

# PRECAUTIONARY CONSTITUTIONALISM IN ANCIENT ATHENS

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## TABLE OF CONTENTS

INTRODUCTION .....	893
I. WHAT IS PRECAUTIONARY CONSTITUTIONALISM? .....	894
II. ATHENIAN PRECAUTIONS .....	897
A. <i>Limiting Magistrates' Influence: Selection by Lot, Rotation, and Collegiality</i> .....	897
B. <i>Ostracism</i> .....	899
C. <i>Graphe Paranomon</i> .....	901
III. PROBLEMS OF PRECAUTIONS .....	904
A. <i>Futility and Commitment Problems</i> .....	905
B. <i>Countervailing Risks: Jeopardy and Perversity</i> .....	906
C. <i>Successful Precautions</i> .....	908
IV. EVALUATING ATHENIAN PRECAUTIONS .....	909
A. <i>Ostracism and Perversity</i> .....	909
B. <i>The Graphe Paranomon and Futility</i> .....	910
C. <i>Lot, Rotation, and Collegiality: Problems of Jeopardy</i> .....	912
CONCLUSION .....	914

## INTRODUCTION

The Athenian democracy developed striking institutions that, taken together and separately, have long engaged the attention of theorists in law, politics, and history. We will offer a unifying account of

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the major institutions of the Athenian constitutional order, attempting both to put them in their best light and to provide criteria for evaluating their successes and failures. Our account is that Athenian institutions are best understood as an illustration of “precautionary constitutionalism”: roughly, the idea that institutions should be designed to safeguard against political risks, limiting the downside and barring worst-case political scenarios, even at the price of limiting the upside potential of the constitutional order.<sup>1</sup> We use this framework to illuminate some of the distinctive features of the Athenian democracy: selection of officials by lot, rotation of office, collegiality, ostracism, and the *graphe paranomon* (the procedure for overturning an unconstitutional decree).

Under some circumstances, precautionary constitutionalism is a useful strategy of institutional design. Under other circumstances, however, precautionary constitutionalism can go wrong in characteristic ways—by perversely exacerbating the very risks it seeks to prevent, by jeopardizing other values and thereby imposing excessive costs, or simply by creating futile precautions that fail the test of incentive-compatibility.<sup>2</sup> We evaluate the precautionary institutions of the Athenian democracy in this light, and suggest that some failed, while others succeeded. While selection by lot, rotation, and collegiality proved to be enduring and incentive-compatible institutions, ostracism perversely exacerbated the risks of tyranny and political domination it was intended to prevent, and the *graphe paranomon* collapsed into futility. Given the limits of our sources and the resulting uncertainty about the performance of Athenian institutions, however, these judgments are inevitably tentative.

Part I defines precautionary constitutionalism and explains its characteristic features. Part II analyzes major Athenian institutions as precautions against political risks, especially tyranny and the excesses of democracy. Part III examines the general conditions under which constitutional precautions succeed or fail. Part IV evaluates Athenian institutions accordingly. A brief conclusion follows.

## I. WHAT IS PRECAUTIONARY CONSTITUTIONALISM?

In ordinary subconstitutional risk regulation, a major set of debates involves “precautionary principles.” There is a bewildering variety of

<sup>1</sup> For an analysis of precautionary constitutionalism, see Adrian Vermeule, *Precautionary Principles in Constitutional Law*, 4 J. LEGAL ANALYSIS 181 (2012), available at <http://jla.oxfordjournals.org/content/4/1/181.full.pdf>. The analysis in Parts I and III draws upon this work.

<sup>2</sup> See generally *id.*

such principles,<sup>3</sup> and the debates often bog down in issues of definition and in subtle differences between formulations. Broadly speaking, however, the common theme is that precautionary principles place the burden of uncertainty on proponents of actions or technologies perceived to be risky. This sort of approach implicates two dimensions: the timing of precautions and their stringency. “On these sliding-scale dimensions, regulation is ‘more precautionary’ when it intervenes earlier and/or more stringently to prevent uncertain future adverse consequences.”<sup>4</sup>

If ordinary risks to health, safety, and the environment pose “first-order problems” of optimal regulatory policy, political risks pose “second-order problems” that arise from the design of institutions, the allocation of decision-making authority among institutions, and the selection of officials to staff those institutions. While the debate over precautionary principles is a recent one as applied to ordinary risks, it is a venerable one as applied to distinctively political risks. With respect to such risks, a longstanding tradition in political and constitutional theory argues that the aim of institutional design should be precautionary rather than optimizing. Rather than attempting to select the *best* institutions or leaders, the argument runs, the aim should be to select the *safest* institutions or leaders. Institutions should be designed in order to minimize downside risks and to prevent the occurrence of worst-case scenarios. In this tradition, the political risks most often seen as requiring stringent safeguards are: dictatorship and tyranny, in the sense of rule by one man; oligarchy or aristocratic rule; majoritarian tyranny and oppression of political or ethnic minorities; excessive centralization; and deprivation of property rights.

Theorists in this tradition have sometimes offered precautionary master principles for designing and evaluating the institutions of a constitutional order. Perhaps the most famous claim of this sort is David Hume’s “knavery principle”: the maxim that “in contriving any System of Government, and fixing the several Checks and Controuls of the Constitution, every Man ought to be suppos’d a *Knave*, and to have no other End, in all his Actions, than private Interest.”<sup>5</sup> Hume acknowledged that “it appears somewhat strange, that a Maxim should be true in *Politics*, which is false in *Fact*.”<sup>6</sup> Not all men or officials are in fact knaves. Yet Hume’s idea, at least as adumbrated by later theorists,<sup>7</sup>

<sup>3</sup> See Per Sandin, *Dimensions of the Precautionary Principle*, 5 HUM. & ECOLOGICAL RISK ASSESSMENT 889, 890–91 (1999).

<sup>4</sup> Jonathan B. Weiner, *Precaution in a Multirisk World*, in HUMAN AND ECOLOGICAL RISK ASSESSMENT: THEORY AND PRACTICE 1509, 1514 (Dennis J. Paustenbach ed., 2002).

<sup>5</sup> 1 DAVID HUME, *Of the Independency of Parliament*, in ESSAYS, MORAL AND POLITICAL 79, 84 (1741).

<sup>6</sup> *Id.* at 85.

