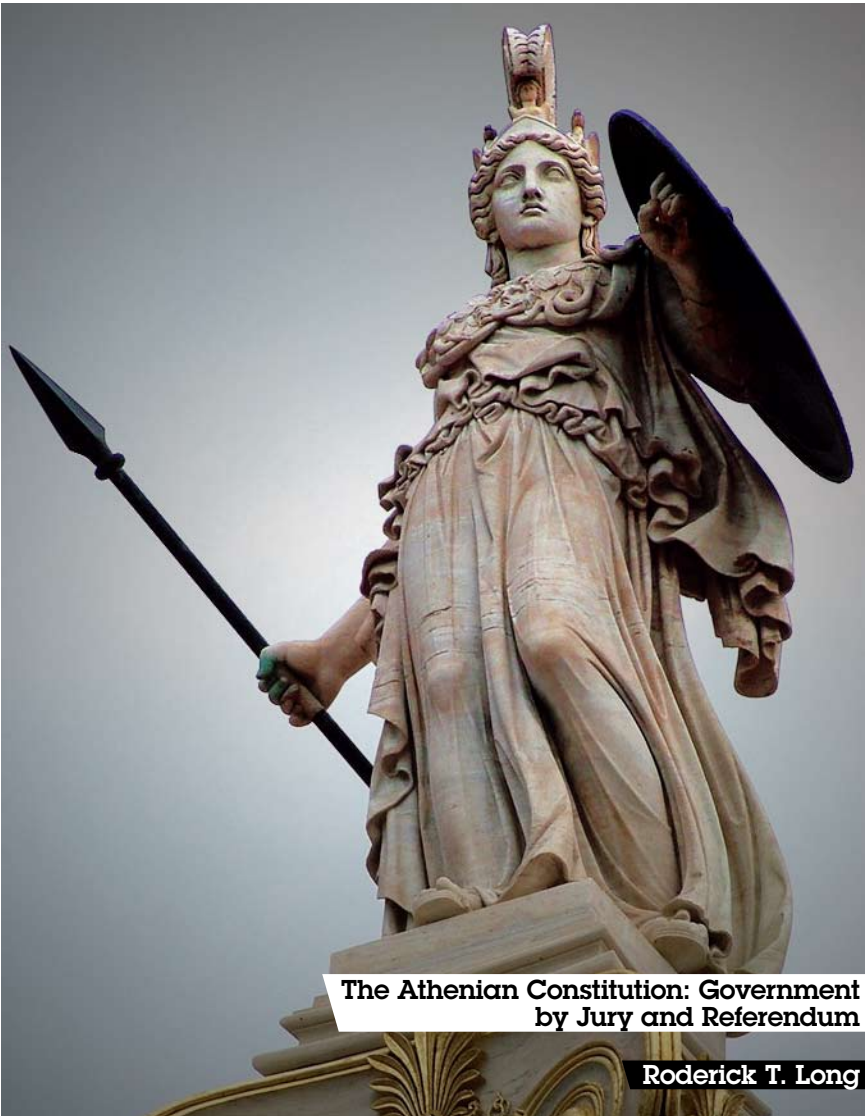


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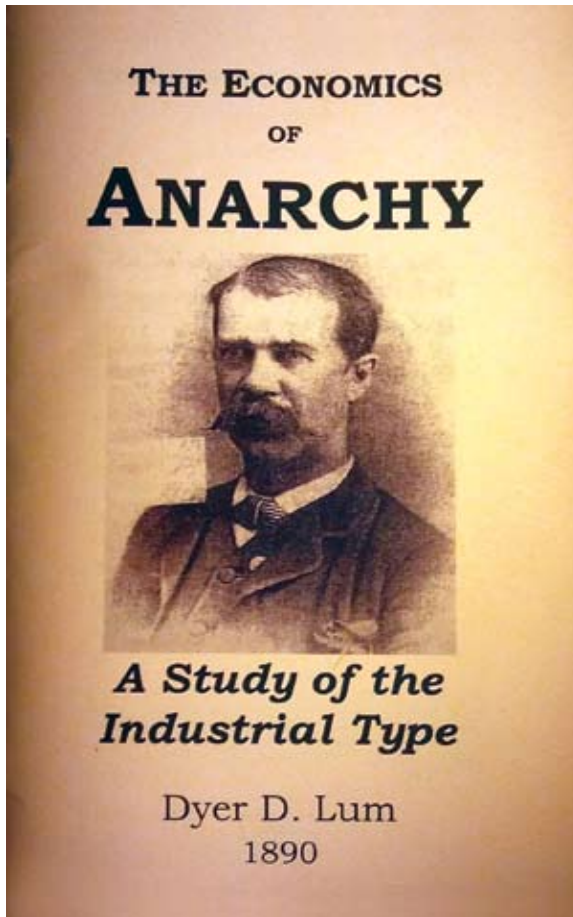
a journal of theory & strategy



**The Athenian Constitution: Government
by Jury and Referendum**

Roderick T. Long

Radical Reprints



**The Economics of Anarchy:
A Study of the Industrial Type**

I have repeatedly been asked to write a brief summary of the aims sought by Anarchists which could be read and discussed in the various clubs that are studying economic questions. With this end in view the following pages are submitted, trusting that they may be a help to those who are earnestly seeking the rationale of the Labor Question. — Dyer D. Lum.

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The Athenian Constitution: Government by Jury and Referendum

"Each single one of our citizens, in all the manifold aspects of life, is able to show himself the rightful lord and owner of his own person, and do this, moreover, with exceptional grace and exceptional versatility." ~ Perikles (c. 495 - 429 BC)

Athens: A Neglected Model

Those engaged in the project of designing a constitution for a new libertarian nation can learn from the example of previous free or semi-free nations. In previous issues of *Formulations* we have accordingly surveyed sample constitutions ranging from the mediæval Icelandic system of competing assemblies to the U. S. Articles of Confederation. One example that is not often considered when libertarians discuss constitutional design is ancient Athens.

In a way this is not surprising. Athens in the fifth and fourth centuries BC is famous for being the purest, most extreme form of democracy in human history. Most libertarians get understandably nervous at the thought of unlimited majority rule. Moreover, the leading thinkers of the classical liberal tradition, from Montesquieu and Madison to Isabel Paterson, learned their Greek history from upper-class writers like Thucydides and Xenophon, Plato and Aristotle, Polybius and Plutarch, and absorbed from them their bias against the democratic institutions of Athens. (The anti-Athenian bias in Alexander Hamilton's capsule history of the Peloponnesian War in the *Federalist Papers* is so extreme as to be ludicrous;¹ and Madison is not much better.)

Nevertheless, the Athenian constitution deserves our consideration. In its heyday, Athens was the freest nation in the world. The Athenian definition of "liberty" was, in private matters, "living as one pleases," and in public matters, "ruling and being ruled in turn." By and large Athens lived up to these ideals. The Athenian statesman Perikles, in a famous funeral oration, boasted that in Athens no one even got sour looks from his neighbors if he chose to live his own life in his own way — an exaggeration, no doubt, but one with which Athens' critics agreed, charging that Athens was, in Plato's words, a supermarket where everyone could pick his own constitution, as if each person were living under a different regime of his own choosing. Unlike most Greek states, Athens exercised no control over education; to the consternation of the philosophers, who favored the Spartan system of compulsory state indoctrination, parents could arrange to have their children taught what and as they pleased. Moreover, the Athenians prided themselves on being as strict with their public officials as they were lenient toward their neighbors; according to Perikles, "we are free and tolerant in our private lives; but in public affairs we keep to the law." (Thucydides, II. 37.)

Athens was especially famous for its intellectual freedom. This freedom had its limits, of course; unpopular thinkers, for example, were sometimes prosecuted for departing from religious orthodoxy (Sokrates being the most famous case). Still, Athenian freedom of thought and speech was robust

enough to attract controversial thinkers and teachers from all over Greece. The Ionian cosmologist Anaxagoras had admittedly been run out of Athens for the crime of claiming that the sun was a giant burning rock rather than a god; but Plato tells us that Anaxagoras' treatise was nonetheless readily available in the public marketplace for one drakhma per copy. Athenian playwrights like Aristophanes mercilessly lampooned the political leaders of the day, apparently with impunity. Philosophers freely taught courses, and published tracts, on the evils of democracy. The orator Demosthenes noted, in a remark later applied *mutatis mutandis* to the United States and the Soviet Union, that the crucial difference between Athens and Sparta was that one was free to praise the Spartan constitution in Athens, but not vice versa.

The execution of Sokrates, for undermining traditional values through his persistent questioning, was an unspeakable crime, but we must remember that someone like Sokrates would have been silenced much earlier in any other Greek state; and even in Athens it took the intense paranoia caused by a recent and bitter civil war to bring the lifelong gadfly at last to trial (where he lost by a slim margin only - 280 to 221 votes).

The Athenian cultural scene was one of intense intellectual ferment, one that laid the foundations for Western art, literature, and science for the next two and a half millennia; and Athenian curiosity, and enthusiasm for intellectual discussion and debate, were a byword. Even four centuries later, the apostle Luke could still say, with a slight sniff of disapproval, that the Athenians "spent their time in nothing else, but either to tell, or to hear some new thing."

Nor was Athenian freedom confined to the marketplace of ideas. A commercial empire, Athens encouraged trade (unlike its rival, Sparta, where commerce and even money were banned). Its economic policies would hardly count as *laissez-faire* by libertarian standards, but they were liberal enough to attract merchants from all over the Mediterranean world. By Greek standards, Athens was a sparkling metropolis; the historian Thucydides remarked caustically that future generations, seeing the glorious ruins of majestic Athenian buildings, would overrate Athens' importance (and underrate Sparta's, since the Spartans put their money into instruments of conquest rather than into luxurious living). Athenian Magistrates, upon entering office, had to take a vow that no Athenian citizen's land would be confiscated or redistributed.

