

What is the Rule of Law *Good For*? Democracy, Development, and the Rule of Law in Classical Athens

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INTRODUCTION

*In nome del popolo italiano la Suprema Corte di Cassazione, sezione feriale, ha emesso all'udienza pubblica del procedimento penale numero 27.884-2013, iscritto al numero 8 dell'udienza pubblica del 30 luglio 2013 la seguente decisione: . . . annulla la sentenza impugnata nei confronti di Silvio Berlusconi limitatamente alla statuizione relativa alla condanna alle pena accessoria per l'interdizione temporanea per anni 5 dai pubblici uffici per violazione dell'art. 12, comma 2, decreto legislativo 10 marzo 2000 n. 74 e dispone trasmettersi gli atti ad altra sezione della corte d'appello di Milano perché ridetermini la pena accessoria nei limiti temporali fissati dal citato articolo 12, ai sensi dell'art. 133 codice penale, valutazione non consentita alla Corte di legittimità. Rigetta nel resto il ricorso del Berlusconi nei cui confronti dichiara, ai sensi dell'articolo 624 comma 2 codice procedura penale, irrevocabili tutte le altre parti della sentenza impugnata.*¹

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1. *Silvio Berlusconi Condannato: Sentenza Mediaset, Interdizione da Ricalcolare*, L'HUFFINGTON POST (Aug. 8, 2013, 10:47 PM), http://www.huffingtonpost.it/2013/08/01/silvio-berlusconi-condannato-processo-mediaset_n_3688851.html#29_la-lettura-delle-sentenzamediaset-video.

In simple terms, the conviction verdict confirmed a four-year jail term for Silvio Berlusconi while returning the final decision on the length of the ban on public office to another court. *Id.* From an initial five years, the ban was cut to two years on October 19, 2013. See Ilaria Polleschi, *Italy Court Bans Berlusconi from Public Office for Two Years*, REUTERS (Oct. 19, 2013, 8:51 AM),

With this barely comprehensible declaration, on August 1, 2013 at 7:48 p.m., the Italian Corte di Cassazione (High Court) definitively convicted Italy's ex-Premier Silvio Berlusconi of tax fraud and sentenced him to prison in the Mediaset² trial. The words above are legalese that vindicates the frustration caused by two decades of failures and it doesn't matter (or it matters less) that a series of other debatable laws will de facto prevent Silvio from ever setting foot inside a jail cell.³

The series of papers appearing in the present edition of the *Buffalo Law Review* deal with the 'Rule of Law in Athens.' As an Italian writing on the Rule of Law (RoL), the temptation to begin with a preamble about Italy's *Cavaliere* is simply too tempting to resist. But there is more to this choice.

One may say that on August 1, 2013, the Corte di Cassazione returned to Italy a principle that stands at the very heart of ancient and modern formulations of the RoL: the principle that "law binds a society's rulers as well as its citizens"—a principle also known as legal supremacy.⁴

Stating that the Corte di Cassazione 'returned to Italy the RoL,' however, may well sound like an exaggeration. The RoL is a broad and multifaceted concept and there is

<http://www.reuters.com/article/2013/10/19/us-italy-berlusconi-idUSBRE99I01T20131019>.

2. As the *New York Times* concisely explained it, Berlusconi was convicted on "charges of buying the rights to broadcast American movies on his Mediaset networks through a series of offshore companies and falsely declaring how much they paid to avoid taxes." Rachel Donadio, *Italian Court Upholds Berlusconi Sentence, Setting Stage for Crisis*, N.Y. TIMES, Aug. 2, 2013, at A4.

3. Through a series of laws, Berlusconi was able to decriminalize his offenses and postpone his trials, obtaining, in most cases, acquittal because the statute of limitations had expired. The Italian journalist Marco Travaglio has collected and discussed all the '*leges ad personam*' passed since 1994 in the book *Ad Personam*. MARCO TRAVAGLIO, *AD PERSONAM* (2010). A summary was published in an Italian newspaper. See Marco Travaglio, *Tutte Le Leggi 'Ad Personam' Di Berlusconi*, IL FATTO QUOTIDIANO (Mar. 12, 2010) (It.), available at http://www.meetup.com/sanremobeppegrillomeetup/pages/TUTTE_LE_LEGGI_AD_PERSONAM_DI_BERLUSCONI.

4. Peter F. Nardulli et al., *Conceptualizing and Measuring Rule of Law Constructs, 1850-2010*, 1 J.L. & CTS. 139, 147 (2013) (defining legal supremacy).

generally little agreement on its constituent elements. With one seeming exception: the principle of legal supremacy.

Legal supremacy is, in fact, the lowest common denominator in debates over the RoL in fields as (apparently) disparate as Political Science and Classics. Nardulli et al.'s useful review of eighteen among the most prominent first-generation RoL measures identifies seven that employ legal supremacy as a parameter.⁵ With seven out of eighteen occurrences, legal supremacy is the second most popular measure after judicial independence, which occurs ten out of eighteen times.⁶ Analogously, in the field of Classics, the principle of legal supremacy is widely accepted—at least if we define legal supremacy, as I did above, as the idea that law ought to establish checks on official abuse of power.⁷

In the absence of an agreement on what RoL is (in Athens as elsewhere), my argument starts from the basic definition of RoL *qua* legal supremacy and hopes to move beyond this basic definition. I hope, first, to clarify some conceptual inconsistencies that have thwarted the development of a definition of RoL in Athens. Second, I purport to broaden the scope of the debate over the RoL in Athens.

5. *Id.* at 153-60.

6. *Id.* Among classical scholars, the debate revolves around the doctrine of separation of powers, which is inherently related to the principle of judicial independence. *See, e.g.*, JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE (1989) [hereinafter OBER, MASS AND ELITE]; Josiah Ober, *The Nature of Athenian Democracy*, 84 CLASSICAL PHILOLOGY 322 (1989) [hereinafter Ober, *Nature*] (reviewing MOGENS HERMAN HANSEN, THE ATHENIAN ASSEMBLY IN THE AGE OF DEMOSTHENES (1987)). Here Ober notes that the absence of an entrenched bureaucracy, the fact that, as Hansen himself demonstrated, “government bodies were staffed by large numbers of amateurs—citizens chosen more or less at random from the whole social spectrum” weakens the thesis of the separation of powers. Ober, *Nature*, *supra*, at 327. *Contra* MOGENS HERMAN HANSEN, THE ATHENIAN ASSEMBLY IN THE AGE OF DEMOSTHENES (1987); Mogens Herman Hansen, *Initiative and Decision: The Separation of Powers in Fourth-Century Athens*, 22 GREEK, ROMAN, & BYZANTINE STUD. 345 (1981).

7. *See* discussion *infra* Part IV.

I return momentarily to the example of Italy under Berlusconi because it helps me illustrate the scope I have in mind. The question can be framed as follows: what does ‘having the RoL’ mean to Italy (assuming, or better, hoping, that this first step made by the Corte di Cassazione will be followed by others)? And, more importantly, what has ‘the absence of the RoL’ meant to the country? In other words, if we speak of RoL *qua* legal supremacy what are we actually saying about a country—its values, its government, its economy?

Perhaps little today: the story of Italy in the past few decades has entertained many, especially outside of Europe. We all laughed at (or, in some cases, with) Berlusconi at one point or another and, in between fits, many pondered the political longevity of a Prime Minister for whom the law (or common decency, for that matter) has constituted a rather loose check. Yet, despite the toll the recent crisis took on the country, whether Italy has had or has been able to enforce the RoL (*qua* legal supremacy) hasn’t mattered much for its survival, stability and prosperity.

Using GDP as a measure of prosperity, Italy dropped from fifth in 1994⁸—that is, when Berlusconi ‘took the field’—to ninth in 2012.⁹ Significantly, in the course of this period, Italy was displaced by China, Brazil, and Russia—hardly model countries in terms of the ability to control their officials.¹⁰ A similar picture emerges from the United Nations Development Programme’s Human Development Index indicators, according to which, despite the drop from the twenty-second to the twenty-fifth position, Italy remains squarely within the group of countries with a “very high

8. *Ranking of the World’s Richest Countries by GDP (1994)*, CLASSORA, <http://en.classora.com/reports/t24369/general/ranking-of-the-worlds-richest-countries-by-gdp> (under the “Choose the edition” drop down list, select 1994) (last updated July 15, 2013).

9. *Ranking of the World’s Richest Countries by GDP (2012)*, CLASSORA, <http://en.classora.com/reports/t24369/general/ranking-of-the-worlds-richest-countries-by-gdp> (under the “Choose the edition” drop down list, select 2012) (last updated July 15, 2013).

10. *Id.*

human development.”¹¹ The last few years have been tough for Italians but haven’t they been tough for others countries (better countries, i.e., more RoL-abiding countries) as well? Did Italy’s economy almost collapse in 2011 because of Berlusconi’s disregard of the RoL? Did the Italian democracy collapse because of that? The truth is that, even for those of us (like me) who grew into political consciousness through a rejection of ‘Berlusconi-style’ politics who would *love* to answer with an unqualified YES, the answer is: not so much. So either the RoL doesn’t matter, or RoL *qua* legal supremacy is only part of the story.

The point of my opening vignette is that even today in developed western European countries, RoL remains a concept that can be understood in quite different ways and, most of all, a concept that is not (by any definition) universally practiced. Moreover, as political scientists know all too well, the relationship between RoL and national prosperity (whether measured by economic growth indicators or otherwise) is not a simple correlation.

What, then, is RoL? And what is it good for? The present Article attempts some basic ‘ground-clearing’ for the work that I will carry out in more depth in my dissertation. The Article shows that some common definitions of RoL are not universally accepted (or applicable across all relevant times and places) and suggests some reasons why the question of what the RoL is good for needs to be reframed.