<sup>7</sup> See, e.g., GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES:

was that bad types (knaves) do more harm than good types do good, so that the constitutional order should build in a systematic skew towards preventing knavery or minimizing its harms.

Hume's polity was only partly a representative-democratic one. For recognizably modern democracies, the leading statement of precautionary constitutionalism was offered by Karl Popper, whose core idea in political theory was that democracy is best justified as a precautionary mechanism against tyrannous or incompetent leadership. Popper's "new approach" to the problem of politics was to "replace the question: *Who should rule?* by the new question: *How can we so organize political institutions that bad or incompetent rulers can be prevented from doing too much damage?*"<sup>8</sup> The answer, for Popper, was democracy: "the principle of a democratic policy" is to "create, develop and protect, political institutions for the avoidance of tyranny."<sup>9</sup> In this light, Popper argued, the "equalitarian methods of democratic control, such as general elections and representative government," amounted to "reasonably effective institutional safeguards against tyranny."<sup>10</sup>

There is a real question whether Popper identifies the right institutional safeguards, even assuming the validity of his master principle that institutions should be designed, above all, with a view to preventing tyranny. As Bernard Manin has shown,<sup>11</sup> political theorists and political actors in the ancient world and in the Italian city-states of the Renaissance argued that elections themselves created a risk of aristocratic oligarchy, if not tyranny, in virtue of their tendency to select "the best"—who will often be the wealthiest or the most pedigreed.<sup>12</sup> On this view, the random mechanism of political selection by lot is a preferable safeguard against oligarchy or tyranny, because it is more stringent. We take up these issues in Part II, in the context of selection of office-holders by lot in the Athenian political system.

For now, the important point is that whatever its merits, Popper's precautionary approach to the constitutional order was not new at all. Predecessors such as Hume are recognized antecedents, but we will

CONSTITUTIONAL POLITICAL ECONOMY 54-59 (1985).

<sup>8</sup> KARL R. POPPER, *The Paradoxes of Sovereignty*, in POPPER SELECTIONS 319, 320 (David Miller ed., 1985) (citations omitted).

<sup>9</sup> *Id.* at 324.

<sup>10</sup> *Id.* For another version of precautionary political theory, centered on liberal freedoms rather than democracy, see JUDITH N. SHKLAR, *The Liberalism of Fear*, in POLITICAL THOUGHT AND POLITICAL THINKERS 3 (Stanley Hoffman ed., 1998).

<sup>11</sup> See generally BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* (1997) (detailing a longstanding tension between democracy and representative elections).

<sup>12</sup> See, e.g., HERODOTUS, *THE HISTORIES* bk. 3.80, at 207 (John Marincola trans., 2003) (also referenced as *Hdt.* 3.80). For a discussion of the lot as democratic, see JAMES HEADLAM, *ELECTION BY LOT AT ATHENS* 12-17 (1890); Richard G. Mulgan, *Lot as a Democratic Device of Selection*, 46 REV. POL. 539 (1984).

claim that the precautionary tradition in constitutionalism goes back at least as far as Athens. The next Part substantiates this claim.

## II. ATHENIAN PRECAUTIONS

In this Part, we discuss three examples of precautionary constitutionalism in classical Athens: 1) provisions limiting executive magistrates' power, such as the lot, rotation, and collegiality; 2) ostracism; and 3) the *graphe paranomon*, the procedure for overturning unconstitutional decrees. The first two methods were aimed at protecting popular sovereignty by preventing any individual from accumulating too much power, or at worst, becoming a tyrant. The third was aimed at protecting popular sovereignty from itself, by preventing demagogues from misleading the Assembly into rash decisions.

### A. Limiting Magistrates' Influence: Selection by Lot, Rotation, and Collegiality

In the ancient Greek world, selection of magistrates by lot was nearly synonymous with democracy.<sup>13</sup> One of the most important functions of the lot in the Athenian democratic structure was to prevent any individual magistrate from amassing too much power and thereby threatening the sovereignty of the popular Assembly. We argue that the lot, taken together with the principles of rotation and collegiality, operated as precautionary measures against individuals gaining too much influence.

In the classical period, the vast majority of Athenian magistrates, about 1100 in all, were selected by lot for one-year terms.<sup>14</sup> The *Boule* (Council), which served as the executive body of the Assembly and was by far the most important magistracy, illustrates the Athenian commitment to lot and rotation.<sup>15</sup> The *Boule* was comprised of 500 men chosen by lot, and was divided into ten groups, or *prytanies*, of fifty.<sup>16</sup>

<sup>13</sup> See MANIN, *supra* note 11. For the ancient sources, see, for example ARISTOTLE, *THE POLITICS* bk. VI, ch. 6, §§ 1317b17-1318a3, at 363 (T.A. Sinclair trans., Penguin 1962) (also referenced as *Ar. Pol.* 1317b17-1318a3) (identifying offices filled by lot as a feature of democracy); HERODOTUS, *supra* note 12, bk. 3.80, at 207 ("Under a government of the people a magistrate is appointed by lot.")

<sup>14</sup> MOGENS HERMAN HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES: STRUCTURE, PRINCIPLES, AND IDEOLOGY* 230 (1991).

<sup>15</sup> For discussion of the operation of the *Boule*, see *id.* at 247-65.

<sup>16</sup> Aristotle, *The Constitution of Athens* 43.2-.3, in ARISTOTLE AND XENOPHON ON DEMOCRACY AND OLIGARCHY 147, 185 (J.M. Moore trans., 1986) (also referenced as *Ar. Ath. Pol.* 43.2-.3); see also HANSEN, *supra* note 14, at 247-50.