The Athenian semi-free market unleashed an unprecedented flood of productive energy that transformed Greek civilization. The Corinthians, allies to Sparta and enemies of Athens, grumbled:

"An Athenian is always an innovator, quick to form a resolution and quick at carrying it out. ... if their enterprise is successful, they regard that success as nothing compared to what they will do next. Suppose they fail in some undertaking; they make good the loss immediately by setting their hopes in some other direction. Of them alone it may be said that they possess a thing almost as soon as they have begun to desire it, so quickly with them does action follow upon decision. ... seldom enjoying their possessions because they are always adding to them. Their

view of a holiday is to do what needs doing; they prefer hardship and activity to peace and quiet. In a word, they are by nature incapable of either living a quiet life themselves or of allowing anyone else to do so.” (Thucydides, I. 70.)

Above all, oppressive oligarchies like Korinth and Sparta feared Athens' tendency to export democratic ideals, awakening democratic and revolutionary aspirations in the common people throughout Greece. When Perikles called Athens “a school for all Greece,” it may sound like idle patriotic piety to us, but to Athens' oligarchic neighbors it meant something definite and worrisome. The Athenian empire, which the oligarchs constantly denounced as tyrannical, seems to have been in many ways a liberatory force, and one welcomed by the democratic elements in the areas where it held sway (cf. Forrest (1975)) - which is *not* to say that Athens never abused its imperial power!

We cannot forget, of course, that the benefits of the Athenian constitution were restricted to free adult males. Women and slaves were largely excluded. But this flaw is one that Athens shared with its neighbors. That women and slaves were oppressed in Athens is nothing remarkable; what is remarkable is the amount of freedom available to Athenian males who were not slaves.

How did Athens achieve such a free and prosperous society? What system of government made this possible? We call Athens a democracy, and think we know what we mean. After all, we all live under the same system, don't we?

But to the Athenians, democracy (*demo-kratia*, “rule by the people”) meant something quite specific, and importantly different from the political system of any nation today. Athenians would have guffawed at the notion of calling the United States, for example, a democracy; by their standards it would have been a moderate oligarchy. What, then, was Athens' democratic constitution, and how can we learn from it?

Origins of the Athenian Constitution

To begin with, Athens did not have a constitution in the sense of a written document. Rather, to speak of the Athenian constitution is to speak of the way the Athenian polity was *constituted*, i.e., what the structure of the political system was. (This was the original meaning of “constitution” in any case; only through etymological drift did a constitution come to be thought of as a written blueprint for a political structure, rather than as an instance of that structure.)

The Athenian constitution originated in class warfare. The three basic socioeconomic classes of Athenian society were the “Horsemen,” the “Yoke-men,” and the “Menials.” The Horsemen were the richest class; they got their name, originally, from the fact that they could afford to own horses. At one time the Horsemen had been the aristocratic class, and Greek names with *hippos*, “horse,” in them (e.g., Hippias, Hipparchus, Pheidippides) continued to have an aristocratic flavor to them, just as last names beginning with “Von” or “De” do today; but as trade brought socioeconomic mobility, a fair number of *nouveaux riches* found their way into the Horsemen class. (In early times the top stratum of the Horsemen was distinguished as a separate class, the

“500-measure-men,” based on the amount of grain their estates could produce; but this distinction became lost as its political significance faded, and I shall ignore it.) Composing the middle class were the Yokemen, deriving their name from the fact that they could afford a yoke of oxen. Unlike the independently wealthy Horsemen, the Yokemen had to work for a living, usually as merchants or farmers; the Greeks used oxen rather than horses for plowing, so horses were a luxury in peacetime, while an ox paid for itself in farm work and so was a more easily affordable possession. In the poorest class were the Menials, those who worked for hire rather than being self-employed like the Yokemen.

This socioeconomic division translated, at least roughly, into a military division. The Horsemen had horses, so they naturally supplied the ranks of the cavalry. The Yokemen, of moderate means, could afford heavy armor and weapons, and so made up the infantry. (In ancient times, soldiers were generally expected to provide their own equipment.) The Menials could not afford any military equipment, and so generally served as rowers in the navy.

The three classes contributed to the rise of the democracy in two ways. First, members of the ruling class (the Horsemen) often found it useful to grant political rights to the lower orders - first to the Yokemen, then eventually to the Menials - in order to win popular support in their intestine struggles for power with *other* members of the ruling class. Kleisthenes, the traditional founder of the Athenian democracy in 508, was simply the last in a long line of glad-handing aristocrats doling out political largess to the masses in exchange for their backing him against his aristocratic rivals; he shot himself and his entire class in the foot by finally giving the lower orders a few powers too many, thus making them rather than the Horsemen the effective masters of the state and so changing the rules of the game forever. (For a spirited analysis, see Forrest (1975).) Second, because Athens was predominantly a naval power, it depended more highly on its rowers than on its cavalry and infantry, and this gave the Menials crucial leverage against the Horsemen and Yokemen.

Thus, Athenian democracy was born. But how did it work?

The Legislative Branch

The Council—In the Athenian state, as in any other, we can distinguish legislative, judicial, and executive functions. The Athenian legislative branch consisted of two bodies, a Council of 500 and an Assembly of 6000. At first glance, this system resembles the American bicameral legislature, with a small, select upper house and a larger, more popular lower house. But this appearance is deceptive.

To begin with, neither the Council nor the Assembly consisted of elected representatives. The members of the Council were selected not by election but by *sortition* - i.e., by lot. In other words, the 500 Councillors were selected *randomly* from the (male) citizen population. (And no Councillor could serve more than two terms.)

The practice of selecting government officials randomly (and the Athenians developed some fairly sophisticated mechanical gadgets to ensure that

the selection really was random, and to make cheating extremely difficult) is one of the most distinctive features of the Athenian constitution. We think of electoral politics as the hallmark of democracy; but elections were almost unknown at Athens, because they were considered paradigmatically *anti*-democratic. Proposals to replace sortition with election were always condemned as moves in the direction of oligarchy.

Why? Well, as the Athenians saw it, under an electoral system no one can obtain political office unless he is already famous: this gives prominent politicians an unfair advantage over the average person. Elections, they thought, favor those wealthy enough to bribe the voters, powerful enough to intimidate the voters, flashy enough to impress the voters, or clever enough to deceive the voters. The most influential political leaders were usually Horsemen anyway, thanks to their social prominence and the political following they could obtain by dispensing largesse among the masses. (One politician, Kimon, won the loyalty of the poor by leaving his fields and orchards unfenced, inviting anyone who was hungry to take whatever he needed.) If seats on the Council had been filled by popular vote, the Horsemen would have disproportionately dominated it - just as, today, Congress is dominated by those who can afford expensive campaigns, either through their own resources or through wealthy cronies. Or, to take a similar example, in the United States women have had the vote for over half a century, and yet, despite being a majority of the population, they represent only a tiny minority of elected officials. Obviously, the persistence of male dominance in the economic and social sphere has translated into women mostly voting for male candidates. The Athenians guessed, probably rightly, that the analogous prestige of the upper classes would lead to commoners mostly voting for aristocrats.

That is why the Athenians saw elections as an oligarchical rather than a democratic phenomenon. Above all, the Athenians feared the prospect of government officials forming a privileged class with separate interests of their own. Through reliance on sortition, random selection by lot, the Council could be guaranteed to represent a fair cross-section of the Athenian people - a kind of proportional representation, as it were. Random selection ensured that those selected would be representatives of the people as a whole, whereas selection by vote made those selected into mere representatives of the majority.

The Council's duties were modest. It exercised some judicial and executive functions, but its main job was to prepare business for the Assembly (which met less often). The Council was convened by its President — a post that rotated among the membership. And I do mean rotated: “every fourth adult male Athenian citizen could say, ‘I have been for twenty-four hours President of Athens’ — but no Athenian citizen could ever boast of having been so for *more* than twenty-four hours.” (Hansen (1991), p. 314.)

The Assembly — Athenians did not trust their representatives; they gave them as little power as possible. While the Council was in charge of day-to-day business, all really important issues were decided not by representatives

but by the people themselves (or as many as chose to show up) in the Assembly, of which every adult male citizen was a member. The Council could prepare legislation to be voted on in the Assembly, but the Assembly was not bound by the Council's agenda.

The Athenians would have agreed wholeheartedly with Karl Hess' critique of representative democracy:

"In politics a person is not a citizen if the person's only function is to vote. Voters choose people who, in turn, act like citizens. They argue. They establish the forms within which people live their lives. They make politics. The people who merely vote for them merely make politicians. People who argue for their positions in a town meeting are acting like citizens. People who simply drop scraps of paper in a box or pull a lever are not acting like citizens; they are acting like consumers, picking between prepackaged political items. They had nothing to do with the items. All they can do is pick what is. They cannot actively participate in making what should be." (Hess (1995), p. 10.)

We should not infer that everyone in the Assembly was equally active, however. As in any group, there were some people who spoke all the time, some who spoke once in a while, and some who never spoke but simply voted yea or nay. Those who spoke all the time were called Rhetors, "speakers," and references to Athenian "politicians" or "political leaders" almost always refer to this group of self-appointed leaders who generally held no official position in the government. These Rhetors were prominent citizens who had gained a popular following; they would rise in the Assembly to propose a new statute or course of action, or to speak for or against someone else's proposal. The job was not risk-free; no one could be made to answer for how they had *voted* in the Assembly, but politicians could be prosecuted for making an unconstitutional proposal, or for deceiving the people with false promises. (Imagine what our own political system would look like if politicians could be prosecuted for false promises!)

The meeting area for the Assembly seated 6000, whereas the number of those eligible to attend has been estimated at anywhere from 20,000 to 60,000. Obviously, not everyone could realistically hope to participate. (If the Athenians were reinstituting their system today, they might solve this problem through telecommunications technology and electronic voting - though they would have a healthy paranoia about the dangers of electronic vote-tampering.) One had to arrive early to be sure of a seat. But we should not picture the entire population of Athens battering on the gates of the Assembly, trying to get in and exercise their political rights. Athens was a large nation, comprising not only the city of Athens proper but the entire plain of Attika, and not all the citizens would have felt like trudging all the way in from the countryside before dawn to vote on trade agreements with some dinky island in the Aegean, or whatnot. (If the issue concerned going to war with Sparta or something of that sort, no doubt there was more interest.) In the early days of the Assembly, often not enough people showed up, and guards had to be sent to round up citizens in the marketplace in order to ensure a quorum for

the Assembly. After pay was instituted for participating in the Assembly, this problem vanished! (Most state offices in Athens came with a salary, so that less affluent citizens could afford to participate without financial sacrifice; this was yet another stratagem to prevent the rich from dominating the political process.) It's unlikely, then, that very many citizens who strongly wanted to participate in the Assembly were barred from doing so.