The Article proceeds as follows: Part I discusses Paul Gowder’s interpretation of RoL as guarantor of political equality. Gowder’s points are to be warmly welcomed in the debate over the RoL for two reasons. First, Gowder’s philosophically-elaborate definition gives pride of place to a pillar of the RoL that, in recent times, may have been too hastily sacrificed to the altar of speedy measuring—the

11. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 1994, at 93 (1994), *available at* http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf; UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT SUMMARY 2013, at 16 (2013), *available at* http://hdr.undp.org/sites/default/files/hdr2013_en_summary.pdf.

principle of equality among citizens.¹² Second, Gowder's arguments are formulated at a moment when the polarization of the debate over the RoL in ancient Athens is such that the debate itself has become an object of study in its own right. His thoughtful interpretation of RoL moves the debate forward insofar as it revolves around a fundamentally different question: not 'did Athens have the RoL?', but 'what did the RoL do for Athens?', or as I framed it, 'what is the RoL good for?'

Before we can apply Gowder's scheme to Athens, however, we ought to clarify some important aspects concerning the debate over the Athenian RoL. In Parts II and III, I deal with a set of problems that I perceive as harmful to a constructive interpretation of the concept of RoL in Athens.

Part II presents an overview of the debate over the RoL in Athens from its conceptual antecedent—the notion of sovereignty of law. Through a comparison between two important constitutional debates, one in ancient Athens, the other in early modern England, the section reflects on the limitations of framing our questions on the role and function of law in Athens in terms of sovereignty. As a result, the narrative aims at exposing the risks that the 'burden of sovereignty' carries for the idea of RoL in Athens as well as elsewhere.

Part III reflects on codification and centralized enforcement as bogeymen of modern conceptions of RoL. I suggest that unwritten law and decentralized enforcement run counter to the idea of RoL only insofar as we take modern developed countries (particularly the United States) as *comparanda*. Broadening the perspective to the

12. Despite the fact that Nardulli et al.'s definition of RoL posits the principle of equality before the law as a fundamental expressive ideal on a par with the principle of legal supremacy, equality before the law occurs only once among first-generation measures. See Nardulli et al., *supra* note 4, at 144-46, 153-60. Conversely, Classical scholars agree on the preeminence of *isonomia* among the Greeks, though they debate whether *isonomia* specifically meant political or legal equality. For an overview of previous scholarship on this topic, see Paul Gowder, *Democracy, Solidarity and the Rule of Law: Lessons from Athens*, 62 *BUFF. L. REV.* 1, 21-22 (2013). See *infra* Part I for further exploration of Gowder's scholarship.

developing world, I use the example of Sierra Leone as an alternative for a better understanding of the place of unwritten law and decentralized enforcement in Athens.

Having cleared this ground, in Part IV I suggest an alternative horizon for the Athenian RoL. Without exceptions, accounts of RoL in Athens remain squarely within the boundaries of the political, if not the legal, domain. As a result, Athenian citizens are perceived in a vacuum, like brains in a vat, as if the many non-citizens that pullulated the alleys of Athens and the roads of Attica did not count or did not matter for the stability (and prosperity) of the polis.

The appearance of metics, foreigners, and slaves in the law courts has begun to receive increasing—albeit contested¹³—attention since the pioneering works of Adriaan Lanni and Edward Cohen.¹⁴ It is with these important contributions in mind that I reflect on the political and economic bargains that presided over the pacification of a newly empire-less Athens as foundational to Athenian development in the fourth century.

The high-stakes political and economic bargains that presided over the pacification of Athens, the reestablishment of the democracy, and the economic recovery of the polis revolved around the problems of violence and limited resources. Recent work with emerging economies suggests that in the aftermath of economic and political crises, the tendency is to ready recourse, to step back, and to diminish expectations.¹⁵ Conversely, in 404/3

13. For a complete bibliography on the legal standing of slaves, foreigners, and metics, see Virginia Hunter, *Introduction: Status Distinctions in Athenian Law*, in *LAW AND SOCIAL STATUS IN CLASSICAL ATHENS* 5-23 (Virginia Hunter & Jonathan Edmondson eds., 2000) and, more recently, DEBORAH KAMEN, *STATUS IN CLASSICAL ATHENS* 19-31, 43-54 (2013).

14. See generally EDWARD E. COHEN, *ATHENIAN ECONOMY AND SOCIETY: A BANKING PERSPECTIVE* (1992); ADRIAAN LANNI, *LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS* (2006).

15. Both domestic and foreign policy reasons support this point. As Jeremy Weinstein and Kosuke Imai show, “the driving force behind the negative effects of civil war on economic growth is a decrease in domestic investment, and in particular, private investment.” Kosuke Imai & Jeremy M. Weinstein, *Measuring the Economic Impact of Civil War* 1 (CID Ctr. Int’l Dev. Harv. Univ.,

and in the years thereafter, Athens did not shy away from the conspicuous investments that recovery required. Such investments targeted the infrastructure and manpower of Athenian trade and commercial prosperity and ranged from the reconstruction of the Long Walls and the dockyards of Piraeus to the extension of legal access to key economic actors.¹⁶ The fact that these investments contributed to lower the stakes of politics by raising the cost of fighting may help explain Athenian success in the long run.

My contribution is different from previous analyses because it looks at legal change from the perspective of the inextricable political and economic processes that fostered that change. Moreover, by taking politics and economics as a bundle, my perspective moves beyond the usual suspects—the citizens of Athens, their institutions and domestic policy—and focuses on larger socioeconomic and political changes within Hellas.

Studying the ancient past—a world on which our actions have no bearing—ought to free us, if not from ideological constraints, at least from the fear of ‘getting it wrong’—a luxury that few disciplines can afford. For this reason, reflecting on the RoL in ancient Athens, an unparalleled laboratory for theorists of democracy and law, has the potential to teach us much about important topics such as the occurrence of civil war, the emergence and persistence of a legal order, the stability of democracy, and their relationship to processes of development—topics to which modern debates over the RoL are intrinsically (and

Working Paper No. 51, 2000). The structural adjustment programs implemented in Sub-Saharan Africa that followed the debt crisis in the 1980s and the crippling austerity measures recently imposed by the European Union on Greece (and other countries in the Eurozone) are cases in point.

16. The investments began with the speedy reconstruction of the Long Walls and the dockyards of Piraeus. See XENOPHON, *Hellenica*, in 2 XENOPHON bk. 4, ch. 8, § 9 (Carleton L. Brownson trans., 1921) (Xen. Hell. 4.8.9), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0206%3Abook%3D4%3Achapter%3D8%3Asection%3D9>; see also Josiah Ober & Barry Weingast, *Is Development Uniquely Modern? Athens on the Doorstep*, 28-29 (Int'l Soc'y for New Inst'l Econ., Paper, 2013), http://extranet.isnie.org/uploads/isnie2013/ober_weingast.pdf. For a further elaboration on Athenian investment in Piraeus, see *infra* Part IV.

importantly) related. My hope is that the story I tell in my dissertation—the story of how law contributed to the success of Athens in her struggle against political instability and limited resources—may be of interest to contemporary theorists and practitioners of the RoL.

I. RoL AS POLITICAL EQUALITY

Gowder has recently put forth a constructive interpretation of the meaning and the role of RoL. According to Gowder's definition, RoL fosters political equality among citizens, and it does so by satisfying three conditions—regularity, publicity, and generality.¹⁷ Gowder sees such construction as readily applicable to the history of the development of the RoL in Athens.¹⁸

Weaving the debates over the place of law in Athens within the interpretive framework of Athenian politics and society put forth by Ober,¹⁹ Gowder argues that, in a society divided between masses and elites, law constituted a weapon in the hands of the masses to regulate elite power.²⁰ In particular, Athens satisfied the principles of regularity and publicity while lacking the principle of generality for reasons that are easy to dismiss in historical perspective, such as the exclusion from political rights of women, foreigners, and slaves.²¹ As a result, Athens achieved a weak version of the RoL by securing vertical equality between

17. Gowder, *supra* note 12, at 10-22; *see also* Paul Gowder, *The Rule of Law and Equality*, 32 *LAW & PHIL.* 565 (2013).

18. Gowder, *supra* note 12, at 12-22.

19. *See generally* OBER, MASS AND ELITE, *supra* note 6. In the past few decades, quantitative work on real wages, demography, and economic development has produced a body of evidence that compels us to put pressure on the validity of the dichotomy between masses and elites in practice, if not in ideology. Yet, such dichotomy remains a centerpiece of our understanding of Athenian politics and society. Unpacking its limits remains one of the goals of my dissertation.

20. Gowder, *supra* note 12, at 10-22.

21. *Id.*

officials and ordinary citizens, thus avoiding terror and hubris (albeit not legal caste).²²

Gowder's arguments are well taken, and his normative focus on political equality at the root of the RoL is important in two ways: first, it contributes to bring 'equality' back into the discussion over the RoL in fields beyond the reach of Classics; second, it moves the debate over the Athenian RoL forward insofar as it answers a fundamental question that, in recent debates, strikes one for its absence: what is the RoL *good for*?

However, before applying Gowder's elaboration to Athens, some points of clarification are necessary. First, I address the confusion between the overlapping concepts of sovereignty of law and RoL. At a glance, the principle of sovereignty of law can be taken to mean, to quote Gowder, "something equivalent to the [RoL]."²³ The distinction Gowder draws between constitutionalism and sovereignty of law/RoL²⁴ is helpful insofar as it is functional to Gowder's own definition of RoL as the guarantor of political equality. Yet, such distinction overlooks an important aspect of the equation between RoL and sovereignty of law in Athens (and elsewhere) that deserves specific mention. I will discuss the problem of sovereignty in Part II.

Second, I address the problems of codification and enforcement of law in the context of modern conceptions of the RoL. In his discussion of the principles of regularity and publicity in Athens, Gowder rightly addresses the widespread assumption that codification—that is, written law—is a prerequisite for RoL arguments. Surely, as Gowder concedes, the change that occurred in Athens in the last years of the fifth century "from scattered and hard-to-discover laws to a centralized law code was a clear improvement from the standpoint of publicity."²⁵ Yet, as Gowder clarifies, through the examples of common law countries such as modern Britain and the United States, the

22. *Id.*

23. *Id.* at 36.