Each *prytany* took a turn serving as the executive committee of the Council for one-tenth of the year, and every day a new "president" (*epistates*) was selected by lot from among the 50 members of the current *prytany*.<sup>17</sup> During his day-long term in office, the *epistates* held the keys to the city's store of money and acted as the head of state for communications with other city-states.<sup>18</sup>

While most magistrates were chosen by lot, a minority of positions that were deemed to require expertise were chosen by election.<sup>19</sup> The ten generals were the most prominent elected offices; the generals were also not subject to the principle of rotation or term limits.<sup>20</sup> Other elected offices included other military commanders, a few of the most important financial posts, the superintendent of the water supply, and other specialized jobs.<sup>21</sup>

Another important feature of the democracy was collegiality, that is, the diffusion of power among several magistrates.<sup>22</sup> In Athens, most magistrates served on boards, typically made up of ten officials. To provide a few examples, boards were assigned to oversee market trading, public works, state finance, court administration, and military operations.<sup>23</sup> Each member of the board generally had equal powers; there was no chairman, and presumably decisions were made by consensus, or, where necessary, majority vote.<sup>24</sup> Many of the elected officials, most notably the generals, also shared power on boards of ten and were thereby subject to the principle of collegiality.<sup>25</sup>

The notion of collegiality as a precaution against tyranny is straightforward,<sup>26</sup> but the idea that the lot and rotation were precautionary measures may not be as obvious. Although ancient sources do not provide a clear statement of the reasons for adopting the lot,<sup>27</sup> selection by lot is uniformly associated with democratic reforms, as opposed to election, which is considered aristocratic.<sup>28</sup> Selection by

<sup>17</sup> HANSEN, *supra* note 14, at 250.

<sup>18</sup> *Id.*

<sup>19</sup> See Xenophon, *The Constitution of the Athenians* 1.2-.3, in ARISTOTLE AND XENOPHON ON DEMOCRACY AND OLIGARCHY, *supra* note 16, at 37, 37 (also referenced as *Xen. Ath. Pol.* 1.2-.3) (noting that Athens did not use the lot for posts requiring expertise, such as general (*strategos*) or commander of the cavalry).

<sup>20</sup> Aristotle, *The Constitution of Athens*, *supra* note 16, 61.1-.7, at 201.

<sup>21</sup> *Id.* 43.1, 61.1-.7, at 185, 201. For discussion, see HANSEN, *supra* note 14, at 233-35.

<sup>22</sup> For a discussion of collegiality in Athens, see HANSEN, *supra* note 14, at 237-39.

<sup>23</sup> For discussion, see *id.* at 243.

<sup>24</sup> *Id.* at 237-39.

<sup>25</sup> Aristotle, *The Constitution of Athens*, *supra* note 16, 61.1-.7, at 201.

<sup>26</sup> See HANSEN, *supra* note 14, at 239.

<sup>27</sup> In fact, there is much debate about when the lot was introduced. For discussion, see HEADLAM, *supra* note 12, at 78-87; Mogens Herman Hansen, *When Was Selection by Lot of Magistrates Introduced in Athens?*, 41 CLASSICA ET MEDIAEVALIA 55 (1990).

<sup>28</sup> See *supra* note 13 and accompanying text (citing ancient sources). For discussion of the lot as democratic, see HEADLAM, *supra* note 12, at 12-17; and Mulgan, *supra* note 12.

lot and the related concept of rotation in office likely had many purposes, including promoting popular and equal participation in government, reducing the risk of bribery and corruption, and minimizing factionalism and conflict between elite groups.<sup>29</sup> But an equally important rationale for the lot and rotation was precautionary: as several scholars have pointed out, it prevented any individual executive official from gaining too much power, thereby insuring the sovereignty and supremacy of the Assembly.<sup>30</sup> Hansen has pointed out that it was the critics of democracy who traced the lot to democratic notions of equality; both the famous statement of democratic principles in Herodotus' Persian Debate and book six of Aristotle's *Politics* appear to link the lot and limitations of magistrates' power with preserving the sovereignty of the demos.<sup>31</sup> Headlam similarly describes the distinctly second-best nature of the lot: "It was introduced . . . to prevent the executive officials from being too influential . . . [M]ediocrity in office was its object, because this was the only means of insuring that not only the name but also the reality of power should be with the Assembly."<sup>32</sup> It is important to emphasize that we are not arguing that the only, or even the chief, motivation for the introduction of the lot and rotation was the desire to limit magistrates' power; we are simply highlighting this precautionary function of the lot as one of the many rationales for this institution. We will evaluate how well these mechanisms worked as precautionary measures in Part IV.

## B. Ostracism

One of the most distinctive institutions in the Athenian democracy was ostracism, a mechanism through which the people could vote to exile a prominent citizen for ten years. Our ancient sources suggest that the Athenians viewed ostracism as a precaution against tyranny and the danger of individual politicians gaining too much power.

<sup>29</sup> See, e.g., HANSEN, THE ATHENIAN DEMOCRACY, *supra* note 14, at 140-41, 236 (reducing bribery and corruption, and minimizing factionalism, respectively); Mulgan, *supra* note 12, at 552 (expressing belief in equality, reducing the authority of executive officials, producing representative bodies, and reducing factionalism). For a discussion of specific political motivations surrounding the introduction of the lot, see Robert J. Buck, *The Reforms of 487 B.C. in the Selection of Archons*, 60 CLASSICAL PHILOLOGY 96 (1965).

<sup>30</sup> HANSEN, *supra* note 14, at 236; HEADLAM, *supra* note 12, at 32; C. HIGNETT, A HISTORY OF THE ATHENIAN CONSTITUTION TO THE END OF THE FIFTH CENTURY B.C. 230-31 (1952); Mulgan, *supra* note 12, at 548.

<sup>31</sup> ARISTOTLE, *supra* note 13, bk. 6, ch. 2, 1319b17-1318a3, at 363; HANSEN, *supra* note 14, at 236; HERODOTUS, *supra* note 12, bk. 3.80, at 207.

<sup>32</sup> HEADLAM, *supra* note 12, at 32.



Each year, the Athenian assembly voted on whether to hold an ostracism.<sup>33</sup> If an ostracism was to be held, Athenians gathered in the agora to cast ballots by writing the name of a citizen on a potsherd.<sup>34</sup> As far as we know, there were no formal speeches or denunciations made, though politicians tried to influence votes informally by, for example, providing ready-made potsherds inscribed with the name of their political rivals.<sup>35</sup> As long as the quorum of 6000 votes was reached, then whoever had the most votes, however few that might be, was ostracized.<sup>36</sup> Ostracism was significantly less harsh than exile, because the ostracized individual could retain his land in Athens and return to it after the ten-year period had ended.<sup>37</sup>