The ideological complexion of the Assembly might vary somewhat from session to session, depending on what else was going on. For example, Athens was a naval power, and preferred to fight its battles at sea rather than on land; during wartime, then, the fleet was more likely than the army to be away, and so Menials would then be under-represented in the Assembly in comparison with Horsemen and Yokemen. The absence of the rowers could thus give the Assembly a temporary oligarchic bias. Apart from the closing years of the Peloponnesian War, however, this does not seem to have been a major problem.

In the fifth century, the Assembly had complete power to pass or repeal legislation. In the fourth century, however, it was decided (by the Assembly itself) to limit this power in order to ensure greater constitutional stability (something that had been sorely lacking during the crisis-fraught closing years of the fifth century). A distinction was drawn between two kinds of legislative acts: decrees, and laws proper. A law, in the strict sense, had to be general in scope and open-ended in duration; anything else was a decree. So, for example, "everyone must wear polka dots from now on" would be a law, whereas "everyone must wear polka dots for the next five weeks" and "Demosthenes must wear polka dots from now on" would be decrees. In any conflict between a law and a decree, the law was taken to have precedence, regardless of which was passed first (just as, in the United States, constitutional law always overrides statute law — at least in theory!). The Assembly retained the power to pass and repeal decrees, but in order to make a change in the laws the Assembly now had to go through the Legislative Courts (about which more below).

The Judicial Branch

Arbitration — In Athens, most disputes were settled through arbitration rather than in the Jury Courts. There were two kinds of arbitration: public and private. In private arbitration, the two parties to the dispute would select a mutually agreeable third person or persons to decide the case; the results of private arbitration were recognized in the law as binding and final, and no appeal was permitted (unless malfeasance could be shown on the part of the arbitrator). Alternatively, the contending parties could bring their dispute to a state-appointed public Arbitrator. (The board of public Arbitrators consisted of all male citizens in their sixtieth year.) Because the disputants had no choice about which Arbitrator was assigned to them, and might end up with a dud, it was thought only fair in the case of public arbitration (unlike private arbitration) to allow the Arbitrator's decision to be appealed to the Jury Courts. The choice between private arbitrators, public Arbitrators, and Jury Courts introduced a salutary competitive element into the Athenian judicial system.

The Jury Courts — The Jury Courts were also staffed by sortition, picked daily from a pool of 6000 volunteers (a favorite number with the Athenians, apparently). Juries were large, ranging from several hundred to several thousand depending on the seriousness of the charge to be considered; typical numbers were 401, 501, and 1001. The numbers were large in order to ensure a representative sample of the Athenian population (arguably an improvement over the current U. S. system), and uneven in order to avoid ties (though sometimes they used even-numbered juries, in which case a tie was interpreted as acquittal). Jurors were paid, once again to ensure an adequate representation of the poor on juries. There was no judge to restrict the jury's power. No Athenian juror was ever subjected to compulsory empanelment, voir-dire, or sequestration, nor was any Magistrate empowered to decide what evidence the jury could or could not be allowed to see. Jurors, like voters in the Assembly (and unlike Rhetors and Magistrates) were not accountable for their decisions.

Potential jurors swore the following oath: "I will cast my vote in accordance with the laws and decrees passed by the Assembly and Council. On any point where the law is silent I will give judgment in accordance with my sense of what is most just, without favor or enmity. I will vote only on the matters raised in the charge, and I will listen impartially to accusers and defenders alike." However, jurors could not be penalized for their vote - unless it could be shown that they had accepted bribes; but the practice of selecting juries randomly on the morning of the trial made bribery difficult, and the sheer size of juries limited the effectiveness of bribery in any case.

Many ancient observers considered that the Jury Courts, rather than the Council or Assembly, were the true governing powers in Athens. For one thing, the Jury Courts had the power of judicial review. The opportunity to exercise this power came when a politician was prosecuted for having proposed an unconstitutional law or decree in the Assembly. A politician could be prosecuted whether his proposal had passed or not; but if it had indeed been enacted into law, and the proposer was found guilty, the law was automatically repealed. The juries made frequent use of this power: "The Supreme Court of the United States has had the power to test and overthrow Congressional Acts since 1803. In the period 1803 -1986 that power was used 135 times: our sources show that at Athens that figure was nearly reached in two decades, let alone two centuries." (Hansen (1991), p. 209.) Thus, a few hundred ordinary citizens could strike down, as unconstitutional, legislation enacted by an Assembly of 6000 people. The notion that Athenian democracy meant the unrestrained tyranny of the majority is clearly a myth. (The Athenian system also allowed for a second kind of judicial review, to be discussed below.)

There were no lawyers in an Athenian courtroom. The plaintiff and defendant each had to conduct their own case, though they could hire someone to help them write their courtroom speeches. (Only in rare cases was a third party allowed to speak on a disputant's behalf.) Prosecutors could be prosecuted for bringing a frivolous charge (defined as one that could not win over even a

substantial minority of the jurors). There was also no distinction between crimes and torts; all trials were treated as civil suits, with the victim (or, in murder cases, the victim's family) rather than a public prosecutor directing the prosecution's case. The closest equivalent to a crime/tort distinction was that between private prosecutions, where the aggrieved party was an individual citizen, and public prosecutions, where the aggrieved party was the city as a whole. Even in the latter case, though, the charge had to be initiated and argued by a private citizen on behalf of the city, so it was really more like what we would call a class-action suit.

Trials were swift, lasting no longer than a day. (Trials today can be criticized for excessive length, but to my mind the Athenian alternative goes too far in the opposite direction - as in fact Sokrates complained at his trial.) If the jury found the defendant guilty, the next phase of the trial concerned sentencing. Some crimes had penalties predetermined by law, but in most cases the choice was left up to the jury, thus avoiding the modern problem of having jury verdicts unduly influenced by the jury's expectation of the likely severity of the penalty.

The procedure worked as follows: The prosecutor would propose a penalty, and the defendant would then respond with a counter-proposal, obviously of a lighter penalty. The jury would then choose between the two penalties. (Having the jury come up with a penalty of its own would have required discussion and debate impracticable under the circumstances, given the size of the jury.) Prosecutors were prevented from proposing excessively harsh penalties by the fear that this would make the jury more likely to choose the defendant's milder proposal; defendants were likewise prevented from proposing excessively mild penalties by the fear that this would make the jury more likely to choose the prosecutor's harsher proposal. This was an ingenious way of ensuring moderation in punishments. (Giving juries the power to decide both verdict and sentence also avoided the modern problem of sentences that defy the jury's intentions, as in the recent case of the jurors who found the survivors of the Waco massacre not guilty of all but a handful of minor counts, only to learn with dismay that those few counts would send the Branch Davidians to prison for many years.)

The most common penalty was a fine. (In addition, the loser paid the winner's court costs.) The severest penalties were enslavement and capital punishment (the latter being inflicted in a number of ways ranging from poison to crucifixion). Intermediate penalties were exile and "dishonor." "Dishonor" is sometimes described by modern scholars as loss of citizenship, but it was actually much more severe; it meant exclusion from the political, economic, and religious life of Athenian society: dishonored citizens, unlike exiles, were allowed to continue residing in the city, but could not vote, hold office, serve on juries, set foot in the marketplace, or bring a case before a courtroom. (This last prohibition meant they were effectively outside the protection of the laws.) Imprisonment was unknown as a penalty. Athenian prisons were only temporary holding cells; thus Athens was spared the staggering expense of housing and feeding criminals for years on end. Any criminal too dangerous to be allowed on the streets was either executed or exiled.

Libertarians today are conflicted on the issue of jury rights. On the one

hand, libertarians generally favor the jury's right to nullify laws, as a check on legislative abuse of power. On the other hand, many libertarians of late have jumped on the conservative bandwagon of imposing limits on the amount of money juries can award in a civil suit. I myself referred to excessive jury awards as a "pressing problem" at the first FNF Forum:

"In recent years, absurdly high awards for damages have demonstrated the risks of a jury system, and the attractions of adjudication by experts. Yet juries remain an essential bulwark against state tyranny, a role government-approved experts are ill-suited to play. Competition among judicial systems would allow whichever mix of trial-by-jury and trial-by-experts best satisfied the needs of the public."

("The Rationale of a Virtual-Canton Constitution," Proceedings of a Forum on the Subject of Constitutions, Autumn 1993.)

I still endorse the point about the value of competition, but over the past few years I have become convinced that the excessive-damages issue has been overstated. The notorious examples of abuse appear to be exceptional, and even many of those do not stand up to close scrutiny. (For example, everyone knows about the woman who sued McDonalds because she spilled some coffee and burned herself; but how many know that McDonalds had received and ignored thousands of complaints about unusually hot coffee (185°, enough to cause serious damage at even a second's exposure) prior to her case, or that her coffee was so hot that it burned through three layers of skin, so that the woman required skin grafts and remains permanently disfigured in the genital area?) In many cases, the "excessive awards" are swallowed up by the government, and the victim never sees a penny of it. Placing a cap on awards because of a handful of abuses seems like exactly the sort of favoritism toward the rich that the Athenians were above all concerned to prevent. I admit to some nervousness about this conclusion, in the light of such recent anti-libertarian trends as cigarette smokers suing tobacco companies and gunshot victims suing arms manufacturers; but I would prefer to address this problem through legislation defining product liability so as to exclude liability for defects that are common knowledge (e.g., the addictive and carcinogenic properties of tobacco) or for "defects" inherent in the proper as-advertised good working order of the product (e.g., the fact that you can injure or kill people by shooting a gun at them), rather than through putting caps on jury awards.