24. *Id.* at 35-37.

25. *Id.* at 19.

RoL does not require all the laws be written or codified.²⁶ This important clarification confirms how much the diverging positions in the debate over the RoL in Athens rest on different conceptions (and different definitions) of RoL.

Gowder's perspective, however, remains squarely within the framework that compares and contrasts ancient Athens to modern western developed countries (be it the United States or Britain, where as Gowder puts it, "it has long been argued that the common law is rooted in the custom of the community").²⁷ In Part III, I suggest and briefly discuss a set of reasons why these *comparanda* may be ultimately misleading.

II. THE PROBLEM OF SOVEREIGNTY IN ATHENS

In order to discuss the problem of sovereignty in Athens and its relation with the concept of RoL, I move, like others have done before me, from Gagarin's tripartite conception of the conceptual pillars of the Athenian RoL—a conception that well summarizes the history of the debate.²⁸ These pillars are:

1. The orderly and peaceful regulation of society according to a set of authoritative rules as opposed to disorder and violence.
2. The principle that all are accountable to the law, and that no one—not even a monarch or tyrant—is above the law.
3. The principle that laws should be clear in meaning and their application consistent and predictable.²⁹

26. *Id.* at 16-17 & n.64.

27. Gowder, *supra* note 12, at 17 n.64.

28. Michael Gagarin, *The Rule of Law in Gortyn*, in *THE LAW AND THE COURTS IN ANCIENT GREECE* 173 (Edward M. Harris & Lene Rubinstein eds., 2004); see also Edward M. Harris, *Did the Athenian Courts Attempt to Achieve Consistency? Oral Tradition and Written Records in the Athenian Administration of Justice*, in *POLITICS OF ORALITY* 343, 343 (Craig Cooper ed., 2007) [hereinafter Harris, *POLITICS*]; Sara Forsdyke, *Rule of Law, Popular Justice and the Politics of Interpreting the Past* 3 (April 12, 2013) (unpublished paper presented at EPAM workshop at Stanford) (on file with author).

29. Forsdyke, *supra* note 28.

The second principle coincides with the principle of legal supremacy that I discussed in the introduction; in the formulation that I offered in the introduction—i.e., that “law binds a society’s rulers as well as its citizens.”³⁰ As Sara Forsdyke acknowledges in a recent article, “most scholars would agree that the Athenians valued the [RoL] in the second sense”³¹ However, as I argued above, legal supremacy—on its own—tells us as little about ancient Athens as it does about modern Italy. Moreover, as I will argue below, there are reasons to question the nature of such an uncritical agreement in those cases when legal supremacy is confused with, or framed by, ill-defined notions of sovereignty of law and RoL.

The third principle has become, in recent years, the single most important focus around which debates over (the rule of) law in Athens almost invariably revolve—with a caveat. The question at hand is as follows: “Does Athens have the RoL, if we define RoL as a set of attributes such as

30. See *supra* text accompanying note 4.

31. Forsdyke, *supra* note 28 (manuscript at 3). On specific procedures such as *graphe paranomon*, *graphe nomon me epitedeion theinai*, and *eisangelia*, see MOGENS HERMAN HANSEN, *EISANGELIA: THE SOVEREIGNTY OF THE PEOPLE’S COURT IN ATHENS IN THE FOURTH CENTURY B.C. AND THE IMPEACHMENT OF GENERAL AND POLITICIANS* (1975); MOGENS HERMAN HANSEN, *THE SOVEREIGNTY OF THE PEOPLE’S COURT IN ATHENS IN THE FOURTH CENTURY B.C. AND THE PUBLIC ACTION AGAINST UNCONSTITUTIONAL PROPOSALS 28-65* (Jørgen Raphaelsen & Sojna Holbøll trans., 1974) [hereinafter HANSEN, *SOVEREIGNTY OF THE PEOPLE’S COURT*]; Edwin Carawan, *The Trial of the Arginousai Generals and the Dawn of ‘Judicial Review’*, DIKE, 2007, at 19 (It.); Paul Cloché, *Remarques sur L’Emploi de la Graphè Paranomón*, 38 REVUE DES ÉTUDES ANCIENNES 401 (1936) (FR.); Ulrich Kahrstedt, *Untersuchungen zu athenischen Behörden*, 30 Kilo 10 (1937) (Ger.); Adriaan Lanni, *Judicial Review and the Athenian ‘Constitution’*, in DÉMOCRATIE ATHÉNIENNE—DÉMOCRATIE MODERNE: TRADITION ET INFLUENCE 235 (Mogens Herman Hansen, ed., 2010) (Switz.); Mark J. Sundahl, *The Rule of Law and the Nature of the Fourth-Century Athenian Democracy*, 54 CLASSICA ET MEDIAEVALIA 127 (2003) (Den.); Harvey Yunis, *Law, Politics and the Graphè Paranomon in Fourth-Century Athens*, 29 GREEK, ROMAN, & BYZANTINE STUD. 361 (1988). On the principle of accountability for Athenian officials, see JENNIFER TOLBERT ROBERTS, *ACCOUNTABILITY IN ATHENIAN GOVERNMENT* (Warren G. Mood ed., 1982). More generally, on the ‘spirit’ of early Greek law, its public nature, and anti-tyrannical origins, see MICHAEL GAGARIN, *WRITING GREEK LAW* (2008); EDWARD M. HARRIS, *Solon and the Spirit of the Law in Archaic and Classical Greece*, in *DEMOCRACY AND THE RULE OF LAW IN CLASSICAL ATHENS* 3, 3-28 (2006) [hereinafter HARRIS, *DEMOCRACY*].

consistency, predictability, clarity etc.?”³² Assessing whether Athens did or did not have the RoL in these terms may well be a crucial step toward a better understanding of law as it was theorized—but especially as it was practiced—in Athens. However, it is important to recognize that such a question makes sense only if we move from, and agree on, the positivistic assumption that the essence of law is a set of attributes.³³

We may question such assumption on philosophical grounds; we may agree with Ronald Dworkin that the essence of law is the product of an interpretive contest not reconcilable with a set of attributes and that the rules that we call laws are not stuff that we can *find*, regardless of how hard we look.³⁴ However, if we frame the debate in this way, which position one holds ultimately reflects one’s intellectual preferences. Reflecting on the polarization reached by the debate over the RoL in Athens, Forsdyke has recently noted that conflicting approaches to the RoL

32. The attributes scholars examine are usually variants on the theme of Fuller’s original list: generality, prospectivity, publicity, clarity, consistency, feasibility, and stability. LON L. FULLER, *THE MORALITY OF LAW* 39 (2d ed. 1969). Consequently, the investigative focus has been directed toward questions such as: was law in Athens substantively coherent? *See, e.g.*, MOGENS HERMAN HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES* 165 (J.A. Crook trans., 1991) [hereinafter HANSEN, *THE ATHENIAN DEMOCRACY*]; S.C. TODD, *THE SHAPE OF ATHENIAN LAW* 71-72, 167-340 (1993); Edward M. Harris, *What Are the Laws of Athens About? Substance and Procedure in Athenian Statutes*, DIKE, 2009/2010, at 5, 5-6 (It.); Robin Osborne, *Law in Action in Classical Athens*, 105 J. HELLENIC STUD. 40 (1985); *see also* THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW (Michael Gagarin & David Cohen, eds., 2005). Was enforcement of these laws centralized and consistent? *See, e.g.*, Edward M. Harris, *Who Enforced the Law in Classical Athens*, in SYMPOSIUM 2005: VORTRÄGE ZUR GRIECHISCHEN UND HELLENISTISCHEN RECHTSGESCHICHTE 159 (2007) (Ger.); *see also* VIRGINIA HUNTER, *POLICING ATHENS: SOCIAL CONTROL IN THE ATTIC LAWSUITS, 420-320 B.C.* 120-53 (1994); Moshe Berent, *Anthropology and the Classics: War, Violence, and the Stateless Polis*, 50 CLASSICAL Q. 257, 258-61 (2000). Did legal or extra-legal arguments play a fundamental role in litigation? *See, e.g.*, Edward M. Harris, *The Rule of Law in Athenian Democracy*, DIKE, 2006, at 156, 171-175 (It.) [hereinafter Harris, *The Rule of Law in Athenian Democracy*]; *see also* LANNI, *supra* note 14, at 42-74.

33. *See* FULLER, *supra* note 32; H.L.A. HART, *THE CONCEPT OF LAW* (1961). For a historical overview, *see* Nardulli et al., *supra* note 4, at 150-51.

34. *See generally* RONALD DWORCKIN, *LAW’S EMPIRE* (1986).

conceal different approaches to the ancient evidence and different conceptions of law.³⁵ As a result, the polarization of the debate—or, as she puts it, the two images on the ‘Rubin vase’ of the Athenian rule of law—exist because “both images are actually there.”³⁶

Notwithstanding the discomfort at seeing the debate become an object of study in its own right, I wholeheartedly agree with Forsdyke. Moreover, I would add that the incompatibility between available interpretations also arises from one fundamental methodological choice, made by both sides to the matter—a choice according to which the RoL is conceived as an end in itself rather than as a means toward an end. Before I move on to formulate the positive part of my argument—that is, before I lay out what I believe this ‘end’ to be—I must go back to discuss the first principle in Gagarin’s tripartite construction.

Despite this vague rendition, speaking of ‘authoritative rules’ locates the first principle within the boundaries of the debate over the concept of sovereignty of law that dominated discussions of Athenian law for almost a century.³⁷ The debate centered on the role and function of the procedure of *graphe paranomon* and, more specifically, on whether or not the *graphe paranomon* performed the function of judicial review of legislation passed in the Assembly. A positive answer to this question was taken to

35. Forsdyke, *supra* note 28 (manuscript at 23-24).

36. *Id.* (manuscript at 1).