Unlike most features of the Athenian constitution, ancient sources provide an explicit rationale for the institution of ostracism. Although the precise date is disputed,<sup>38</sup> Aristotle's *The Constitution of Athens* reports that Cleisthenes introduced ostracism as a measure against tyranny, and, in particular, to prevent Hipparchus from reinstating the Peisistratid tyranny.<sup>39</sup> In the *Politics*, Aristotle similarly describes ostracism as a mechanism for preventing any citizen from amassing too much power.<sup>40</sup> One scholar has suggested that the primary appeal of ostracism over, for example, Solon's anti-tyranny law, was its precautionary nature: tyranny is a crime "which should be prevented rather than punished,"<sup>41</sup> and ostracism permitted the removal of dangerous individuals before they became so powerful as to be beyond

<sup>33</sup> R.K. SINCLAIR, *DEMOCRACY AND PARTICIPATION IN ATHENS 169-70* (1988). For general discussions of ostracism, see P.J. RHODES, *A COMMENTARY ON THE ARISTOTELIAN ATHENAION POLITEIA* 267-71 (1993); Sara Forsdyke, *Exile, Ostracism and Athenian Democracy*, 19 *CLASSICAL ANTIQUITY* 232 (2000); Donald Kagan, *The Origin and Purposes of Ostracism*, 30 *HESPERIA* 393 (1961); Antony Raubitschek, *The Origin of Ostracism*, 55 *AM. J. ARCHAEOLOGY* 221 (1951).

<sup>34</sup> SINCLAIR, *supra* note 33.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> For a discussion of the debate, with references, see RHODES, *supra* note 33, at 267-69.

<sup>39</sup> See Aristotle, *The Constitution of Athens*, *supra* note 16, 22.1, at 165; see also RHODES, *supra* note 33, at 269 ("On the purpose of ostracism there is general agreement in the sources: it was devised after the fall of the tyranny to prevent future tyrannies."). It is important to note that some scholars argue that the purpose of ostracism was a different type of precaution: not to prevent tyranny, but to prevent factionalism by providing a peaceful resolution of conflict between political rivals. *E.g.*, Forsdyke, *supra* note 33, at 254-55. Space does not permit a full discussion of why we find this theory, though plausible, less convincing than the standard anti-tyranny account of ostracism. But if the anti-factionalism theory of ostracism is correct, then ostracism does not suffer from perversity as described in Part IV of this Article. Rather, under this view, the use of ostracism by politicians to eliminate their rivals was not a misuse of the institution at all, but evidence of its success in fulfilling its aims.

<sup>40</sup> ARISTOTLE, *supra* note 13, bk. 3, ch. 13, 1284a17, at 213-14. For further discussion, see RHODES, *supra* note 33.

<sup>41</sup> Raubitschek, *supra* note 33, at 225.

the reach of a tyranny prosecution.<sup>42</sup> It seems clear that ostracism was adopted not because it was viewed as an optimal institution—in fact, since no trial was held it clearly introduced a risk that the state would lose some of its most talented leaders for no reason—but rather as a precaution against the very real risk of a return to tyranny.

As we will see in Part IV, from the beginning politicians used ostracism as a weapon against their rivals, thereby undermining the function of ostracism as a precaution against tyranny. Perhaps in part for this reason, ostracism fell into disuse by the last quarter of the fifth century.<sup>43</sup>

### C. Graphe Paranomon

The *graphe paranomon* was a legal procedure for challenging legislation passed by the Athenian Assembly as *paranomos* ("contrary to law," or "unconstitutional"). Although we do not have a contemporary account of the reasons for the creation of the *graphe paranomon* procedure, it is clear that this institution was intended and structured as a precaution against rash decision-making by the popular Assembly, particularly imprudent actions taken under the influence of demagogues.

Under the *graphe paranomon* procedure, any male citizen could challenge a decree as *paranomos*, or unconstitutional.<sup>44</sup> There is some debate over whether a decree could be overturned where it did not contravene existing statute law but instead violated general

<sup>42</sup> For a discussion of ostracism as a form of "prediction market" that aggregated opinions about which individual was most dangerous to the state, see JOSIAH OBER, *DEMOCRACY AND KNOWLEDGE* 160-61 (2008).

<sup>43</sup> See SINCLAIR, *supra* note 33, at 170 (noting that ostracism fell into disuse).

<sup>44</sup> The legal reforms at the end of the fifth century established a hierarchy between laws (*nomoi*) that proclaimed general and permanent higher norms of general application and time-limited decrees (*psephismata*); in theory, at least, no decree could contravene a law, and no new law could contradict an existing law unless the pre-existing law was simultaneously repealed. HANSEN, *supra* note 14, at 161-62. Following this reform, the *graphe paranomon* was limited to challenges to decrees, while a new procedure, the *graphe nomon me epitedeion theinai* ("public procedure for introducing an unsuitable law"), was introduced for challenging new laws. Prior to the reforms, all legislation could be challenged under the *graphe paranomon*. For a general discussion of the *graphe paranomon* procedure, see 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 Rasmussen & Sonja Holbøll trans., 1974); Hans Julius Wolff, "Normenkontrolle" und Gesetzesbegriff in der attischen Demokratie, in *SITZUNGSBERICHTE DER AKADEMIE DER WISSENSCHAFTEN HEIDELBERG PHILOSOPHISCH-HISTORISCHE KLASSE* 1969-1970 (1970); M.J. Sundahl, *The Use of Statutes in the Seven Extant graphe paranomon and graphe nomon me epitedeion theinai Speeches* (May 2000) (unpublished Ph.D. dissertation, Brown University) (on file with author). For an overview of both the *graphe paranomon* and *graphe nomon me epitedeion theinai* procedures, see HANSEN, *supra* note 14, at 205-12.

constitutional principles, or even where it simply was deemed to be contrary to the city's interests.<sup>45</sup> A constitutional challenge would result in a day-long jury trial in which the sponsor of the legislation was charged with defending his decree.<sup>46</sup> The typical jury included 501 members, but more jurors might have been used in high-profile cases.<sup>47</sup> Any male citizen could challenge proposed legislation either before or after the Assembly enacted it; here, the legislation was suspended pending the outcome of the trial.<sup>48</sup> If the prosecution was successful, the decree was nullified and, as long as the challenge was brought within a year, the jury assessed an appropriate punishment for the defendant, usually a fine.<sup>49</sup> If the jury upheld an already enacted decree, then the legislation became legally binding.<sup>50</sup> Interestingly, it appears that if the jury in a *graphe paranomon* upheld a decree that had been challenged prior to legislation's enactment, the decree was automatically validated even though the Assembly had never voted on the measure.<sup>51</sup>

We do not know for certain when the *graphe paranomon* was introduced. The first attested example is 415 B.C.,<sup>52</sup> and there is some reason to think that the institution was relatively new at this time.<sup>53</sup> The current leading, though necessarily speculative, accounts of the introduction of the *graphe paranomon* both emphasize the precautionary nature of the institution. For Hansen, it is not coincidental that the *graphe paranomon* appears to have been introduced soon after the demise of ostracism: for him, the *graphe paranomon* replaced ostracism as the primary mechanism for preventing individual political leaders from gaining too much power

<sup>45</sup> For discussion of this debate, see Adriaan Lanni, *Judicial Review and the Athenian "Constitution,"* in 56 DÉMOCRATIE ATHÉNIENNE—DÉMOCRATIE MODERNE: TRADITION ET INFLUENCES 235, 238–40 (Mogens H. Hansen ed., 2010).