The rule of evidence is a particularly delicate issue for libertarians. On the one hand, the idea of a dangerous criminal getting off on a technicality is distasteful. On the other hand, giving law enforcement officials carte blanche to violate the law goes against everything we stand for. Yet the judge's power to rule on the admissibility of evidence is being increasingly abused, and may be a luxury we can no longer afford. Two recent examples of this:

1) During the O. J. Simpson trial, the jury was allowed to learn that the police detective who found the main evidence against Simpson had lied about using racial epithets - but they were not allowed to learn that he was a virulent

racist who had bragged on tape about planting evidence and beating up minorities. I did not follow the Simpson case closely enough to have any opinion as to what verdict the jury should have reached (I may be the only person in America without such an opinion!), but it seems to me that when the main evidence against a black defendant depends on the testimony of a man who says all blacks should be killed, and who admits having planted evidence in the past, that is clearly *relevant* to the defense's case, and something the jury ought to be told — but the judge decided to exclude the tape.

2) Several years ago in Massachusetts a Christian Science family was prosecuted for having relied on Christian Science treatment rather than medical care for an ill child who subsequently died. That sort of case raises complicated legal, moral, scientific, and religious issues which I won't address now. What concerns me at present is the fact that there was a Massachusetts statute on the books which specifically exempted Christian Scientists from the requirement that parents provide their children with medical care, and the jury was not allowed to know about that statute; the judge refused to permit the defense lawyers to inform the jury about it. (Testimony defending the reliability of Christian Science healing was also excluded.) The jurors were "instructed" that they had to find the defendants guilty, and they did so, tearfully and reluctantly; they were furious afterward, when they learned the truth. When *the law itself* can be excluded as inadmissible evidence, clearly the judge's power to exclude evidence has gone too far.

To my mind, the most attractive solution to the problem of admissibility is one suggested by Eric Klien and Mike Oliver in the Constitution of Oceania:

"The jury may not at any time be removed from the courtroom during a trial to prevent them from hearing evidence. ... The judge has no power to strike any evidence from the record. It is expected that juries are reasoning Adults who are as competent as the judge to decide who is lying and who is not. Evidence uncovered by an illegal search WILL be allowed in Court. Unlike corrupt countries that allow both the criminal and the arresting officer to go free when an illegal search is made, Oceania will prosecute both."

This is very much in the spirit of the Athenian jury system.

The Athenians would have been horrified at the extent to which our government today has encroached upon the jury's authority with voir-dire, rules of evidence, and the like. The 19th-century libertarian theorist Lysander Spooner, a hero of today's jury-rights movement, in his famous *Essay on the Trial by Jury* defended the idea of jury sovereignty in terms quite similar to the thinking of the Athenian democrats:

"To secure this right of the people to judge of their own liberties against the government, the jurors are taken ... from the body of the people, by lot, or by some process that precludes any previous knowledge, choice, or selection of them, on the part of the government.

This is done to prevent the government's constituting a jury of its own partisans

and friends; in other words, to prevent the government's packing a jury, with a view to maintain its own laws, and accomplish its own purposes.

It is supposed that, if twelve men be taken, by lot, from the mass of the people, without the possibility of any previous knowledge, choice, or selection of them, on the part of the government, the jury will be a fair epitome of 'the country' at large, and not merely of the party or faction that sustain the measures of the government; that substantially all classes of opinions, prevailing among the people, will be represented in the jury; and especially that the opponents of the government ... will be represented there, as well as its friends A trial by such a tribunal is, therefore, in effect, 'a trial by the country.' ...

But all this 'trial by the country' would be no trial at all 'by the country,' but only a trial by the government, if the government could either declare who may, and who may not, be jurors, or could dictate to the jury anything whatever, either of law or evidence, that is of the essence of the trial.

If the government may decide who may, and who may not, be jurors, it will of course select only its partisans, and those friendly to its measures."

(Spooner, pp. 122-123.)

(And of course Spooner's argument for selecting jurors by lot applies *mutatis mutandis* to the selection of legislators.)

The Athenian court system did not operate according to precedent. No jury was bound by the decisions of previous juries in previous cases. This is a striking difference between Athenian law and more familiar systems like Roman law or the English common law. Whether this was a good or bad thing is hard to say. On the down side, the refusal to rely on precedents deprived the Athenian legal process of the valuable attribute of predictability. Reduction of uncertainty is ordinarily a virtue in any legal system. Moreover, case law, evolving in response to the needs of day-to-day life, can serve as a useful check against an arrogant and unrestrained legislature; and case law can also serve as a storehouse for the accumulated wisdom of many generations of judges. On the positive side, the jury's freedom to decide cases according to their common sense rather than adhere to judicial precedent ensured that people would be judged according to the well-understood and widely-accepted customs and moral sense of the average citizen, rather than according to the arcane criteria of a jurisprudential elite. (My impression is that case law is preferable so long as it retains a strong competitive element, and becomes a maze of impenetrable jargon only when that element is removed.)

The Areopagos — The Jury Courts formed the core of Athens' judicial branch; but another court, the Areopagos, was also highly respected. The Areopagos, so called because it met on the Hill of Ares, was a survival from an earlier period; before the establishment of democracy, the Areopagos had been the old aristocratic senate, the most powerful body in Athens. Democratic reforms transferred most of the Areopagos' powers to the Council or the Assembly, transforming the Areopagos into a court with fairly limited jurisdiction (whose extent appears to have fluctuated over the years).

These reforms also changed the Areopagos' composition from a body of hereditary nobles to a board consisting of former Magistrates. The Areopagites held office for life, an extremely unusual provision by Athenian standards - but since the Areopagites were drawn from the Magistrates, who in turn were chosen by lot, the Areopagos, like the Jury Courts, could be expected to represent a fair cross-section of the Athenian population, while the fact that all Areopagites had served as Magistrates guaranteed that they would have more political experience than the average jury. The Areopagos seems to have enjoyed a kind of mystique, and its decisions were highly respected.

During the Roman period, after Athens had ceased to be a democracy, the Areopagos recovered many of its old aristocratic powers, and became once more the supreme power in Athens. That is why, in the first century AD, the apostle Paul was brought before the Areopagos ("Mars' hill"), rather than the Council or Assembly, to explain his doctrine. (Acts 17: 15-23.)

The Legislative Courts — At the beginning of the fourth century, after a decade of unprecedented constitutional crisis, the Athenians decided to add a stabilizing factor: the Legislative Courts. Each year, the Assembly conducted a review of all the existing laws (in the narrow sense, excluding decrees), voting each one up or down. If a law was approved, it was retained without change. But if it was disapproved, the Assembly could not simply abolish it as they could with decrees; the Athenians did not want to run the risk that the Assembly might be pressured or intimidated into abolishing Athens' democratic institutions, as they had in 411. If the Assembly wanted a law revised or repealed, they had to convene a Legislative Court.

Cases before the Legislative Courts were conducted like regular jury trials, except that it was the law, rather than an individual, that stood accused. Those favoring repeal acted as prosecutors, those opposing repeal argued the defense. Instead of choosing between penalty and counter-penalty, the jurors (called "Legislators," but drawn by lot from the same pool of volunteers as the ordinary Jury Courts) chose between the existing law and the proposed revision. The Legislative Courts thus acted as a second forum for judicial review.

The Executive Branch

The Magistrates — The remainder of government business was conducted by a host of commissioners, functionaries, and minor officials, known collectively as the Magistrates. These too were generally chosen by lot, and restricted to a one-year term; an important exception was the Board of Generals, who were elected by popular vote (this was one office the Athenians could not afford to fill with inexperienced people chosen at random) and could be re-elected indefinitely (term limits for a successful General in the middle of a war didn't make sense).

Contemporary critics regarded the practice of appointing Magistrates by lot as sheer lunacy. Most of these critics were oligarchs who shuddered at the thought of offices being filled from the ranks of the rabble, but at least one critic, the anonymous author of the fourth-century treatise *Dissoi Logoi*, attacked sortition

on democratic grounds: Since oligarchs are a minority of the population, elections will keep them out of office, whereas sortition could easily place such people in positions of power, thus imperilling the city's democratic institutions. Most Athenians, however, were inclined to view elections as *more* likely than sortition to bring oligarchs to power, given the influence that wealth can have on elections.

In any case, there were safeguards against the danger that the lot would bring too many knaves and fools to power:

“It was not ‘the rulers of the city’ who were chosen by lot, but officials charged with limited routine duties, for which little more than ‘a sense of decency and fair play’ was required. Furthermore, it must be remembered that a magistrate had to pass a preliminary examination, which was, it is true, usually formal, but gave his enemies an opportunity for raking up his past; was liable to be deposed by a vote of the assembly taken ten times a year; and after his year was subject to a scrutiny in which his accounts were audited and any citizen could charge him with inefficiency or abuse of authority.” (Jones (1957), p. 48.)

Law Enforcement — Law enforcement was not one of the services offered by the Athenian state. Athens had no actual police force; the nearest equivalent was a few hundred guards - slaves owned by the state - but their main task was keeping order at public meetings. The notion of an elite enforcement corps, with broader authority than the average citizen, would have been anathema to the Athenians. “No classical state ever established a sufficient governmental machinery by which to secure the appearance of a defendant in court or the execution of a judgment in private suits. Reliance on self-help was therefore compulsory” (Finley (1994), p. 107.) Victims had to rely on friends and relatives to enforce judicial decisions; if these lacked sufficient force, it might be necessary to appeal to a powerful patron, though the role of patronage in law enforcement never reached the level of formalization that we find in, for example, mediæval Iceland. (Still, in light of this recourse to private law enforcement, it's debatable whether Athens really counts as a *state*.)

Ostracism

The Athenians did not take their democracy for granted. They were all too conscious of the exceptional and fragile nature of their political system, and they built in as many safeguards as they could devise against the growth of an oligarchic elite. This fear was not idle; they saw that those few political leaders who were not appointed by lot - the Generals and the Rhetors - came overwhelmingly from the wealthier classes. Clearly, social prominence and economic patronage, combined with the eloquence and persuasiveness available to those who could afford to pay teachers of rhetoric, could provide a path to political power for the rich. The Athenians knew the early history of their city, when tyrants won power by posing as champions of the people, and they were determined not to let it happen again.