37. Forsdyke places the origins of the debate in the second half of the twentieth century, when the thesis developed by Hansen in the mid-1970s was picked up and developed by Ostwald and Sealey in the late 1980s. Forsdyke, *supra* note 28 (manuscript at 4-5); see RAPHAEL SEALEY, *THE ATHENIAN REPUBLIC: DEMOCRACY OR THE RULE OF LAW?* 42-45 (1987). In antedating the origins of the debate over sovereignty to the late nineteenth century, I emphasize the continuity between the mature debate over sovereignty that took place in the 1980s and its logical antecedent: the ‘constitutionalist model’ of Athenian democracy based on the analogy between the procedure of *graphe paranomon* and judicial review first suggested by Thomas Goodell in 1893-1894. See Thomas Dwight Goodell, *An Athenian Parallel to a Function of Our Supreme Court*, 2 *YALE REV.* 64 (1893). Robert Bonner and Gertrude Smith later continued Goodell’s analogy. See 2 ROBERT J. BONNER & GERTRUDE SMITH, *THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE* 296-97 (1938).

mean that ultimate sovereignty within the state was conferred to the law courts over the Assembly and, by extension, to the laws themselves over the people.³⁸ The debate soon settled on two diametrically opposed interpretations: for some, sovereignty lay unshaken in the hands of the people, even across the fourth century divide;³⁹ for others, the late fifth century reforms introduced such an unquestionable primacy of the law over the people that even the very meaning of democracy in Athens was questioned.⁴⁰ The impasse recently reached by the debate over the Athenian RoL has, thus, an illustrious antecedent in the debate over sovereignty.

Speaking of sovereignty of law in a post-Westphalian (and post-Bodinian/Hobbesian) world requires us to search for a unitary locus of sovereignty. However, as Ober already noted in 1989:

Attempts to define divisions of powers, to find a unitary locus of sovereignty, and to enunciate a ["RoL"] that was exterior, superior, and in opposition to the will of the people will not, I think, help us to understand the nature of Athenian democracy,

38. See HANSEN, SOVEREIGNTY OF THE PEOPLE'S COURT, *supra* note 31. For an overview of the opposing arguments, see Forsdyke, *supra* note 28 (manuscript at 4-7).

39. See Peter J. Rhodes, *Enmity in Fourth-Century Athens*, in KOSMOS: ESSAYS IN ORDER, CONFLICT, AND COMMUNITY IN CLASSICAL ATHENS 144, 144-45 (Paul Cartledge et al. eds., 1998); Peter J. Rhodes, *Judicial Procedures in Fourth-Century Athens: Improvement or Simply Change?*, in DIE ATHENISCHE DEMOKRATIE IM 4. JAHRHUNDERT V. CHR. 303 (Walter Eder ed., 1995) (Ger.); Gerhard Thür, Book Review, 55 GNOMON 601 (1983) (Ger.) (reviewing HANSEN, SOVEREIGNTY OF THE PEOPLE'S COURT, *supra* note 31); Gerhard Thür, *Die Athenischen Geschwornengerichte—eine Sackgasse?*, in DIE ATHENISCHE DEMOKRATIE IM 4. JAHRHUNDERT V. CHR., *supra*, at 321.

40. See HANSEN, SOVEREIGNTY OF THE PEOPLE'S COURT, *supra* note 31; MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW, at xix-xxii (1986); SEALEY, *supra* note 37, at 138-140. Harris settled the debate over the apparent contradiction between sovereignty of law and sovereignty of the people by arguing that democracy and RoL are far from incompatible. See Harris, *The Rule of Law in Athenian Democracy*, *supra* note 32, at 157-59. Harris' is an important argument—one that, however, introduced into the debate a new challenge—that of defining the features of the Athenian RoL.

because the Athenians themselves never acted nor thought along those lines.⁴¹

Equating RoL to the principle of sovereignty of law, then, burdens the notion of RoL with a heavy load—a load that is problematic not only to the understanding of ancient Athens, but also to the very idea of RoL.

The advocates of the sovereignty of law/RoL position almost unmistakably locate the origins of the Athenian belief in the supremacy of law in a passage of Euripides' *Suppliants* where Theseus, Athens' mythical founder, contrasts the rule of a tyrant with the rule of the (written) laws.⁴² As Forsdyke shows, however, Theseus' appeal (and thus the notion of sovereign law) finds a worthy counterpart in an idea expressed never so well as in Demosthenes' superlative closure of the oration against Meidias, where the orator asks his audience:

And what is the strength of the laws? If one of you is wronged and cries aloud, will the laws run up and be at his side to assist him? No; they are only written texts and incapable of such action. Wherein then resides their power? In yourselves, if only you support them and make them all-powerful to help him who needs them. So the laws are strong through you and you through the laws.⁴³

41. OBER, MASS AND ELITE, *supra* note 6, at 22.

42. EURIPIDES, *Suppliants*, in 1 EURIPIDES, THE COMPLETE GREEK DRAMA lines 426-55 (Whitney J. Oates & Eugene O'Neill, Jr. eds., E.P. Coleridge, trans., 1938) (Eur. Supp. 426-55), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0122%3Acard%3D426>. The value of *isonomia* for good government was celebrated in the fifth century by Herodotus and, perhaps more caustically, by Thucydides. See 3 HERODOTUS, *The Histories*, in HERODOTUS ch. 80, §§5-6 (A.D. Godley trans., 1920) (Hdt. 3.80.5-6), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0126%3Abook%3D3%3Achapter%3D80%3Asection%3D5>; THUCYDIDES, *The Peloponnesian War*, in THUCYDIDES: HISTORIAE IN TWO VOLUMES ch. 37 (Benjamin Jowett trans., 1942) (Thuc. 2.37), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0247%3Abook%3D2%3Achapter%3D37>.

43. DEMOSTHENES, *Against Midias*, in DEMOSTHENES WITH AN ENGLISH TRANSLATION §224 (A.T. Murray trans., Harvard Univ. Press 1939) (Dem. 21.224), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0074%3Aspeech%3D21%3Asection%3D224>; see Forsdyke,

If the laws are inanimate and their strength rests on human agency, how can ‘the law’ be sovereign? Demosthenes points here to an inconsistency in the doctrine of sovereign law that legal philosophy has struggled with for centuries after him. As Dworkin remarks in the preface of *Law’s Empire*:

We live in and by the law. . . . It is sword, shield and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed, *even when the books that are supposed to record its command and directions are silent*.⁴⁴

Dworkin’s passage highlights that such inconsistency is not a feature of the ancient Athenian reflection on law, but part and parcel of the nature of law. In every legal system, there exist areas of ‘penumbra’ where the application of the law is not a function of mere transposition of the letter of the law to a specific court case. Moreover, the mere existence of a law is not a guarantee for its correct and consistent applicability. The idea of sovereign law, therefore, ought to be analyzed in light of these difficulties: that the realm of substantive law is man-made and that procedure offers a partial (sometimes very partial) degree of protection against abuse or, to put it in a more optimistic perspective, various degrees of interpretive freedom.⁴⁵

The idea of sovereign law in Athens has been attacked by reference to specific features of Athenian law and the Athenian legal system: the use of law as evidence (as opposed to the body of “rules by which a case should be

supra note 28 (manuscript at 7-8) (describing the idea that “laws are inert and need human agents to enforce them”).

44. Dworkin, *supra* note 34, at vii (emphasis added).

45. In developing this argument I do not take up the thorny issue of legal change. On the introduction in the Athenian legal system of rules of change and the relationship of these rules with Athenian legal ideology (that largely saw law as immutable), see Mirko Canevaro, *Making and Changing Laws in Classical Athens*, in OXFORD HANDBOOK OF ANCIENT GREEK LAW (E.M. Harris and Mirko Canevaro eds., forthcoming 2015).

decided”);⁴⁶ the law’s persuasive (as opposed to binding) force in a court of law;⁴⁷ and the statutes’ substantive vagueness. Yet, elaborating on Dworkin’s argument, I suggest that there are reasons to question the analytical validity of the idea of unitary sovereignty on wholly different grounds. The problem is not that, as Forsdyke put it, “gaps in the law were a result of the ad hoc development of Athenian law.”⁴⁸ The problem, as I see it, has much deeper roots.

In order to clarify my point, in what follows, I carry out a comparison between two constitutional debates that revolved around the question of sovereignty; one took place in Athens in the last decade of the fifth century BC, and the other occurred in England during the seventeenth century. The aim of such a comparison is to show that even in monarchical England—that is to say, when the idea of unitary sovereignty had an institutional bearer, namely, the king, and a highly philosophical elaboration, first and foremost by Jean Bodin and Thomas Hobbes—the concept of unitary sovereignty proved impracticable in the face of a viable opposition. In light of this comparison, I conclude that sovereignty constitutes a highly problematic concept, and one that definitions of RoL ought to move away from.