<sup>46</sup> *Id.* at 237.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; Mogens Herman Hansen, *Grappe Paranomon Against Psephismata Not Yet Passed by the Ekklesia*, 38 CLASSICA ET MEDIAEVALIA 63 (1988), reprinted in THE ATHENIAN ECCLESIA II: A COLLECTION OF ARTICLES 1983–89, at 271–82. However, Edwin Carawan, *The Trial of the Arginousai Generals and the Dawn of Judicial Review*, 10 DIKE 19, 36–37 (2007), suggests that, at least in the fifth century, a decree could not be overturned after it was implemented.

<sup>49</sup> Wolff, *supra* note 44, at 9–10; Lanni, *supra* note 45, at 237. Carawan, *supra* note 48, at 32–35, argues that the one-year time limit on liability may not have been true of the fifth-century *graphe paranomon*.

<sup>50</sup> Lanni, *supra* note 45, at 237.

<sup>51</sup> See Hansen, *supra* note 48; Lanni, *supra* note 45, at 237–38. Presumably, in the case of proposed laws upheld in a *graphe nomon me epitedeion theinai*, the measure would still need to be duly enacted through the *nomothetai*. M.H. Hansen, *Athenian Nomothesia*, 26 GREEK, ROMAN & BYZANTINE STUD. 345, 360–71 (1985); Sundahl, *supra* note 44, at 19.

<sup>52</sup> Lanni, *supra* note 45, at 236.

<sup>53</sup> See ANDOKIDES, ON THE MYSTERIES bk. 1.17, at 33 (Douglas MacDowell ed., 1962) (also referenced as *And. Mys.* 1.17). For discussion, with references to theories dating the institution to Solon, Ephialtes, and the late fifth century, see HANSEN, *supra* note 14, at 205; Sundahl, *supra* note 44, at 24–26.

over the people.<sup>54</sup> Wolff similarly viewed the *graphe paranomon* as a way to limit the ability of individual politicians to mislead the people.<sup>55</sup> But for Wolff, the key change toward the end of the fifth century was not the abandonment of ostracism, but the rise of a new type of politician after the death of Pericles. These politicians, criticized by conservatives as demagogues, tended to exercise their power exclusively as *rhetores* (public speakers in the Assembly), rather than as generals like Pericles who were subject to election and an accounting at the end of office. Under this theory, the *graphe paranomon* was introduced to provide some political accountability for demagogues and to limit the damage that could be done by them by providing a mechanism to overturn legislation taken in haste.<sup>56</sup>

The *graphe paranomon* procedure, commonly compared to modern judicial review<sup>57</sup> or bicameralism,<sup>58</sup> is typically viewed by modern scholars as serving a precautionary function in the Athenian system. By requiring a fresh hearing on a different day, the *graphe paranomon* provided some safeguard against hasty or ill-advised legislation, particularly given the fear that skilled public speakers might mislead or whip the *demos* into a frenzy.<sup>59</sup> The Mytilenean affair of 427<sup>60</sup> may illustrate the deficiencies of Assembly decision-making that prompted the creation of the *graphe paranomon*. After being persuaded by Cleon, a demagogue, to destroy Mytilene because it had revolted against Athenian rule, the Athenians immediately thought better of their hasty decision. In that case, a second Assembly was called, and cooler heads prevailed, saving the city.<sup>61</sup>

In addition to formalizing a procedure for a sober second look at legislation, the *graphe paranomon* procedures were more conducive to rational assessment than the Assembly. The court hearing itself insured that the legislation was examined for an entire day, and that both sides of the case were given a full airing by prepared speakers.<sup>62</sup> While politicians might try to pack the Assembly with supporters or influence

<sup>54</sup> HANSEN, *supra* note 14, at 205.

<sup>55</sup> Wolff, *supra* note 44, at 18–23.

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., 2 ROBERT J. BONNER & GERTRUDE SMITH, THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE 296–97 (1938); HANSEN, *supra* note 14, at 209; T.D. Goodell, *An Athenian Parallel to a Function of our Supreme Court*, 2 YALE REV. 64 (1893); Lanni, *supra* note 45, at 257–63.

<sup>58</sup> See HANSEN, THE SOVEREIGNTY OF THE PEOPLE'S COURT, *supra* note 44, at 50; Lanni, *supra* note 45, at 258–59.

<sup>59</sup> See, e.g., HANSEN, THE SOVEREIGNTY OF THE PEOPLE'S COURT, *supra* note 44, at 50–51; Sundahl, *supra* note 44, at 21–23.

<sup>60</sup> THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR bk. 3.36–50, at 212–23 (Rex Warner trans., 1954) (also referenced as *Thuc.* 3.36–50).

<sup>61</sup> *Id.*

<sup>62</sup> Debate in the Assembly may have been significantly more chaotic. See HANSEN, THE SOVEREIGNTY OF THE PEOPLE'S COURT, *supra* note 44, at 50–51.

votes taken by open vote in the Assembly, the random selection of jurors and the secret ballot insured that individual politicians could not influence the jurors judging the constitutionality of the legislation. Finally, although there was substantial overlap between the Assemblymen and the jurors, the two groups were not exactly the same: the jury was limited to men over thirty years old,<sup>63</sup> a significant difference in a society like Athens, where age was very strongly associated with wisdom and rationality,<sup>64</sup> and where the life expectancy at birth was roughly twenty-five years.<sup>65</sup>

In theory and structure, then, the *graphe paranomon* was a precautionary institution: it was not the preferred form of law-making because it circumvented the authority of the sovereign Assembly, but it was considered a necessary precaution against the dangers of demagogues and the resulting excesses of popular democracy. In Part IV we will evaluate the extent to which this precautionary institution succeeded.