One of the safeguards they adopted was formal ostracism. This allowed the Athenian people as a whole to vote for the expulsion from the city of any citizen

they chose, for a period of ten years. Unlike exile, ostracism was not a penalty for a crime; also unlike exile, it was applied only to the prominent and powerful — those that the people feared might be positioning themselves for a coup. The procedure was that someone would propose to hold an ostracism, the Assembly would vote on it, and if the proposal won then an ostracism would be scheduled. On the day of the ostracism, every adult male citizen could turn in a ticket (literally a potsherd, *ostrakon*, whence the name) inscribed with the name of the person they thought Athens could best do without, and the person whose name got the most votes had to leave the city for ten years.

A famous anecdote about the Athenian statesman Aristides, popularly known as “Aristides the Just,” is that one day when Athens was holding an ostracism, an illiterate farmer came up to him, not knowing who he was, and asked him for help in inscribing his ostracism ticket. Aristides agreed to help, and asked whose name the farmer wanted to inscribe. “Aristides!” the farmer said. When asked what he had against Aristides, the farmer replied that he was sick of hearing Aristides called “Aristides the Just” all the time. So Aristides duly inscribed his own name on the ticket, and in fact was ostracized. (It would be particularly poignant if his ostracism had carried by one vote, but it seems not. The whole story is usually assumed to be apocryphal; however, Hansen points out: “oddly enough, there does survive one *ostrakon* on which the name Aristides was started in a shaky hand and crossed out and begun again in a firm, legible one.” (Hansen (1991), p. 312.))

This anecdote is often appealed to (e.g., by Isabel Paterson) as evidence that people were ostracized for frivolous reasons; but I think this fails to see the farmer’s point. The farmer was not simply being cantankerous, envious, or malicious; when a prominent politician gets a name like “the Just” or “the Great” popularly attached to his name, thus being treated with the kind of reverence and deference more appropriate to a king than to a fellow-citizen, from the Athenian point of view this is a danger sign that the individual is getting too powerful and poses a danger to his nation’s freedom. The formal ostracism was a kind of pre-emptive strike.

Ostracism was fairly common in the fifth century, but seems to have been abandoned in the fourth, when prosecution for unconstitutional proposals became the more common way of curbing the power of politicians. This is arguably preferable, in fact, since it requires charging the accused person with a definite infraction and proving him guilty, and so seems less arbitrary and more in accordance with the traditional Athenian respect for the rule of law.

Athenian Democracy and Its Critics

Ancient Critics — Not all Athenians had a high opinion of their constitution. Thucydides, for example, blamed the loss of the Athenian Empire on incompetent leadership, entering the Peloponnesian War rashly and then waging it in an erratic and irresponsible fashion. This in turn he thought was the inevitable result of allowing the ignorant masses to outvote the educated and respectable citizens. For a long time modern historians accepted this judgment, blaming

Athenian democracy both for starting the war and for losing it. But recent historical research has shown that these charges are largely unfounded; I won't take the space to go into details here, but check the bibliography entries for Forrest and Kagan. Recall, too, that if it was under democracy that the Athenians lost their empire, it was also under democracy that they won it - not once but twice.

Another common charge in antiquity — found in Plato's *Republic*, for example — was that democracy leads to tyranny. All Greeks knew of examples where ambitious men had won dictatorial powers by posing as champions of the poor. The opponents of democracy reasoned that this should be all the more easy in democratic states, because the poor — the natural supporters of such a champion — have more clout and so can bring their champion to power more easily.

But a study of history does not seem to bear this theory out. It is certainly true that in *non*-democratic societies, unscrupulous politicians have often exploited democratic aspirations on the part of the poor in order to gain power for themselves; think of Julius Cæsar, or in more recent times Juan Perón. But this is far less common in a genuine democracy, precisely because the poor have access to established constitutional means for redressing their grievances and so have less need of such a champion. And the two brief coups that occurred in the history of the Athenian democracy were both carried off by avowed oligarchs who made no pretense of democratic sympathies.

One charge brought by some of the more extreme critics of Athenian democracy, like Plato in the *Republic*, or the anonymous author called the "Old Oligarch," was that under democracy there was too much freedom. People made their own choices and lived as they pleased, without being directed and supervised by the state; and they showed insufficient deference to their social superiors. Of course, the fact that Athenian democracy attracted this sort of comment is precisely why libertarians should take it seriously as a model!

Critics of democracy regarded politics as the rightful domain of an educated elite, a domain in which the lower orders had no business meddling. Indeed, "minding one's own business" became an oligarchic code phrase for depriving the lower class of political rights, prompting Perikles to snap in response:

"Here [in Athens] each individual is interested not only in his own affairs but in the affairs of the state as well: even those who are mostly occupied with their own business are extremely well-informed on general politics — this is a peculiarity of ours: we do not say that a man who takes no interest in politics is a man who minds his own business; we say that he has no business here at all." (Thucydides, II. 40.)

This retort has sometimes been misread as an endorsement of collectivism and compulsory political participation; in fact it is simply a rejection of the notion that slavish deference to one's class superiors is an appropriate attitude for a free citizen.

Plato's main criticism of the Athenian system was that, in politics as in every other field of endeavor, decisions should be made by experts rather than by voting. We do not decide how to treat a disease, or build a house,

or solve a mathematical problem, by putting the matter to a vote or picking people at random; instead we appeal to those who have knowledge, and accept their decision, ignoring everybody else's. Why, he asked, should we not behave likewise in politics, giving supreme power to a handful of experts while denying any voice in the matter to the ignorant masses?

The obvious response, of course, is to ask, first, how these experts are to be recognized and identified, and second, even if their expertise is genuine, how they are to be trusted to rule in the common interest rather than exclusively in their own. Athenians had a skeptical attitude toward professional politicians:

"They went on the basis that, given the chance, every one of them would have his hand in the till and make a profit out of political activity, and they took every possible means to limit the chances. ... Athenian leaders were called to account more than any other such group in history: to be a rhetor or a general was to choose a perilous career that could easily lead to condemnation and execution - if you failed to flee into exile in time." (Hansen (1991), p. 310.)

Plato has Sokrates remark in his defense speech that if he had been a politician rather than a philosopher he would have been executed a lot earlier, since no Athenian politician who opposes the will of the people can expect to escape with his life. (Plato means this as a complaint against Athens; from our perspective it may look more like praise.)

Plato would have agreed that politicians are generally untrustworthy, but he would have blamed this on the fact that they had been improperly brought up. This was another quarrel that Plato and other critics had with democracy: the absence of public education. The teaching of children was left up to their parents to arrange; Plato was convinced that if this power were taken away from the arbitrary and ill-informed decisions of parents and transferred instead to the state, so that future leaders could be subjected from birth to a rigorous program of moral training and indoctrination, the problem of untrustworthy politicians would be solved.

Plato seems to have seen few limits to the capacity of human nature to be shaped and molded. Not all of his students agreed. Aristotle, for example, though also an advocate of public education, favored a narrower scope for it than Plato had, and made more modest claims on its behalf. To justify his skepticism Aristotle pointed to the example of Sparta, on whose education system Plato's was largely modeled; the Spartans, he noted, behaved with inflexible virtue and iron discipline when they were being observed by their peers, but once they traveled outside of Sparta they were notorious for being the most corrupt crooks in Greece.

Most critics of democracy were less extreme than Plato. They did not generally advocate giving absolute power to an elite and disenfranchising the common people utterly. Instead, they advocated a system which has come to be known as a *constitutional republic*. Even Plato eventually came around, in his later years, to this model.

The function of a constitutional republic is to balance the interests of the

wealthy minority against the interests of the less affluent majority, so that neither side can run roughshod over the other's rights. Xenophon, for example, argued that since it is agreed that it is wrong for the rich to oppress the poor, it should also be agreed that it is wrong for the poor to oppress the rich. Aristotle made the same point from the opposite angle: since it is agreed that it is wrong for the poor to oppress the rich, it should also be agreed that it is wrong for the rich to oppress the poor. (Perhaps they were addressing different audiences?) In addition to being more just, such a system was also likely to be more stable, since the interests of the two classes most able to overthrow the constitution (the rich, powerful because of their wealth, and the poor, powerful because of their numbers) would both be addressed.

How would such a constitutional republic be structured? There were different proposals, but many of the moderate critics of democracy converged on a model called the Mixed Constitution. (Some Athenians called it the "ancestral constitution," on the basis of a certain similarity to the precepts of the early Athenian lawgiver Solon.) Thucydides and Aristotle favored this system, for example, as did such later Aristoteleans as the historian Polybius, who looked to the Roman Republic as a successful example; and the Mixed Constitution has continued to cast its spell well into the modern era, influencing such figures as Machiavelli, Montesquieu, and Madison.

The idea behind the Mixed Constitution was to combine elements of democracy with elements of oligarchy, the theory being that this was the best way to achieve the goal of balancing the interests of the many against the interests of the few. Different versions of the Mixed Constitution were proposed, but the following four points are fairly representative:

1. *Abolish sortition in favor of election by vote.* As we've seen, election was regarded as a move away from genuine democracy because it favored the wealthy and prominent over the average citizen. The moderates condemned selection by lot as foolish, since it gave more qualified candidates no advantage over less qualified ones, and they hoped that an electoral system would bring a "better class of people" into office.

2. *Abolish pay for government officials and jurors.* Advocates of the Mixed Constitution saw government salaries as favoring the poor over the rich and the middle class, since poor people would be disproportionately attracted to them - especially the very poorest, the marginal, unemployable, disreputable "rabble."

3. *Deprive the Menial class of all political rights.* This is in the same spirit as point 2. The theory was that political sense and political virtue were the product of education and experience, and so required leisure. Those who engaged in manual labor did not have the time to develop the political skills necessary for an informed vote. In addition, servile laborers - i.e., those who worked for hire rather than being self-employed - were regarded as being dependent on their employers and thus too analogous to slaves to qualify as complete citizens.

Finally, it was thought that the poverty of the Menials made them potential traitors to the regime, since it would be easier to bribe them; the city would be more stable if political rights were reserved to those who had a financial stake, a kind of investment, in the preservation of the constitution.