In the late sixteenth century, Jean Bodin settled the medieval debate concerning the right of resistance—that is, the right of a people to resist a badly-performing king—by conceptualizing the restraints on royal power as “recommendations of prudence and good government,” rather than “constitutional requirements.”⁴⁹ In reaction to,

46. Forsdyke, *supra* note 28 (manuscript at 7-9); see 2 A.R.W. HARRISON, *THE LAW OF ATHENS* 133-35 (1971).

47. TODD, *supra* note 32, at 58-60.

48. Forsdyke, *supra* note 28 (manuscript at 12).

49. Julian H. Franklin, *Introduction* to JEAN BODIN, *ON SOVEREIGNTY* xiii (Julian H. Franklin ed., trans., 1992). The issue, both conceptually and practically, revolved around the difficulty of accommodating divinely ordained absolute sovereignty in the face of two challenges: the reciprocal relationship of political and religious authority and the reciprocal relationship between sovereign and subjects. *Id.* In the latter context, the problem was to recognize a space for lawful resistance to a sovereign who misbehaved. Before Bodin, jurists and political thinkers limited themselves to the recognition of a series of

and inspired by Bodin's formulation of indivisible and absolute royal sovereignty, in the mid-seventeenth century, a theory of parliamentary sovereignty developed in England. Michael Mendle has convincingly argued that "Parliamentary sovereignty" was as absolute as royal sovereignty because it was "claimed in the way that Charles' lawyers and lay theoreticians had made a case for Charles' absolute power."⁵⁰ Moreover, the theory of parliamentary sovereignty, as that of royal sovereignty in response to which it was developed, presented the same uneasy relationship between the contradictory demands of absolute sovereignty on the one hand and deference to law and the ancient constitution on the other. This point is crystallized by Pocock:

A quarter of a century later . . . we have the parliament of 1628 asserting the aboriginality and primacy of custom and statute in order to check the claims of the crown's lawyers that England was governed by several discrete laws and the king had discretion in choosing by which to proceed.⁵¹

In addition to exemplifying the attempt of both Crown and Parliament to situate themselves in relation to each other and to the law, this quote from Pocock also highlights that, behind the veil of the opposing demands for absolute sovereignty, the relationship between king and parliament, even at a theoretical level, was actually quite complicated.⁵²

exceptions to the obedience of a sovereign that was otherwise absolute. *Id.* at xviii. As a consequence of this practice, both the principle of absolute sovereignty and the legal status of the right of resistance were dangerously undermined. *See id.*

50. Michael Mendle, *Parliamentary Sovereignty: A Very English Absolutism*, in *POLITICAL DISCOURSE IN EARLY MODERN BRITAIN* 97, 98 (Nicholas Phillipson & Quentin Skinner eds., 1993).

51. J.G.A. Pocock, *A Discourse of Sovereignty: Observations on the Work in Progress*, in *POLITICAL DISCOURSE IN EARLY MODERN BRITAIN*, *supra* note 50, at 377, 385.

52. There were other sides to the debate too. *See* CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, *SUBJECTS AND SOVEREIGNS: THE GRAND CONTROVERSY OVER LEGAL SOVEREIGNTY IN STUART ENGLAND 1* (1981) (providing an overview of what they term the "political theory of order" and the "community-centered view of government"). The idea of sovereignty of the law was formulated in two slightly different arguments, one philosophical and the

Moreover, according to Maitland, already in the sixteenth and early seventeenth century:

The long parliaments of Henry VIII, Elizabeth and James, no doubt had very important results—not only did they educate the commons to act together, but they familiarized the nation with the notion of parliament as of a permanent entity, in which the sovereignty of the realm might be vested⁵³

Among the key privileges that members of the Parliament enjoyed, Maitland illustrates, were freedom of speech, freedom from arrest—which in Maitland’s opinion boils down to actually constituting immunity from ordinary law⁵⁴—and (especially before James) even regulation of succession to the throne.⁵⁵ The principle of royal absolutism was therefore limited by fundamental practical exceptions. At the same time, it was hard indeed to make a case for the supremacy of the parliament since the parliament’s very existence depended on the king’s will.⁵⁶ Absolute theories of royal sovereignty or parliamentary sovereignty were thus not only theoretically lacking, but they were also impracticable because the debate had, since its inception, collided with the rough terrain of political practice.

As the debate degenerated into civil war and climaxed in the decapitation of Charles I, the stakes of the political debate suddenly got higher. As Pocock insightfully suggested, “it is the experience of an anomic condition which constituted the central trauma of English history.”⁵⁷ Barrington Moore bolsters this position, noting that “[n]o

other juridical, by Samuel Rutherford and Edward Coke, respectively. See SAMUEL RUTHERFORD, *LEX, REX: THE LAW AND THE PRINCE* (1644). For an overview of Coke’s position, see F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 300-01 (1908).

53. MAITLAND, *supra* note 52, at 250.

54. *Id.* at 243.

55. *Id.* at 253. Henry VIII (1509-1547) appealed to the parliament to regulate the succession to the throne, and during Elizabeth’s reign (1558-1603) it was treason to admit that the succession could not be settled by an act of parliament. *Id.* at 252.

56. *Id.* at 252-54.

57. Pocock, *supra* note 51, at 393.

subsequent English king tried to take royal absolutism seriously again.⁵⁸

The Athenian constitutional debate revolved around a similar, though less theoretically elaborate, tension between absolute demands to sovereignty and practical checks on these demands. In both cases, the check was framed in terms of the existence of a body of laws—an ancestral constitution—that demanded recognition.⁵⁹ Respect for the laws of the fathers, subsumed under the rubric of the appeals to the concept of *patrios politeia* (i.e., the constitution of the fathers) punctuated the claims of both democrats and oligarchs to power.⁶⁰ After a century of democracy, however, and given the Greek peculiar obsession with tyranny, no oligarch (or democrat, for that matters) would dream of framing his claims in terms of absolute and uncontested power—that is in terms of absolute sovereignty.

Yet, the fifth century democracy had collapsed under the weight of the military consequences of unrestrained decision-making power.⁶¹ Analogously, the oligarch's

58. BARRINGTON MOORE JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY* 17 (1966).

59. In the case of England, see Pocock, *supra* note 51.

60. ARISTOTLE, *Athenian Constitution*, in ARISTOTLE IN 23 VOLUMES § 29.3 (H Rackham trans., Harvard Univ. Press 1952), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0046%3Achapter%3D29%3Asection%3D3>; ([Arist.] *Ath. Pol.* 29.3); THUCYDIDES, *The Peloponnesian War*, in THUCYDIDES: HISTORIAE IN TWO VOLUMES § 8.76.6 (Richard Crawley trans., J. M. Dent 1910) (Thuc. 8.76.6), available at <http://www.perseus.tufts.edu/hopper/text?doc=Thuc.+8.76.6&fromdoc=Perseus%3Atext%3A1999.01.0247>.

61. According to Thucydides, after the failure of the attempt to conquer Sicily—a failure that took a tremendous toll on Athenian resources—the polis reacted unanimously to the question concerning who (or what) was to be held responsible for the failure: “they [the Athenians] were angry with the orators, who had joined in promoting the expedition, just as if they had not themselves voted it.” THUCYDIDES, *supra* note 60, § 8.1.1 (Thuc. 8.1.1); see also LYSIAS, *On the Confiscation of the Property of the Brother of Nicias*, in LYSIAS (1930) (Lys. 18.2) (“[T]he responsibility for the disaster ought in fairness to lie with those who persuaded you.”), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0154%3Aspeech%3D18%3Asection%3D2>. The passages emphasize the lack of constraints on the power of the orators to persuade the demos and the tendency of the demos to shift the blame on others instead of taking responsibility for its own decisions. See also JOSIAH OBER,

repeated refusal to abide by the rules set by (quasi-) legitimate constitutional assemblies triggered the explosion of civil violence.⁶² As in England, so in Athens, the experience of violence was the single most important argument against unitary sovereignty and a factor that shaped the following steps in important ways.

Interestingly, in both cases the violence was put to an end and the constitutional impasse overcome when the parties to the fight agreed on one fundamental principle: that of coordination in lawmaking. Barry Weingast has successfully argued that, in the case of England, the Bill of Rights and the Settlement constituted a coordination device that clarified “an explicit set of strategies over what actions should trigger a joint response by both groups [i.e., Whigs and Tories].”⁶³ Analogously, I suggest that, in Athens, a consensus framed in terms of *patrios politeia* introduced the principle of coordination in lawmaking by means of legislative reforms. Such reforms established boards of *nomothetai* (lit. lawgivers) that shared with the Assembly the power to make laws.⁶⁴

Obviously, the cases of seventeenth century England and fifth century B.C. Athens differ profoundly, and it is not my purpose to deny or mystify such a truism. The purpose

POLITICAL DISSENT IN DEMOCRATIC ATHENS: INTELLECTUAL CRISIS OF POPULAR RULE 52-121 (1998).

62. XENOPHON, *supra* note 16, §§ 2.3-2.4 (Xen. Hell. 2.3-2.4). The oligarchy of the Four Hundred was constitutionally established in 411 through popular vote (albeit the legitimacy of the assembly that voted the democracy out of existence was highly questionable). The vote ratified that the Four Hundred were commissioned to form a transitional government before yielding power to a broader oligarchy of five thousand citizens. In spite of this, the Four Hundred kept postponing the election of the Five Thousand. See THUCYDIDES, *supra* note 60, §§ 8.89-90 (Thuc. 8.89-90); Aristotle, *supra* note 60, § 32 ([Arist.] *Ath. Pol.* 32). In a similar vein, in 403 although “the Thirty had been chosen . . . for the purpose of framing a constitution under which to conduct the government, they continually delayed framing and publishing this constitution, but they appointed a Senate [i.e., *boule*] and the other magistrates as they saw fit.” XENOPHON, *supra*, §§ 2.3.11-12 (Xen. Hell. 2.3.11-12); see also Aristotle, *supra* note 60, § 35 ([Arist.] *Ath. Pol.* 35).

63. Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 253 (1997).

64. HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 32, at 161-77.

of my comparison is twofold: first, to emphasize the limits of theoretical and, most of all, rhetorical elaborations of sovereignty of law as we find them in our sources; second, to corroborate my argument concerning the problematic nature of the concept of unitary sovereignty with a reconstruction of the fate of the ideal in a political landscape that, unlike that of classical Athens, could have much more easily accommodated the concept.

As to the idea of sovereignty of law, its problematic nature emerged for the British theoreticians (even before it presented itself to the practitioners) in the difficulty of answering the question: *who* makes the law?

In *Lex Rex*, Samuel Rutherford employed arguments from Scripture, Natural Law, and Scottish law to attack royal absolutism and emphasize the importance of the original covenant and the law (by which Rutherford included Divine Law and Natural Law as well as positive law). He maintained that, “the power of creating a man a king is from the people” and that “[t]he law hath a supremacy of constitution above the king.”⁶⁵ Thus, by the transitive property, the people have the power to make a man king and the king is subject to law.⁶⁶ Establishing the primacy of law, then, is to avoid the problem of the source of authority from which the law necessarily derives.