### III. PROBLEMS OF PRECAUTIONS

Under what conditions will precautionary rules and principles of constitutionalism succeed or fail, relative to their intended purposes or best justifications? The issues are inevitably local and contextual; sometimes precautions succeed, sometimes they do not, and when they fail, they may fail in different ways and on different grounds. Despite the local character of the issues, it is possible to offer some tentative generalizations about the problems of precautions. This Part identifies three such general problems—futility, jeopardy, and perversity—and, conversely, outlines some conditions under which precautions will prove successful. Part IV applies the analysis to Athenian institutions.

To be clear, the following examples of futility, jeopardy, and perversity problems are examples of arguments, not conclusions. In any particular case, the arguments may or may not be ultimately correct, and the precautions at issue may or may not be desirable, all things considered. We offer them to illustrate the typical pitfalls that precautionary constitutionalism must sidestep.<sup>66</sup>

<sup>63</sup> *Id.* at 50.

<sup>64</sup> See K.J. DOVER, GREEK POPULAR MORALITY IN THE TIME OF PLATO AND ARISTOTLE 102–06 (Hackett Publ'g 1994) (1974).

<sup>65</sup> Mogens Herman Hansen, *The Political Powers of the People's Court in Fourth-Century Athens*, in *THE GREEK CITY: FROM HOMER TO ALEXANDER* 215, 222–23 (Oswyn Murray & Simon Price eds., 1991).

<sup>66</sup> For more extended discussion of these points, see Vermeule, *supra* note 1.

#### A. Futility and Commitment Problems

Adapting categories originally developed for other purposes by the intellectual historian Albert Hirschman,<sup>67</sup> we may distinguish futility, jeopardy, and perversity as the main problems that precautions face. Futility means that the precaution fails to accomplish its intended purposes (or the purposes that put it in its best light), simply because the precaution is inefficacious. As relevant here, the most important form of futility is a commitment problem, in the economic sense. Although enacted or created at Time 1 to bind or constrain decisions at Time 2, the precaution fails to stick; when Time 2 arrives, the precaution is undone by those it was supposed to constrain.

Here the key problem is lack of incentive-compatibility: crucial actors at Time 2 lack adequate incentives to enforce the precaution enacted at Time 1. In the case of ordinary subconstitutional commitments, such as contracts, there is an external institution such as a court system that enforces the commitment. The parties can strike a deal that prevents either of them from renegeing *ex post*, and the availability of this external enforcer make the contracting parties better off *ex ante*. In constitutional settings, however, the problem is far more severe. Putting aside international institutions, there is no actor external to society who can enforce the commitment through coercive law.<sup>68</sup> The consequence is that political actors must fall back upon fragile mechanisms of decentralized enforcement, such as repeat-play and tit-for-tat cooperation.<sup>69</sup> Such mechanisms, however, are fragile because there are usually multiple equilibria—if others will not contribute to enforcement of the constitutional rules, then each actor has no incentive to do so—and because a Time 1 commitment will come unstuck altogether if no one desires to enforce it at Time 2.

In contemporary constitutional law,<sup>70</sup> an example is constitutional protection of free speech. A standard theory of free speech, the “pathological perspective,”<sup>71</sup> appeals to the desirability of precautionary commitments against majoritarian oppression of dissent, caused by political panic or other collective pathologies. On this approach, some constitutional rulemaker—a framer or a constitutional court—may

<sup>67</sup> See ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991).

<sup>68</sup> See JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* 94–95 (2000). See generally Daron Acemoglu, *Why Not a Political Coase Theorem? Social Conflict, Commitment, and Politics*, 31 J. COMP. ECON. 620 (2002).

<sup>69</sup> See generally Acemoglu, *supra* note 68.

<sup>70</sup> For other constitutional applications, see Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657 (2011).

<sup>71</sup> See generally Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).



attempt to lay down, at Time 1, speech-protecting rules that aim to institutionalize precautions against pathological action at Time 2. The problem is that when Time 2 actually arrives, then-extant actors may lack any incentive to enforce the speech-protective commitment in their current circumstances. Judges, for example, may themselves be caught up in the passions of the moment and not only buckle to the majority's demands for oppression, but actually embrace them; a review of judicial protection for free speech in wartime argues that this is a common denouement.<sup>72</sup> Where this occurs, the Time 1 precaution proves futile.

### B. *Countervailing Risks: Jeopardy and Perversity*

In the futility case, a precaution is ineffectual. In other cases, a precaution is effectual but bad. In general, this can happen because of countervailing risks. While the precaution focuses on a target risk, the precaution may neglect other types of risks, or the precaution may itself exacerbate the very risk it aims to prevent. Where the countervailing risk is different than the target risk, we will call the issue one of jeopardy; where the countervailing risk is the same as the target risk, so that the precaution actually operates at cross-purposes to itself, we will call the issue one of perversity.

*Jeopardy.* Jeopardy problems are conceptually straightforward, although the causal mechanisms that produce jeopardy differ from case to case. The logic of jeopardy is simply that taking precautions to reduce a target risk may create or exacerbate a countervailing risk. Where the latter effect is particularly severe, precautions against the target risk may make things worse rather than better overall. The costs of precautions may exceed their benefits, using "costs" and "benefits" in a loose and informal consequentialist sense, rather than in the technical sense of cost-benefit analysis that defines costs and benefits in terms of monetized willingness to pay or accept.

In modern (post-Enlightenment) constitutional theory, jeopardy arguments appear at both the macro-level of the whole constitution and at the micro-level of particular constitutional rules and institutions. At the macro-level, Federalist No. 41 invoked jeopardy to rebut the Antifederalist concern that a strong national government would "abuse" its powers.<sup>73</sup> Publius' straightforwardly consequentialist response was that a strong national government would help to produce domestic peace and social welfare, so that stringent precautions against governmental abuse would forego too many independent benefits: "[T]he choice must always be made, if not of the lesser evil, at least of

<sup>72</sup> See generally GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004).