4. *Give both the Horsemen and the Yokemen the right to vote, but ensure that only Horsemen hold office.* There were two possible ways of doing this. The most obvious would be to simply exclude Yokemen from office by legal fiat. A subtler way would be to rely on step 1, using the social prominence and economic patronage of the Horsemen to guarantee that offices would nearly always go to them anyway, even if Yokemen remained technically eligible as well.

The reason for reserving governmental offices for the Horsemen class was the usual one that political wisdom requires education, which requires leisure, which requires wealth. Why, then, allow Yokemen the vote? Why not let the Horsemen monopolize all political rights? Because the Mixed Constitution is intended to be a combination of oligarchy and democracy, not a pure triumph for oligarchy. To exclude the respectable middle class - the Yokemen - from all political rights would be unjust, as well as threatening the stability of the regime by giving the armed infantry (drawn predominantly from the Yokemen) an incentive to rebel.

In addition, Aristotle advanced a subtler reason for not disenfranchising the Yokemen. He agreed that the more prosperous citizens were likely to be wiser; but, unlike Plato, he thought that a large number of individually unimpressive people might, by pooling their collective experience, turn out to be wiser than a single wise individual. (A modern confirmation of this is that, e.g., if people who have no idea how tall Mount Everest is are nevertheless asked to guess, any individual guess is likely to be wildly wrong, but as the sample increases, the average of all the guesses converges with astonishing accuracy on the correct figure.)

How well founded were these four proposals? Not very. If sortition brought such useless people to power, how was Athens able to dominate Greece? Complaints about the inefficiency of the lot seem to be rather exaggerated. And many of these complaints missed the point anyway:

“... how absurd it is, says Sokrates, to pick the magistrates by lot when you would not pick a helmsman, or whatever, in that way. [Sokrates’ fallacy] resides in the unstated premise that the magistrates have the same power to steer the ship of state as a helmsman has to steer his ship. But the Athenians chose their magistrates by lot precisely to ensure that they should not be steersmen of the state: one of the purposes of the lot was to diminish the powers of the magistrates. The lot was based on the idea not that all men were equally expert, but that all men were expert enough at what they were chosen for, and that by the use of the lot magistracies would cease to be attractive as weapons in the struggle for power.” (Hansen (1991), p. 236.)

Nor is there any evidence to suppose that the poor were over-represented in political offices or on juries. Jurors in particular were drawn largely from

older, retired citizens, who had the necessary leisure to serve all day as jurors, and many were drawn to the job for its psychic rewards - put bluntly, an opportunity to wield power - rather than for the modest wages. As for the proposal to exclude the poorer classes from some or all political rights, the notion that wisdom and virtue are correlated with wealth and education is a dubious one that history does not seem to support; and Aristotle's suggestion that manual laborers are on a par with mental defectives is such an obvious product of class bias that it is difficult to take seriously. Moreover, the idea that the poor are the most likely to turn traitor is particularly ludicrous, given that Athens' most famous traitors - men like Alcibiades and Hippias - came from the aristocratic class. Indeed, one could argue that the poor were the class *least* likely to be tempted to betray their country, as they had the most to lose if the democratic constitution were overturned.

These theorists were right to favor the notion of a constitutional republic, where neither the rich minority nor the poor majority could gain the upper hand and play the role of tyrant. Their mistake lay in thinking that the Mixed Constitution, a combination of democracy and oligarchy, was the best way to implement the republican ideal. On the contrary, the Athenian democracy *was* a constitutional republic already. Thucydides has one spokesman for democracy, a Sicilian Rhetor with the suspiciously apposite democratic name of Athenagoras, point out that *demokratia* - rule by the people - means empowering the people as a whole, not just the majority:

"There are people who will say that democracy is neither an intelligent nor a fair system, and that those who have the money are also the best rulers. But I say, first, that what is meant by the demos, or people, is the whole State, whereas an oligarchy is only a section of the State; and I say next that though the rich are the best people for looking after money, the best counselors are the intelligent, and that it is the many who are best at listening to the different arguments and judging between them. And all alike, whether taken all together or as separate classes, have equal rights in a democracy." (Thucydides, VI. 39.)

The Athenian playwright Euripides likewise describes the democratic ideal not as domination by the majority but as equality before the law:

"Your start was wrong, seeking a master here. | This city is free, and ruled by no one man. | The people reign, in annual succession. | They do not yield the power to the rich; | The poor man has an equal share in it. ... | People of small resources and the rich | Both have the same recourse to justice. Now | A man of means, if badly spoken of, | Will have no better standing than the weak; | And if the little man is right, he wins | Against the great. This is the call of freedom: | 'What man has good advice to give the city, | And wishes to make it known?' He who responds | Gains glory; the reluctant hold their peace. | For the city, what can be more fair than that? ... | But when one man is king, he finds this hateful, | And if he thinks that any of the nobles | Are wise, he fears for his despotic power | And kills them. How can a city become

strong/ If someone takes away, cuts off new ventures/ Like ears of corn in a spring field? What use/ To build a fortune, if your work promotes/ The despot's welfare, not your family's?" (Euripides, *The Suppliant Women* 404 - 451.)

The advocates of the Mixed Constitution, on the other hand, saw democracy as rule by the poor majority. Since they knew that oligarchy was rule by the rich minority, it was not unnatural for them to conclude that the best way to balance the interests of both factions was to design the constitution so as to embody a mixture of democratic and oligarchic elements. Their error lay in seeing a symmetry between democracy and oligarchy that did not exist.

Why was this an error? Because severing the *official* link between wealth and political power did not deprive the wealthy of all their power, but only of some of it. The riches of the upper class still provided them with a great deal of influence, even under democracy. As I have argued elsewhere:

"The city-states of the ancient world ... had surprisingly weak and decentralized governments, with nothing we would recognize as a police force. ... Yet these city-states were class societies, with a powerful and effective ruling class. Where did the power of the ruling class come from, if not from a powerful state?"

The historian M. I. Finley has studied this question, and come to the conclusion that the ruling classes maintained their power through the device of patronage In effect, the wealthy classes kept control by buying off the poor. Each wealthy family had a large following of commoners who served their patrons' interests (e.g., supporting aristocratic policies in the public assembly) in exchange for the family's largess."

("Can We Escape the Ruling Class?," in *Formulations*, Vol. II, No. 1 (Autumn 1994); cf. Finley (1994).)

The Athenian democrats were well aware of the dangers from patronage. They could have attempted to meet this problem by simply abolishing inequalities of wealth and redistributing the oligarchs' riches to the masses. Indeed, the upper class was fond of accusing the democrats of planning to do this. But in fact the Athenian democrats were far too committed to the ideals of individual rights and the rule of law to contemplate such a measure. Rather than eliminating economic inequality itself, they sought to combat its *effects*. That is why they relied on sortition rather than election - so that the rich could not use patronage to buy their way into office. Likewise, all the Athenian experiments (mild by today's standards) with welfare statism were attempts to fight patronage by providing the poor with a source of revenue that would not make them dependent on their class opponents.

Athens' democratic institutions weakened the effects of patronage, and so largely prevented the rich from oppressing the poor. But they did not do away with the effects of patronage entirely, and so the poor were not thereby empowered to oppress the rich. The result was a balance between the interests of the two classes, just as the advocates of the Mixed Constitution

recommended. Those advocates did not recognize Athens as an instance of their ideal of a constitutional republic, because they did not sufficiently appreciate the power of patronage. Their favored remedy, the Mixed Constitution, tilts the scales of power decisively in favor of the rich once the power of patronage is taken into account - the Roman Republic being an obvious case in point.² Because they underestimated the political clout that wealth brings, their recommended system of checks and balances overcompensates for the power of the poor and undercompensates for the power of the rich.

Modern Critics — Athens has its modern critics also. One common criticism of the Athenian system of direct democracy is that such a high level of participation requires a great deal of leisure, and that the citizens enjoyed this leisure only because they could rely on the unpaid labor of women and slaves. Thus, it is claimed, the Athenian political system inherently requires involuntary servitude as its economic base. By contrast, in a representative system, the level of participation demanded is lower, and so citizens do not have to spend all their time discussing politics; they can work for a living, and so do not have to depend on exploiting the labor of a large class without political rights.

I think this objection is mistaken. It is certainly true that in Athens, as in other Greek states, women and slaves were excluded from the benefits of democratic rights. But this was not essential to the system. The amount of leisure that the Athenian system required has been grossly exaggerated. Most Athenians worked for a living. The heaviest labor was performed not only by slaves but also by Menials, who were generally too poor to own slaves; to the Menials, the notion of Athenians as a bunch of leisured gentlemen relying on the labor of slaves would have seemed a bad joke. The Yoke-men did ordinarily have slaves, but they themselves worked too, as farmers or tradesmen, often right alongside their slaves. The only class of which the “leisure” stereotype is at all true is the Horsemen, and they were a minority of the Athenian population. There was no significant conflict between political participation and earning a living. Serving as a Councillor or Magistrate was a temporary position; the Assembly met infrequently, and most people attended only occasionally anyway; and the judiciary was manned primarily by retirees. So the Athenian system would not have been noticeably hampered if slavery and sexual inequality had been banished.

One prominent modern critic (modern in the sense of post-Renaissance) of Athenian democracy was James Madison, father of the U. S. Constitution. In the *Federalist Papers*, he wrote:

“... a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole ... and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have

ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. ...” (Federalist §10.)

But this image of Athenian democracy is not a realistic one. Property rights and personal security were as secure in Athens as anywhere else, if not more so; and the constitution was a relatively stable one by Greek standards. The Athenian democracy is generally regarded as beginning in 508, with the reforms of Kleisthenes, and ending in 338, when Athens like the rest of Greece fell under the yoke of the Macedonian Empire. During that period - over a century and a half - all the political convulsions that Athenian critics like to point to were crammed into a single decade at the end of the fifth century: the Crisis Years of 413-403. These years saw the destruction of most of Athens' fighting force during the Sicilian expedition; an oligarchic coup and democratic counter-coup; the mass trial of the Arginusai Generals; Athens' defeat and occupation by Sparta; the installation of the bloodthirsty dictatorship of the Thirty; and a violent civil war which restored the democracy. It was in the wake of this crisis period that Sokrates was sentenced to death by a harrowed and paranoid jury in 399. Athens has been indicted on the basis of a quite short and atypical period of its history (cf. Finley (1969), p. 72.). Nor did the Athenian democracy die in political convulsion; it rebuilt itself from the ashes and flourished for another three quarters of a century, before finally succumbing not to domestic turmoil but to an outside threat that swallowed up all of Greece.