Moreover, framed in terms of sovereign power, the law is locked up behind a wall of adamant immutability that may well serve functional purposes, especially in the face of political instability, but that also allows the justification of the status quo—whatever that may be.

The problem of sovereignty, then, is that it imposes a synchronic veil of order over an intrinsically mutable matter—the law.

The point of my comparison is that equating RoL to the sovereignty of law in the context of ancient Athens is not only unwarranted (as Ober remarked, the Athenians never

65. RUTHERFORD, *supra* note 52, at 10, 230 (Conclusion to Question IV and Assertion 1, Question XXVI).

66. The sovereignty of law is therefore rooted in popular consensus over royal investiture.

'thought along those lines')⁶⁷ but also misleading. When it comes to modern developed countries, equating RoL to sovereignty is a truism insofar as the principle of judicial independence functions as a (de jure and de facto) guarantor of such equation. We tend not to debate anymore (as Sealey, for example, did)⁶⁸ the compatibility between RoL and democracy, and despite the fact that western constitutions locate the source of legitimate authority in the people, we rarely question the existence of the RoL in our developed democracies. Conversely, in places where judicial independence is merely de jure (many developing countries) or does not apply (ancient Athens),⁶⁹ speaking of RoL in terms of unitary sovereignty is a fruitless, if not dangerous, exercise.

I suggest, therefore, that we must reject the equation between sovereignty of law and RoL and question the uncritical agreement on the RoL *qua* legal supremacy when legal supremacy is framed in terms of sovereignty.

III. CODIFICATION AND ENFORCEMENT OF LAW IN A GLOBAL PERSPECTIVE

As I showed at the beginning of Part II, Gowder's claim that Athens satisfied the principle of regularity finds ample support in modern scholarship. However, as Gowder himself notes, "One worry leading to a potential objection with respect to regularity in Athens arises from the extent of the discretion juries had to convict defendants."⁷⁰

Despite recent challenges, Lanni's argument that juries in Athens' popular courts exercised vast discretion in convicting or acquitting defendants⁷¹ remains a tough nut to crack. Lanni's detractors have emphasized, in particular, the role of the judicial oath as a check on juries' discretion.⁷²

67. OBER, *MASS AND ELITE*, *supra* note 6, at 22.

68. *See* SEALEY, *supra* note 37.

69. *See supra* note 6 and accompanying text.

70. Gowder, *supra* note 12, at 15.

71. LANNI, *supra* note 14.

72. Harris, *The Rule of Law in Athenian Democracy*, *supra* note 32, at 158-70.

Gowder concisely summarizes the conflicting positions as follows: “While the jurors were required to take an oath to follow the law, some scholars have argued that extra-legal evidence was often taken into consideration such that jurors often did not act as if they were bound to convict or acquit defendants on legal grounds alone.”⁷³

The crux of the matter here, is the meaning of ‘legal grounds.’ In equating legal grounds with written law, Gowder is directly addressing the widespread tendency to consider codification as a prerequisite for RoL claims. In line with this assumption, classical scholars have regarded the process of revision and codification of the laws that took place in Athens in the last decade of the fifth century as a huge step forward in terms of Athens’ achievement of the RoL.⁷⁴ Moreover, the reform passed in the years around 403 and quoted by Andocides—a reform that forbade magistrates from enforcing unwritten rules in the popular courts—has tended to confirm the preeminence of written legislation over informal norms in the courts of classical Athens, at least in the fourth century.⁷⁵

However, as Gowder observes, the RoL does not require all the laws be written or codified. In order to illustrate his point, Gowder cites the example of common law countries, such as the United States and Britain, “which incorporate social custom into the law and still comply with the rule of law.”⁷⁶ Gowder’s clarification is valuable in that it confirms the role played by idiosyncratic definitions of RoL in shaping the debate over the RoL in Athens.

73. Gowder, *supra* note 12, at 15 & n.57.

74. However, doubts remain concerning how available the laws (and records form court proceedings) actually were, even in the fourth century. See JAMES P. SICKINGER, PUBLIC RECORDS AND ARCHIVES IN CLASSICAL ATHENS (1999); Harris, POLITICS, *supra* note 28; Adriaan Lanni, *Arguing from ‘Precedent’: Modern Perspectives on Athenian Practice*, in THE LAW AND THE COURTS IN ANCIENT GREECE, *supra* note 28, at 159; James P. Sickinger, *The Laws of Athens: Publication, Preservation, Consultation*, in THE LAW AND THE COURTS IN ANCIENT GREECE, *supra* note 28, at 93.

75. See *infra* text accompanying notes 88-91.

76. Gowder, *supra* note 12, at 17.

However, Gowder's argument can be taken a bit further: if codification is not a necessary prerequisite for the existence of a rule of precedent, the problem of codification may not merely concern the nature of law, as much as it concerns its enforcement.⁷⁷ In other words, in terms of Gowder's publicity principle, there is a worry that unwritten law would be hard to enforce because ordinary Athenians may disagree on what exactly, and at any given time, constitutes applicable principles of unwritten law.

Yet, as Gowder argues,

Athens' small population, its cultural and religious homogeneity, the public nature of its procedures, and the extent of citizen participation in juries all give us good reason to suppose that ordinary citizens were familiar, in their capacities as citizens, with the law that they enforced in their capacities as jurors.⁷⁸

Gowder's arguments suggest that the enforcement of formal law alongside informal norms in the courts of Classical Athens does not necessarily imply that Athens rejected the RoL, as Lanni maintains. Lanni, however, would in turn answer Gowder's objection by remarking that the problem is not so much the existence and the enforcement in Athenian courts of both written and unwritten rules;⁷⁹ the problem, as she sees it, is the multiplicity of norms at play that, by making outcomes unpredictable and *ad hoc*, defies RoL standards of predictability and consistency. Conversely, Gowder's thesis would probably find support in Harris' claim that predictability and consistency were in fact achieved in Athens, although Harris would probably deny that extra-

77. This is particularly true where enforcement is carried out by a wealth of different actors. On the relative role of magistrates and citizens in enforcing the law, see HUNTER, *supra* note 32 and Harris, POLITICS, *supra* note 28.

78. Gowder, *supra* note 12, at 19.

79. In her 2009 essay, Lanni actually claims that the fact that Athenian courts enforced unwritten norms alongside formal statutes contributed to render Athens a "remarkably peaceful and well-ordered society." Adriaan Lanni, *Social Norms in the Courts of Ancient Athens*, 1 J. OF LEGAL ANALYSIS 691, 693 (2009). In fact, enforcement of informal norms compensated the weakness in the Athenian system of law enforcement.

legal arguments played any significant role in court verdicts.⁸⁰

In what follows, I suggest an alternative pathway to examine the interplay between written and unwritten law in Athens (and its implications for the idea of RoL). Lanni's 2009 essay, which Gowder amply references, opens with a discussion of the growing academic literature that looks at "the relationship between social norms and informal sanctions (such as gossip or private dispute resolution) on the one hand, and formal legal rules and institutions on the other"⁸¹ Lanni rightly observes that, "[t]he Athenian case is particularly interesting While much of the norms literature focuses on the choice between informal and formal norms and institutions, in Athens informal norms were enforced *through* the formal court system."⁸² I contend that as long as we consider modern developed countries as *comparanda*, the intricacies of unwritten law and decentralized enforcement as well as their relationship with formal structures may ultimately escape us. Elaborating on Lanni's insight, I suggest that, in order to fully appreciate the singularity of the Athenian case, developing countries with dual legal systems may offer a more fruitful comparison.

My recent work experience in legal empowerment NGOs in Africa informs this perspective. In Sierra Leone, for example, decentralized mechanisms of dispute resolution have in part been subsumed under the rubric of formal institutions. As Varvaloucas et al. explain:

The foundation of Sierra Leone's current dual legal system was laid in 1896, when the colonial British government signed the Protectorate Declaration with local chiefs in what is now known as the Provinces. . . . Legal dualism had existed informally before 1896, but the Proclamation formalized the structure, leading to the official division of the justice system into two parts: a formal

80. See Edward M. Harris, *Law and Oratory*, in PERSUASION: GREEK RHETORIC IN ACTION 130-50 (Ian Worthington ed., 1994); Edward M. Harris, *Open Texture in Athenian Law*, DIKE, 2000, at 27, 27-29 (It.); Harris, POLITICS, *supra* note 28.

81. Lanni, *supra* note 79, at 691.

82. *Id.* at 692.

system instituting mostly British common law and statutes, and a customary system based on traditional law and courts run by paramount chiefs. . . . After independence, the new government of Sierra Leone continued using British common law and statutory law, as the colonial government had. In 1963, two years after independence, the Local Courts Act of 1963 was passed, governing customary law in the Provinces. The LCA repealed the paramount chiefs' courts, now mandating that a paramount chief nominate a local court chairman to oversee the local courts. While the authority of village and section chiefs were not recognized by the government as legally binding, chiefs continued to adjudicate cases in their communities, as they had before colonialism and as they continue to do today. Similar systems exist in other African countries formerly ruled by the British, such as Ghana, Uganda, Kenya, and Zimbabwe.⁸³

Sierra Leone's 1991 constitution statutorily recognizes customary—that is, unwritten—law as a source of legitimate authority. Section 170 of the Constitution of Sierra Leone⁸⁴ introduces a principle that is most explicitly stated in the Local Court Act 2011, section 1:⁸⁵ the principle according to which formal law trumps customary law in formal institutions. Customary law then applies in the context of formal institutions only insofar as the constitution, the common law and statutes are silent; customary law also applies in the context of informal institutions as long as it does not contradict the principles of

83. Alaina Varvaloucas et al., *Improving the Justice Sector: Law and Institution-Building in Sierra Leone*, in ECONOMIC CHALLENGES AND POLICY ISSUES IN EARLY TWENTY-FIRST CENTURY SIERRA LEONE 511-12 (Omotunde E.G. Johnson ed., 2012).

