ecclesia Legislate after 403/2?” *GRBS*, 20.


______. 2000 The Use of Statutes in the Seven Extant graphe paranomon and graphe nomon me epitedeion theinai Speeches, Unpublished Ph.D. Dissertation (Brown University).


Todd, S. 1985 Athenian Internal Politics 403-395 BC with Particular Reference to the Speeches of Lysias, University of Cambridge.