In any case, it is risky to judge Athens on the basis of notorious incidents like the Arginusai mass trial or the execution of Sokrates. As one scholar points out:

“Excesses and illegalities are all too common in the history of peoples and governments roused to anger by sorrow, tension, and passion. In despotisms they rouse little attention and are not long remembered, for arbitrary and excessive behavior is their normal pattern of life. In constitutional, moderate, lawful states, however, they are seized upon as outrages and never forgotten, precisely because they stand out so sharply as contrary to what is usual.” (Kagan (1987), p. 374.)

So it was in Athens.

Madison perpetuates the stereotype of Athens as an unruly mob, gripped by irrational whims:

“In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Sokrates, every Athenian assembly would still have been a mob.” (Federalist §55.)

O Fortunate Athens, that by amazing luck or the favor of the gods was able to gain ascendancy over half the Greek world, to defy first the Persian and

then the Spartan war machine, and finally, after being conquered, to rise again to a level of power and prestige almost equal to what it had lost - all under the guidance of passion rather than reason!

Madison's suggested cure for the alleged evils of democracy draws heavily on the tradition of the Mixed Constitution:

“A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. ... the delegation of the government ... to a small number of citizens elected by the rest [serves] to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for that purpose.”
(Federalist §10.)

Of course, Madison realizes that this is not the only possible outcome:

“On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people.”
(Federalist §10.)

But Madison argues that this problem can be avoided if the republic is sufficiently large. (In this respect he is departing from the traditional republican position, which held that a republican system could avoid collapsing into oligarchy only if the republic were fairly small in territory and population.)

“...as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. ... A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it”
(Federalist §10.)

This idea of Madison's was a brilliant one. Unfortunately, experience has shown it to be mistaken. As I wrote in the premiere issue of *Formulations*:

“Such was the intent of the Framers of the U.S. Constitution the broad base of representation was expected to ensure that no special interest could succeed in manipulating the government. ... As we have since learned all too well, the experiment eventually proved to be a failure. Madison and his colleagues could not foresee the logrolling process whereby ... special interests (‘factions’) that were intended to hold one another in perpetual check instead made concessions to one another’s ambitions in exchange for like concessions to their own.”

*(“Virtual Cantons: A New Path to Freedom?”
Formulations, Vol. I, No. 1 (Autumn 1993).)*

The large size of the American republic only made things worse, as the widely dispersed majority were distant from their representatives and unable to concentrate their voice.

The last modern critic of Athenian democracy that I shall consider is Isabel Paterson, whose 1943 book *The God of the Machine* (published the same year as Rose Wilder Lane's *The Discovery of Freedom*, Ayn Rand's *The Fountainhead*, and Albert Jay Nock's *Memoirs of a Superfluous Man*) remains one of the classics of 20th century libertarian thought. Paterson is obsessed with the importance of political structure - an obsession I share. To quote my first *Formulations* article once more:

“What would the constitution of a free nation look like? In trying to answer that question we immediately think in terms of a Bill of Rights, restrictions on governmental power, and so forth. And any constitution worth having would certainly include those things. But if a constitution is to be more than a wish list, it must also specify the political structure necessary to ensure that these freedoms are not eroded or ignored. Consider the old Soviet Constitution, which guaranteed all sorts of fine-sounding freedoms for its citizens - but which in practice proved only a empty promise, since its interpretation and enforcement lay in the hands of an unfettered monolithic centralized state.

Framing a constitution is an exercise in public-choice economics; politicians react to incentives, and so the political incentive structure must be designed in such a way that those in authority cannot profit by the aggrandizement of state power.”

This is a lesson I first learned from Paterson. It is also central to Madison's way of thinking. Where Paterson goes wrong, I think, is that she, like Madison, fails to recognize the political structure that existed in democratic Athens.

Paterson condemns Athens for a lack of checks and balances. As she sees it, Athenian democracy represents pure majority will, without any counter-vailing power to offset it: “dislocated mass,” Paterson calls it. But this is a mistake. I will admit that I would be more comfortable with the Athenian

system if proposals in the Assembly and verdicts in the Jury Courts had required a supermajority rather than a bare majority in order to be enacted. But all the same, the power of the majority could hardly be described as unchecked.

For one thing, the Athenian judiciary had the power, as we've seen, to strike down unconstitutional legislation. For another, the wealth of the rich minority enabled them to exert a serious influence to balance against the will of the less affluent majority. Paterson fails to recognize patronage as playing a role in the constitutional structure, as she often fails to see structure that is informal and not codified into law. (This is why she wrongly rejects anarchism as incompatible with political structure; but that's another story.)

Pursuing this no-structure critique, she also faults Athens for not attaching representation to regional bases, something she sees as crucial for stability. Here she is simply misinformed; members of the Athenian Council represented not a mass aggregate of citizens, but regional districts called demes.

Paterson also complains that the Athenians had no notion of individual rights - that nothing, in principle, was beyond the scope of the democratic government's authority. She grants that Athenian law left a wide area of freedom to the individual, but she insists that this was a matter of custom, not something regarded as a right. This charge is difficult to assess; the Athenians did not have a written constitution, and so had nothing like a Bill of Rights. But - Paterson to the contrary notwithstanding - they did generally think that there was a moral standard beyond custom, to which custom had to answer in order to be legitimate. The Athenian playwright Sophokles expresses the common view:

" - You knew the order not to do this thing?| - I knew, of course I knew. The word was plain.| - And still you dared to overstep these laws?| - For me it was not Zeus who made that order.| Nor did that Justice who lives with the gods below mark out such laws to hold among mankind.| Nor did I think your orders were so strong| that you, a mortal man, could over-run| the gods' unwritten and unfailling laws.| Not now, not yesterday's, they always live,| and no one knows their origin in time."
(Sophokles, *Antigone* 447-456.)

A similar point is made by Perikles:

"... in public affairs we keep to the law. This is because it commands our deep respect. We give our obedience to those whom we put in positions of authority, and we obey the laws themselves, especially those which are for the protection of the oppressed, and those unwritten laws which it is an acknowledged shame to break."
(Thucydides, II. 37.)

Moreover, as Hansen (1989) has shown, the Athenian democrats operated with a firm distinction between the public sphere, which was the legitimate province of state action, and the private sphere, which was not the state's

business. It was the Athenian *philosophers*, largely oligarchic in their sympathies, or at least in favor of a Mixed Constitution - and deeply alienated from their own society, for a mix of good and bad reasons - who denied the public/private distinction; but the Athenian *democrats* had a different outlook.

Like other anti-Athenian theorists we have looked at, Paterson has an enormous admiration for the Roman Republic. (Indeed, despite my great admiration for her book as a whole, I must say I find her pro-Roman bias so pronounced as to be extremely tiresome!) She sees the contrast between Athens and Rome as one of arbitrary rule versus respect for law. She is uncomfortably aware, however, that Roman law was generally more brutal and oppressive than its Athenian counterpart; but she dismisses this as irrelevant:

“To sentimentalize Roman law and gloss over its harsh and faulty aspects is to miss the point. Its solid virtue was its mere existence, since at worst it proved preferable to the unpredictable will of either king or people. In their ordinary conduct the Athenians were probably more humane, or easygoing, than the Romans; but the quality of Roman law was that it was dependable.” (Paterson (1993), Ch. 3.)

But this ideal of dependability and predictability was not a Roman monopoly; Kleon, one of the most prominent leaders of the Athenian democrats, made precisely the same point:

“And this is the very worst thing - to pass measures and then not abide by them. We should realize that a city is better off with bad laws, so long as they remain fixed, than with good laws that are being constantly altered” (Thucydides, III. 37.)

Stability of the law was an Athenian ideal no less than a Roman one.

It is true that Rome probably did have greater reverence for the strict and exact letter of the law than Athens did. But this legalistic attitude is not necessarily to Rome's credit. For example: at one point Rome had a law saying that it was illegal to execute a virgin. Presumably the intent of the law was to protect virgins; but the result was that, in order to abide by the letter of the law while evading its spirit, executioners were legally authorized to rape virgins before killing them. It is very difficult to imagine the Athenians standing for this sort of thing.

Paterson does think Athens was lacking in the rule of law:

*“Though the anecdote may have been invented as a joke which related that an Athenian voted for the banishment of Aristides because he was tired of hearing Aristides called *The Just*, the thing was not impossible by the democratic system. In Roman law a man must be charged with a specified act having known penalties, and convicted on something more positive than opinion, to incur sentence. He could not be guilty for no cause.”* (Paterson (1993), Ch. 3.)

But this contrast is unfounded. The Athenians were as committed to the

rule of law as the Romans were. The ostracism example is a rather bad one, because ostracism was the *only* case in which an Athenian citizen could be exiled for no crime, and it was used very infrequently. (And of course, as we've seen, Paterson misses the point of the Aristides anecdote.) In the pages of Thucydides one finds that it is the Athenian democrats above all else who are the most likely to praise the idea of respect for law. And it is odd that Paterson so roundly condemns the Athenian practice of ostracism, when she praises the Romans' habit, during the Imperial period, of assassinating their Emperors (about a third of all Roman Emperors died by assassination) as a useful constitutional adaptation, akin to a letting a fuse blow to protect a circuit in event of a short. Surely the Greek *ostrakon*, whatever its faults, was a more civilized response to the threat posed by powerful individuals than the Roman dagger.

We should also not be too quick to agree with Paterson that the *content* of the law is relatively unimportant so long as the law is stable and its enforcement predictable. It is useful to remind ourselves of what some of the laws were under Paterson's beloved Roman Republic. The common people were forbidden to assemble in large numbers except on official state business; magistrates could impose penalties on any citizen, without due process or the right of appeal; military discipline was arbitrary and brutal; and male heads of households were authorized to put their wives and grown children to death if they so pleased. Roman women were mere adjuncts of men, and were not even allowed to have names.³ On just about any comparison between Athens and Rome, Athens comes out rather well.