<sup>73</sup> THE FEDERALIST NO. 41 (James Madison).

the GREATER, not the PERFECT, good; and...in every political institution, a power to advance the public happiness involves a discretion which may be misapplied and abused."<sup>74</sup>

The micro-level is illustrated by criticisms of the reasonable doubt rule. In its classic Blackstonian formulation,<sup>75</sup> the rule posits that it is better for ten guilty men to go free than for one innocent to be convicted, and thus represents a stringent precaution against erroneous convictions. The critics, however, urge that discharging the guilty in high ratios is itself an error that creates unacceptable collateral risks of other crimes to innocent third parties.<sup>76</sup> The higher the costs of that countervailing risk, the lower the ratio of erroneous acquittals to erroneous convictions should be.

*Perversity.* Perversity problems arise when the precaution itself exacerbates the target risk, rather than a separate countervailing risk; in such cases, the precaution may prove self-defeating. Perversity problems afflict a range of precautions in modern liberal constitutionalism. An example from the founding era in the United States involves standing armies—a central thread of debate over the constitution proposed at Philadelphia.

The draft constitution authorized Congress to create armed forces, subject only to the constraint that military appropriations must be renewed every second year.<sup>77</sup> Antifederalists argued that these rules contained insufficient precautions against the risk that a President or other political leader might use a standing army to crush popular liberty and assume dictatorial powers. Hamilton's Federalist No. 8 argued at length that the precautions desired by the Antifederalists would have perverse effects, exacerbating rather than reducing the dangers to political liberty.<sup>78</sup> Absent a powerful national government capable of quelling conflict among states, the result might well be a Europeanization of the North American continent, in which regional military powers would engage in ongoing struggle. Such a development would risk producing a *multitude* of standing armies at the state level and even a multitude of military dictatorships, with worse consequences for political liberty overall—perversely threatening the very value that the Antifederalists aimed to protect.<sup>79</sup>

<sup>74</sup> THE FEDERALIST NO. 41, at 255–56 (James Madison) (Clinton Rossiter ed., 1961).

<sup>75</sup> 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 362 (Oxford: Clarendon Press ed. 1769).

<sup>76</sup> See, e.g., Larry Laudan, *Is It Finally Time to Put "Proof Beyond a Reasonable Doubt" out to Pasture?* 16–17 (Univ. of Tex. Sch. of Law, Pub. Law & Legal Research Paper Series, Working Paper No. 194, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1815321](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815321).

<sup>77</sup> See U.S. CONST. art. I, § 8, cl. 12.

<sup>78</sup> See THE FEDERALIST NO. 8, at 66–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>79</sup> *Id.*

In the case of standing armies, the precautions the Antifederalists desired were never adopted, so Hamilton's argument was never put to the test.<sup>80</sup> Yet actual precautions have also faced perversity objections. In free-speech cases involving subversive organizations such as the Communist Party, precautionary arguments about the dangers to liberty of suppressing political speech have been met with the rejoinder that if the government falls to internal enemies, all liberties, including free speech itself, will fall as well. As Chief Justice Vinson put the argument, writing for the Court in *Dennis v. United States*:

Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected.<sup>81</sup>

### C. Successful Precautions

So far we have given examples of several ways in which constitutional precautions can go wrong. Yet we do not mean to suggest that any and all constitutional precautions are undesirable—an incoherent claim in any event, for a major function of constitutions is to safeguard the polity against political risks. Rather, our suggestion is that constitutional rulemakers can and should design *optimal precautions*. By that we mean precautions that take into account all relevant risks, both target risks and countervailing risks, and that provide or at least rely upon incentive-compatible mechanisms for their own enforcement. By employing “mature”<sup>82</sup> and well-rounded precautions of this sort, constitutional rulemakers can and do improve the welfare of relevant populations.

A conspicuous example of a well-designed precaution in American constitutional law is the Incompatibility Clause, which bars simultaneous service in the legislative and executive branches.<sup>83</sup> Conditional on accepting the basic decision behind the Clause—the Philadelphia Convention's choice of independent legislative and executive institutions, as opposed to a parliamentary system—the Clause amounts to a precaution against the risk that one branch will swallow the other by means of personnel who hold dual offices. Its clarity and simplicity have made it easy to enforce; subsequent actors

<sup>80</sup> On the other hand, Congress did not create a standing army until after the Civil War, so the risk feared by the Antifederalists never materialized.

<sup>81</sup> 341 U.S. 494, 509 (1951).

<sup>82</sup> See HIRSCHMAN, *supra* note 67, at 153–54.

<sup>83</sup> U.S. CONST. art. I, § 6, cl. 2.

have in fact honored it; and experience since the founding has not disclosed serious countervailing costs and risks. To be sure, the Clause does not at all address the separate problem that political parties may in effect temporarily unite the branches by controlling personnel in both, but that is a far larger problem occurring in many other settings as well,<sup>84</sup> and it was not the evil that the Clause was designed to address. The framers lacked the foresight to take precautions against the risk of partisan collusion across branches, assuming it is a risk, but that does not show any failure of the precaution they did take, against the risk they did perceive.

Overall, successful precautions are those that: 1) derive from a mature, even-handed consideration of all relevant risks, both those prevented and those created by the precautions; and 2) rest upon enforcement mechanisms that are compatible with the ex post incentives of the actors whose action is necessary if adequate enforcement is to occur. The problems that we have identified, in other words, are pitfalls into which constitutional rulemakers can stumble, but it is not written in the nature of things that all precautions must fail. As we will see in Part IV, in the Athenian case, some precautions failed, while others succeeded, in ways that illuminate both the promise and the problems of precautionary constitutionalism.

## IV. EVALUATING ATHENIAN PRECAUTIONS

In this Part, we evaluate each of the Athenian precautions discussed above in terms of the potential pitfalls of precautionary institutions. Ostracism perversely increased the risk of tyranny and the *graphe paranomon* was ineffective. We argue that the lot, rotation, and collegiality introduced significant countervailing risks in the form of incompetence and inefficiency, but were nevertheless successful precautions, all things considered.