84. CONSTITUTION OF SIERRA LEONE 1991, ch. 12, § 170.

85. While copies of the Local Court Act are not widely available, a lawyer and founding director of a law NGO in Sierra Leone has verified the Act's contents. Interviews with Simeon Koroma, Founding Director, Timap for Justice, in Freetown, Sierra Leone (July 2013). For a general discussion of the Local Court Act, see Allieu Vandi Koroma, *Transforming the Informal Justice Sector: Discussing Relevant Provisions of the Newly Enacted Local Courts Act 2011*, CENTRE FOR ACCOUNTABILITY AND THE RULE OF LAW (Oct. 3 2011), <http://www.carl-sl.org/home/reports/516-transforming-the-informal-justice-sector-discussing-relevant-provisions-of-the-newly-enacted-local-courts-act-2011->; *Evaluation of the Recently Enacted Local Court Act 2011*, UNITED NATIONS INTEGRATED PEACEBUILDING OFFICE IN SIERRA LEONE, <http://unipsil.unmissions.org/Default.aspx?ctl=Details&tabid=9649&mid=12590&ItemID=10756> (last visited Dec. 8, 2013).

natural justice, equity, and good conscience or conflict with any statute.⁸⁶

Despite the presence of formal institutions and a hierarchy of norms, in Sierra Leone, geographic isolation and the lack of centralized states (not to mention delays, case overload and widespread corruption in the formal system) often allow for *de facto* autonomy. In such interstices, traditional authorities and unwritten law govern collective behavior—and they are often the only available source of legality. Cases like Sierra Leone reveal that the foremost difference between written and unwritten law is not one of nature but one of enforcement. Unwritten law is ‘arbitrary’ only insofar as the authorities that administer it tend to be corrupt (a risk to which formal law is not wholly insusceptible), and saying that ordinary citizens are unaware of the principles governing their relations with their neighbors is, more often than not, patently false. Unlike formal law, unwritten law in Sierra Leone is an everyday reality. As a result, any average Sierra Leonean would understand the judgment of a Paramount Chief much more readily and accurately than an average Italian is able to understand the verdict of the Corte di Cassazione.⁸⁷

More complicated is the relationship between formal and informal justice institutions and that between written and unwritten law. Yet, it may be argued that the pre-eminence of written law over unwritten law in formal Athenian courts, introduced at the end of the fifth century and enshrined in the reform quoted by Andocides,⁸⁸ resembles the hierarchy of norms enshrined in post-independence African constitutions. The Athenian provision

86. I would like to thank Simeon Koroma for his help in clarifying the intricacies of the relationship between different bodies of laws in Sierra Leone.

87. Seeing is believing: *Berlusconi Fans Misunderstanding the Sentence that Convicted Silvio for Good on Charges of Tax Fraud*, YOUTUBE (Aug. 2, 2013), <http://www.youtube.com/watch?v=VCy1sfxtHw0>.

88. Andocides, *On the Mysteries*, in 1 MINOR ATTIC ORATORS IN TWO VOLUMES § 87 (K.J. Maidment trans., Harvard Univ. Press 1968) (Andoc. 1.87), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0018%3Aspeech%3D1%3Asection%3D87>.

is stricter insofar as it seems to entirely ban unwritten law from formal institutions (i.e., the popular courts) but it says nothing about other applications of unwritten law beyond these structures. It is in fact worth emphasizing that, as far as we know, the reform applied to the centralized judicial bodies of the polis (as indicated by the use of τὰς ἀρχάς, i.e., the magistrates),⁸⁹ and we know very little about, and focus even less on, the existence of decentralized mechanisms of dispute resolution, for example at the deme level⁹⁰ or in the context of what Forsdyke has termed ‘extra-judicial popular justice.’⁹¹ I suggest that the wealth of law-court evidence from the fourth century, by directing our attention away from decentralized mechanisms of dispute resolution, may have contributed to a partial understanding of the meaning of these reforms.

The debate over the RoL in Athens has graduated from one that revolved around ill-defined, abstract principles to one that seeks universal answers from partial evidence and relies on large numbers (of quotes) as the only methodologically viable approach to determine whether (or not) the RoL existed in Athens. I welcome the shift, but the impasse reached by current debates compels us to move forward and evaluate methodologies as well as questions based on their achievements. At the same time, interesting developments such as Gowder’s are still locked in a logic

89. *Id.*

90. We hear of judges operating at the deme level from Demosthenes and Pseudo-Aristotle. See DEMOSTHENES, *Against Timocrates*, in DEMOSTHENES WITH AN ENGLISH TRANSLATION, *supra* note 43, at 112.2 (Dem. 24.112.2); Aristotle, *supra* note 60, § 53.1 ([Arist.] *Ath. Pol.* 53.1); see also LYSIAS, *Against Pancleon*, in LYSIAS, *supra* note 61, § 23.2 (Lys. 23.2), who however terms them tribe judges; cf. P.J. RHODES, *A COMMENTARY ON THE ARISTOTELIAN ATHENAION POLITEIA* 588 (1st ed. 1981); DOUGLAS MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 206-07 (H.H. Scullard ed., 1978).

91. Forsdyke, *supra* note 28 (manuscript at 18-22). The relationship between formal courts and alternative mechanisms of dispute resolution, such as mediation and domestic arbitration, also deserves more attention. For an overview, see, for example, HARRISON, *supra* note 46, at 64-68; MACDOWELL, *supra* note 90, at 203-11.

that looks at law as a byproduct of politics—a criticism Harris has relentlessly put forth in recent years.⁹²

Conversely, I will argue in my dissertation that in the absence of a unitary locus of sovereignty, the Athenians developed a non-reified concept of ‘law without sovereignty.’ In other words, law in Athens was neither conceptualized as a sovereign power, as some RoL theorists would have it, nor was it understood as the command of a sovereign power, as Austin postulated. Instead, law in Athens was conceptualized as a coordination device for collective action: there were gains to be reaped from the practices of public, large-scale design, exercise, and enforcement of law. An analysis of the structure of the legal system in the fourth century reveals that the Athenians were aware of this fact.

Moreover, I argue that in order to understand what the rule of law was good for in Athens we ought to focus on the late fifth century struggles for democracy against civil war and for prosperity in a post-imperial dimension. The RoL allowed for prosperity by granting important institutional access to economically vital non-citizens, while reserving participation-rights (and thus legislative authority) to citizens.

The question ‘what is the RoL good for?’ requires a shift in the analytical perspective with which we approach the study of law and legal institutions in ancient Athens. Such a shift owes much to debates over the role and function of law in the literature on ‘institutions’ and ‘governance.’ Here, the impact of strong legal institutions on political stability and economic growth has been, in recent times, widely explored.⁹³

92. *E.g.*, Edward M. Harris, *Law and Oratory*, in *PERSUASION: GREEK RHETORIC IN ACTION* 130-50 (Ian Worthington ed., 2000); Edward M. Harris, *Open Texture in Athenian Law*, *DIKE*, 2000, at 27, 27-29 (It.); Harris, *POLITICS*, *supra* note 28.

93. *See, e.g.*, DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* (1990); DOUGLASS C. NORTH, *STRUCTURE AND CHANGE IN ECONOMIC HISTORY* (1981); Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 *AM. ECON. REV.* 1369 (2001); Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 *J. POL. ECON.* 949 (2005); Rafael La Porta et al., *Law and Finance*, 106 *J. POL. ECON.* 1113 (1998); Rafael La Porta et al., *Legal Determinants of External Finance*, 52

It is by reference to these fields that, I suggest, we should frame our questions concerning the RoL in Athens, at least insofar as we recognize (and are interested in) the potential contribution of the Athenian RoL to modern debates. In the remainder of this paper, I lay out the framework for an analysis of Athenian legal institutions and their impact on democratic stability and economic development in the fourth century—an analysis that will receive more ample study in my dissertation.

IV. RULE OF LAW, POLITICAL STABILITY AND ECONOMIC DEVELOPMENT IN FOURTH CENTURY ATHENS

In what follows, I move from the assumption that Athens was indeed different in the fourth than in the fifth century, not only from the standpoint of its legal institutions but also from a political and economic perspective: the loss of the Athenian empire in the aftermath of the Peloponnesian War meant the loss of the single most important source of revenues; at the same time, the fragility of the democracy surfaced in two almost consecutive and increasingly violent oligarchic regimes and led to important reforms that modified the democratic structure of the polis.⁹⁴ Yet, if we follow Ober, in the aftermath of these changes—that is, in the fourth century—Athens was still an incredibly prosperous and stable democracy.⁹⁵ How did the polis manage to rebound so definitively?

J. FIN. 1131 (1997); Rafael La Porta et al. *The Economic Consequences of Legal Origins*, 46 J. Econ.Lit. 285, 285 (2008); Rafael La Porta et al., *The Quality of Government*, 15 J.L. ECON., & ORG. 222, 222 (1998); Dani Rodrik et al., *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131 (2008); Daniel Kaufmann & Aart Kraay, *Growth Without Governance*, (World Bank Inst. & Dev. Research Grp., Pol’y Research Working Paper No. 2928, 2002), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/12/21/000094946_0212060414208/Rendered/PDF/multi0page.pdf.

94. For a recent and comprehensive treatment of these changes, see Ober & Weingast, *supra* note 16.

95. JOSIAH OBER, *DEMOCRACY AND KNOWLEDGE* 265-68 (2008).

In my dissertation, I will present an account of how Athens overcame the threat of violence and the problem of limited resources in a way that allowed the polis to successfully develop, both politically and economically. My hypothesis suggests that a consensus on law created the conditions without which political stability and economic growth would have been highly unlikely. In particular, I suggest that such consensus created two conditions for sustained stability and growth.