What Can We Learn From Athens?

Today we call the United States a democracy. But the Athenians would have called it an oligarchy - or at best a Mixed Constitution. They would have seen our reliance on an electoral system as reinforcing the power of a wealthy, privileged elite whose manipulation of the media and restrictions on ballot access ensure continued success at the polls. The notion that America is run by majority rule is one the Athenians would have found ludicrous; they would have seen that America is run by a tiny minority consisting of public officials and the wealthy interests that support them.

Libertarians are fond of echoing the conservatives' dictum that America's founders wanted a republic, not a democracy. What we mean when we say this is that they wanted a system in which neither the majority nor the minority could run roughshod over the other, rather than a system that simply empowers the majority. To that extent, they were right. But for the founding fathers, or many of them, this translated into a preference for a constitution based more on the Roman model than on the Athenian; and this last preference may well have been the fatal error that opened the door to an American Leviathan.

What does the Athenian constitution have to teach us? Which successful features of Athenian law could be usefully borrowed by those seeking to

establish a free nation? Here, I think, are some of the lessons that we can learn from that free-nation experiment of two and a half millennia ago:

1. Take the dangers of patronage far more seriously than libertarians are accustomed to doing, and try to devise methods of circumventing its influence.

2. Select a substantial number of government officials by lot in order to break the power of special interests and make the government more representative of the governed. (Just consider: under the Athenian system there would *already* be libertarians in Congress!)

3. Impose strict term limits on public offices.

4. Make sure the salaries for public office are high enough to ensure that those who are not independently wealthy can afford to serve. (Out of understandable frustration at the cupidity of our rulers, many libertarians have suggested that public officials should be paid little or nothing. It's an attractive idea, but I think the Athenians were right in regarding it as a dangerous mistake.)

5. At the end of each term, subject officials to a public review of their conduct in office.

6. Make it a prosecutable offense for legislators to pass unconstitutional laws or to win votes through deception.

7. Increase the scope of citizen referendum.

8. Increase the sovereignty of juries by eliminating compulsory empanelment, voir-dire, rules of evidence, and the like. (Though I resist, on egalitarian grounds, the Athenian idea of making juries not legally accountable for their decisions, unless such an exemption is agreed to by both parties to the dispute. Also, a right of appeal would be nice.)

9. Give juries the power of judicial review. (This goes one step beyond the power, already advocated by many libertarians, to nullify the application of a law in a particular case, to the power to actually strike down the law and in effect repeal it for everybody. But an exemption should be made for laws that are, e.g., basic constitutional guarantees of rights.)

10. Make juries extremely large, so that they will be more representative.

11. Treat all cases as civil cases, with the victim rather than the state directing the prosecution.

12. Replace criminal cases with class-action suits.

13. Let juries decide between alternate penalties suggested by prosecutor and defendant.

14. Offer exile (temporary or permanent) as a cost-effective alternative to imprisonment.

15. Foster competition among systems of dispute adjudication.

16. Shift the focus of law enforcement from governmental police to self-help.

It seems appropriate to give the last word to Perikles, the most articulate and inspiring defender of the Athenian constitution:

“Let me say that our system of government does not copy the institutions of our neighbors. ... Our constitution is called a democracy because power is in the hands not of a minority but of the whole people. ... everyone is equal before the law ...

what counts is not membership of a particular class, but the actual ability which the man possesses. No one, so long as he has it in him to be of service to the state, is kept in political obscurity because of poverty. And, just as our political life is free and open, so is our day-to-day life in our relations with each other. We do not get into a state with our next-door neighbour if he enjoys himself in his own way, nor do we give him the kind of black looks which, though they do no real harm, still do hurt people's feelings. We are free and tolerant in our private lives; but in public affairs we keep to the law. ...

When our work is over, we are in a position to enjoy all kinds of recreation for our spirits. ... in our own homes we find a beauty and a good taste which delight us every day and which drive away our cares. ...

Our city is open to the world, and we have no periodical deportations in order to prevent people observing or finding out secrets which might be of military advantage to the enemy. ... The Spartans, from their earliest boyhood, are submitted to the most laborious training in courage; we pass our lives without all these restrictions, and yet are just as ready to face the same dangers as they are. ... There are certain advantages, I think, in our way of meeting danger voluntarily, with an easy mind, instead of with a laborious training, with natural rather than state-induced courage. ...

We regard wealth as something to be properly used, rather than as something to boast about. As for poverty, no one need be ashamed to admit it: the real shame is in not taking practical measures to escape from it. ... We Athenians, in our own persons, take our decisions on policy or submit them to proper discussions ...

Taking everything together then, I declare that our city is an education to Greece, and I declare that in my opinion each single one of our citizens, in all the manifold aspects of life, is able to show himself the rightful lord and owner of his own person, and do this, moreover, with exceptional grace and exceptional versatility. ... Mighty indeed are the marks and monuments of our empire which we have left. Future ages will wonder at us, as the present age wonders at us now. ...

What I would prefer is that you should fix your eyes every day on the greatness of Athens as she really is, and should fall in love with her. ... Make up your minds that happiness depends on being free ...” (Thucydides, II. 37-43.) D

Notes:

¹“The celebrated Pericles, in compliance with the resentment of a prostitute, at the expense of much of the blood and treasure of his countrymen, attacked, vanquished, and destroyed the city of the *Samnians*. The same man, stimulated by private pique against the *Megarensians*, another nation of Greece, or to avoid a prosecution with which he was threatened as an accomplice in a supposed theft of the statuary of Phidias, or to get rid of the accusations prepared to be brought against him for dissipating the funds of the state in the purchase of popularity, or from a combination of all these causes, was the primitive author of that famous and fatal war, distinguished in the Grecian annals by the name of the *Peloponnesian* war; which, after various vicissitudes, intermissions, and renewals, terminated in the ruin of the Athenian commonwealth.” - (Alexander Hamilton, *Federalist* §6.)

Here Hamilton relies not even on the moderately biased account of Thucydides, but the centuries-after-the-fact gossip and speculations of the Platonist historian Plutarch. For a more balanced assessment of the origins of the Peloponnesian War, one that shows Perikles' policy to have been primarily a defensive rather than an aggressive one, see Kagan (1969).

²The only version of a Mixed Constitution for which much can be said is the old Icelandic constitution, with Chieftains being analogous to Horsemen with the right to hold political office, heads of households being analogous to Yokemen with the right to choose such officers but not to become them, and everybody else being analogous to Menials entirely dependent on the good will of the other two classes. If the Icelandic constitution was more favorable to freedom than the Roman one, it is only because it had less centralization of power. (And if Iceland was a more anarchistic version of Rome, perhaps what lovers of freedom need is a more anarchistic version of Athens.)

³Roman men had names like our own - a first name peculiar to oneself, and a last name representing one's family. (Sometimes a nickname, either of the individual or of the family, was added as a third name.) But women had only a last name - their father's family name - but no personal name. So, for example, if a man was named Marcus Sempronius, his son might be named Gaius Sempronius or Lucius Sempronius or Titus Sempronius, but his daughter would simply be named Sempronia (the feminine version of Sempronius). If he had several daughters, they would *all* be named Sempronia. Parents told their daughters apart by *numbering* them; for example, the fourth daughter of Marcus Sempronius would be named Sempronia Four. The position of Athenian women was nothing to brag about, but at least Greek women were regarded as having enough of an independent identity to be worthy of having *names*. (Nor were their husbands authorized to execute them.)

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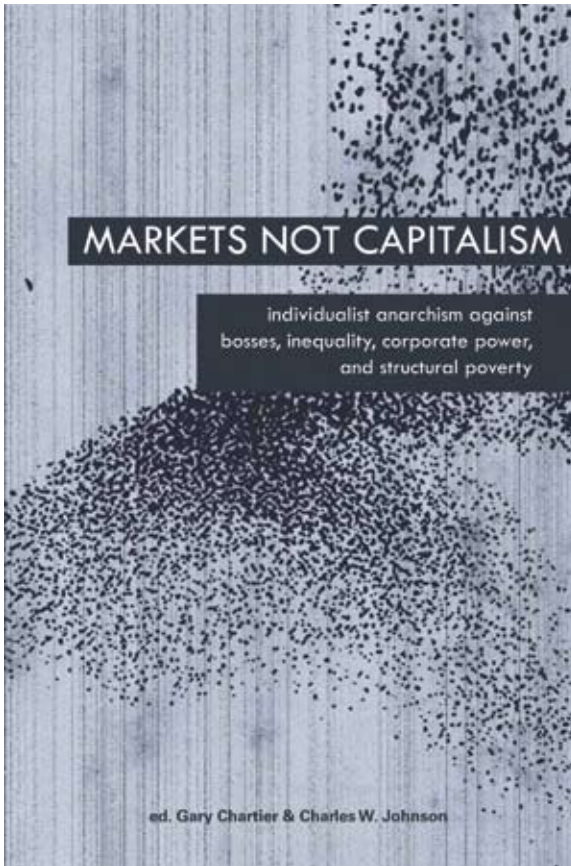
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By Roderick T. Long

Dr. Long specializes in Greek philosophy; moral psychology; ethics; philosophy of social science; and political philosophy (with an emphasis on libertarian/anarchist theory). He has also taught medieval philosophy and eastern philosophy. He is the author of Reason and Value: Aristotle Versus Rand (Objectivist Center, 2000) and Wittgenstein, Austrian Economics, and the Logic of Action (Routledge, forthcoming 2012); and co-editor of Anarchism/Minarchism: Is a Government Part of a Free Country? (Ashgate, 2008) and of the Journal of Ayn Rand Studies. He runs the Molinari Institute and Molinari Society; serves as webmaster and archivist for the Alabama Philosophical Society; blogs at Austro-Athenian Empire; serves as faculty advisor to the AU Libertarians; and is a senior scholar at the Ludwig von Mises Institute, a co-founder of the Alliance of the Libertarian Left, and a member of the board of the Foundation for a Democratic Society.



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