First, the consensus prevented Athens from devolving into protracted stasis after the unrest of the years 404/3. I consider political stability as neither a necessary nor a sufficient condition for growth. Yet, as a minimum requirement, I contend that the likelihood of achieving high and sustained economic growth in the context of high and sustained large-scale social conflict is small. Such an assumption may sound almost commonsensical. Yet, both in the ancient and in the modern world, the study of the impact of violence on processes of development has produced mixed results.⁹⁶

Second, by making democracy a viable option, the consensus laid the foundation for Athenian recovery and growth because it allowed Athens to exploit its limited resources more efficiently. I contend that, among the real regime options available to the polis, the challenge for post-imperial Athens to achieve high and sustained levels of economic growth would have been magnified had a government other than the democracy been established. I identify the harbor of Piraeus as the single most important source of potential revenues in the aftermath of the late fifth century wars, and I assess the crucial role of the

96. I investigate the validity of my assumption by means of a comparison between the experiences of civil war in Syracuse in the fifth and fourth centuries and in Rome in the late second and first centuries. The question guiding the investigation can be stated as follows: is civil war *per se* bad for economic development? For a description of the civil war in Syracuse, see, for example, SHLOMO BERGER, *REVOLUTION AND SOCIETY IN GREEK SICILY AND SOUTHERN ITALY* 34-52 (1992). For Rome, see, for example, P.A. BRUNT, *SOCIAL CONFLICTS IN THE ROMAN REPUBLIC* (1971).

harbor in the recovery of Athens.⁹⁷ In the context of limited resources, tapping into Piraeus' crippled potential required major investments in infrastructure and institutional capacity.⁹⁸ These investments contributed to lower the threat of violence by raising the cost of fighting; at the same time, their successful implementation required a set of new political and economic bargains among citizens and between citizens and a host of other actors.

The story of Athens in the fourth century is a story that revolves around Piraeus and the 'people of Piraeus'—slaves, metics, and foreign merchants—much more fundamentally than it is usually acknowledged. In the aftermath of the civil war, the failure of the repeated attempts of the democratic leader Thrasybulus to extend citizenship to those slaves, metics and foreigners that had fought against the supporters of the bloody oligarchy of the 'Thirty Tyrants' reveals that Athenian citizenship was not up for grabs.⁹⁹ Yet, Athens needed slaves, metics, and merchants—the manpower of Piraeus—as much as it needed the harbor itself. Preventing the productive sectors of the society from sharing in the public good of citizenship, especially after

97. In order to explore the validity of my assumption, I formulate the following counterfactual: had Athens been razed to the ground at the end of the Peloponnesian War, what was the fate of Piraeus likely to have been?

98. See *supra* note 16 and accompanying text. In addition to rebuilding the infrastructure of the harbor, the polis also needed to figure out a way to attract merchants and traders by means other than coercion.

99. Aristotle, *supra* note 60, § 40.2 ([Arist.] *Ath. Pol.* 40.2); AESCHINES, *Against Ctesiphon*, in AESCHINES (Charles Darwin Adams trans., 1919) (Aeschin. 3.195), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:text:1999.01.0002:speech=3:section=195&highlight=thrasybulus>; PLUTARCH, *Dinarchus*, in VITAE DECEM ORATORUM § 10 (William W. Goodwin trans., 1874) (Plutarch, X Orat. Vit. 835 F-36 A), available at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2008.01.0346%3Achapter%3D10; P.Oxy.XV 1800: Miscellaneous Biographies, OXYRHYNCHUS PAPYRI COLLECTION, http://163.1.169.40/cgi-bin/library?e=q-000-00---0POxy--00-0-0--0prompt-10---4-----0-11--1-en-50---20-about-1800--00031-001-0-0utfZz-8-00&a=d&c=POxy&cl=search&d=HASH9e99183be4ab4dd6840a04> (last visited Dec. 23, 2013) (P.Oxy 1800 Fragments 6 and 7); *Searchable Greek Inscriptions, IG II² 10*, PACKARD HUMAN. INST., <http://epigraphy.packhum.org/inscriptions/main> (last visited Dec. 23, 2013) (follow Attica (IG I-III) hyperlink; then follow IG II² hyperlink; then follow 1-278 hyperlink; then follow 1-20 hyperlink; then follow 10 hyperlink).

their contribution to the reestablishment of the democracy, would appear to be a missed opportunity. So much so if we compare Athens with later societies, particularly the Italian city-states of early modern times: here, the establishment of paths to citizenship for merchants has been rightly regarded as the institutional hallmark of the ability of places such as Venice and Genoa to harness the economic forces unleashed by the productive sectors of society and grow 'larger than life.'¹⁰⁰

The Athenian attitude toward citizenship has contributed to produce an image of Athens as a closed society—ultimately, a 'child of its time.' Yet, I suggest that the Athenians' efforts to protect citizenship in the early fourth century are best understood as attempts to protect the fragile political equilibrium that the new democracy managed to devise in the aftermath of a tremendous and protracted shock to the system.

At the same time, if citizenship was a public good that the Athenians were unwilling to share with others, other public goods were made available. The fifth century 'economy of coercion' was superseded by a fourth century 'open access economy' that made Piraeus an attractive, commercial haven in the Aegean. The reconstruction of Piraeus' walls and dockyards and the land grants to traders' religious sanctuaries are only some of the measures aimed at returning Piraeus to its position of primacy: this goal was largely achieved by means of reforms that lowered transaction costs and opened up spaces for merchants to obtain legal redress as disputes arose.¹⁰¹ Among the measures implemented, Nicophon's law—a law whereby money-testers were set up in the markets of Athens and Piraeus to secure the silver-content of coins and avoid

100. Robert Salbatino Lopez, *Market Expansion: The Case of Genoa*, 24 J. ECON. HIST. 445, 447 (1964); see also SHEILAGH OGILVIE, INSTITUTIONS AND EUROPEAN TRADE 51-52 (2011). Ogilvie well illustrates the tensions around the extension of forms of citizenship to merchants although he concludes that "[t]his comparative openness of Venice and Genoa may have been one source of their striking commercial dynamism." *Id.* at 52.

101. See *supra* note 16 and accompanying text.

counterfeits¹⁰²—and the establishment of the *dikai emporikai*—law courts for the resolution of commercial disputes¹⁰³—stand out.

I suggest that rather than analyzing the Athenian attitude toward citizenship and that toward productive non-citizen actors as unrelated or even contradictory, we should see them as two sides of the same coin. By throwing the doors of its law courts and markets open to productive sectors of the economy—metics, slaves (particularly *choris oikountes*, slave bankers, and some categories of public slaves), and foreign merchants—Athens devised an alternative to citizenship. Such alternative allowed the polis to exploit its resources efficiently by reaping the benefits of the economic activity of non-citizens, while at the same time protecting a level of internal stability among citizens that was likewise fundamental for growth.

This access to dispute resolution mechanism, I suggest, is the key to understand what the Athenian RoL was *good for*. Access to the law courts was neither universal nor was meant to be so as modern notions of access to justice would require. Athenian openness was less a matter of normative values than one of profit-maximization. The poor, like the economically unproductive, are absent from our sources—unlike, for example, *some* social strata that we would never expect to show up (and in fact fail to justify)—such as some categories of slaves.¹⁰⁴

The shift from the fifth to the fourth century, then, was a shift from economically productive coercion to an open access economy that revolved around the extension of legal rights and protection for those that sustained the political

102. See Ronald S. Stroud, *An Athenian Law on Silver Coinage*, 43 *HESPERIA: THE JOURNAL OF THE AMERICAN SCHOOL OF CLASSICAL STUDIES AT ATHENS* 157, 159 (1974).

103. See LANNI, *supra* note 14, at 149.

104. In my dissertation, I will have a detailed discussion of the highly fragmentary (and likewise debated) evidence related to the legal standing of *choris oikountes*, slave bankers, and some categories of public slaves.

structure of Athens by bringing much needed revenues to the polis.¹⁰⁵

The way the political, economic, and legal infrastructure of Athens bounced back, refashioned, from the experience of violence and a protracted shock to the system constitutes an example of successful democratic consolidation that is worth explaining. However, the fact that the choice of democracy was, at least in part, a legacy of path dependence warns us against the use of easy recipes for implementing democracy where democracy has never appeared. At the same time, the role of law and legal institutions at the very root of changes in economic structures may provide indications as to what needs to, and can be, done.

CONCLUSION

If we follow Gowder's argument, we may conclude that Athens took many steps along the RoL continuum but not enough of them: in fact, Athens achieved regularity and publicity but not generality all the way down. As students of the Athenian democracy, we tend to conceive of inclusion strictly as a political matter and to justify the failures of universal inclusion by means of historical contextualization. As Ober put it, "The limitation of the franchise to freeborn males is certainly undemocratic by current standards, but to deny the name democracy to Athens' government, on the grounds that the Athenians did not recognize rights that most western nations have granted only quite recently, is ahistorical."¹⁰⁶ As a result, speaking of RoL in terms of political equality, as Gowder does, cannot but lead to the conclusion that in Athens access was partial and the RoL 'weak.'

Conversely, my point is that considering the Athenian attitude toward inclusion only in terms of political inclusion is also "ahistorical." My account of RoL in Athens aims at showing that *some forms of equality and access* were substantially expanded in the course of the classical period. The fact that the Athenian solution was morally imperfect

105. See Ober & Weingast, *supra* note 16.

106. OBER, MASS AND ELITE, *supra* note 6, at 6.

ought not to obscure the fact that it was certainly better than the alternatives such as civil war, poverty, and immiseration—i.e., the conditions of much of the developing world where the RoL (whatever its definition) has proven hard to implement.

The Athenian approach to RoL, therefore, may point to a way forward—one that does not achieve Gowder's ideal of full equality but which drives in that direction, while at the same time contributing significantly to the provision of important public goods such as peace and prosperity.

Such formulation of the nature and role of the RoL may at times allow for some very disturbing moments—for example, Berlusconi avoiding jail, threatening to bring down the government, and asking the President of the Republic for an amnesty on account of service rendered . . . all the same time! However, those moments may be the price of choosing non-civil war and prosperity over an all-or-nothing struggle for perfect equality here and now.