### A. Ostracism and Perversity

The Athenian practice of ostracism may illustrate the problem of perversity. That is, in some cases ostracism may have actually exacerbated, rather than diminished, the risk of tyranny and accumulation of power by one individual. From the beginning, prominent politicians used ostracism to get their rivals expelled from

<sup>84</sup> Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (discussing similar problems in other settings).

the city, thereby concentrating power in even fewer individuals at the top.<sup>85</sup>

It appears that Themistocles successfully pushed to have several of his rivals ostracized in the 480s.<sup>86</sup> Their absence helped cement his power as the most powerful Athenian politician in this period.<sup>87</sup> Early in his career, Pericles similarly used ostracism to have his main rival, Cimon, expelled.<sup>88</sup> The last attested case of ostracism, from around 416, provides another example of how ostracism could be self-defeating: in that year, a politician who was widely acknowledged not to be a threat was ostracized because two more prominent politicians teamed up against him.<sup>89</sup> Perhaps in part because Themistocles and Pericles were great leaders, we seldom think of them as having overstepped their bounds. But they were anomalies in the Athenian constitution, and for better or worse ostracism did not limit them<sup>90</sup> so much as it limited, or rather eliminated, several of their rivals.

#### B. *The Graphe Paranomon and Futility*

The failure of the *graphe paranomon* procedure to prevent what is likely the most disastrous decision of the Athenian democracy—the condemnation of the Arginusae generals<sup>91</sup>—may illustrate the problem of futility and commitment described earlier.<sup>92</sup> The generals in charge of the naval victory at Arginusae in 406 B.C. were criticized for failing to rescue the shipwrecked sailors after the battle, despite a storm that prevented the rescue effort.<sup>93</sup> Kallixenos introduced a decree in the Assembly calling for the Athenians to decide on the guilt of the eight accused generals in a single vote during the current Assembly meeting.<sup>94</sup> Eurypolemos challenged the decree as unconstitutional, apparently on

<sup>85</sup> As noted earlier, a plausible alternative explanation for ostracism is that it was a precaution against factionalism. See *supra* note 39 and accompanying text. Under this interpretation, ostracism did succeed in peacefully resolving conflicts between elite politicians by inducing one of the rivals to leave peacefully for ten years.

<sup>86</sup> For relevant discussion, see Kagan, *supra* note 33, at 399.

<sup>87</sup> See *id.*

<sup>88</sup> *Id.* at 393.

<sup>89</sup> *Id.* at 401.

<sup>90</sup> Although Themistocles was himself later ostracized. OXFORD CLASSICAL DICTIONARY 1053 (N.G.L. Hammond & H.H. Scullard eds., 1970) (entry for "Themistocles" noting that he was ostracized in 471 B.C.).

<sup>91</sup> For discussion, see Lanni, *supra* note 45, at 246–47.

<sup>92</sup> As is often pointed out, the *graphe paranomon* was used in practice as a political weapon to attack enemies, and in this sense can also be questioned on jeopardy grounds. See HANSEN, THE SOVEREIGNTY OF THE PEOPLE'S COURT, *supra* note 44, at 62–65.

<sup>93</sup> XENOPHON, HELLENICA I–IV bk. 1.7.9–.35, at 71–85 (Charleton L. Brownson trans., 1968) (also referenced as *Xen. Hell.* 1.7.9–.35).

<sup>94</sup> *Id.* bk. 1.7.9–.10, at 71–73.

the grounds that it violated the generals' right to a trial, and to an individual assessment of guilt.<sup>95</sup> According to Xenophon's account, Eurypolemos was brow-beaten by the mob into dropping his constitutional challenge. The crowd (*plethos*) in the Assembly exclaimed "that it was monstrous if the people were to be prevented from doing whatever they wished,"<sup>96</sup> and one citizen proposed that if Eurypolemos did not drop his challenge he should be tried by the same vote as the generals.<sup>97</sup> Bowing to the popular pressure, Eurypolemos dropped his challenge, and instead made a counterproposal suggesting a trial, which was defeated.<sup>98</sup> The eight generals were condemned, and the six that were present were put to death.<sup>99</sup> This act deprived Athens of some of its most experienced generals at a critical time in the war with Sparta, and is commonly cited as a contributing factor in Athens' eventual defeat.<sup>100</sup>

The Arginusae affair arguably illustrates a classic commitment problem that rendered the precautionary procedure ineffective: the Assembly apparently was not willing to be constrained by the *graphe paranomon* procedure that had been set up precisely to prevent such a rash decision. Nevertheless, it is interesting to speculate about what would have happened if Eurypolemos had been a little more persistent. Despite the shouts and threats from the crowd, it is not at all clear from Xenophon's account that the Assembly would have refused to table the vote if Eurypolemos had forced the issue; in fact, the ultimate vote on whether to have a trial nearly passed.<sup>101</sup> If Eurypolemos had declined to withdraw his motion for a constitutional trial, it is entirely possible that a trial would have been held and that the *graphe paranomon* jurors would have overturned the decree to condemn the generals. So one wonders to what degree the Arginusae affair illustrates an inherent defect in the *graphe paranomon* (i.e., that in extreme cases the Assembly could simply ignore a bona fide motion to empanel a jury to hear the constitutional question), as opposed merely to a loss of nerve by Eurypolemos. The commitment problem in the Arginusae affair was, in any event, somewhat different from modern constitutional commitment problems. In the Arginusae affair, the Athenians blocked the precautionary institution, here the jury, from being engaged at all, while in modern contexts judicial review typically does occur, but in making

<sup>95</sup> *Id.* bk. 1.7.12–.13, at 73.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* bk. 1.7.34, at 83.

<sup>99</sup> *Id.*

<sup>100</sup> See MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW 434, 445 (1986).

<sup>101</sup> XENOPHON, *supra* note 93, bk. 1.7.34, at 83.



their rulings judges may not be willing to be constrained by constitutional rules.

Yet even allowing for these caveats, the Arginusae affair shows the limits of the *graphe paranomon*: the decree to condemn the generals was at least arguably a departure from the Athenian constitution; at a minimum Euryptolemos brought this to the Assembly's attention yet no jury was empaneled; and had a jury been empaneled to think over the issue there was a reasonable chance they would have reversed a decision that ultimately had disastrous consequences for Athens. The affair thus illustrates a chief design defect: there was no safeguard to protect someone making a *graphe paranomon* motion from popular retaliation, and no institution external to the Assembly to guarantee the jurisdiction of a *graphe paranomon* jury once it was properly invoked.

This does not mean that *graphe paranomon* was also ineffective in less highly charged situations; for this we have insufficient evidence to make a conclusive judgment,<sup>102</sup> and it is quite possible that any precaution of this type can only have helped prevent some of the rashness inherent in a democracy as radical as Athens'. But the evidence we do have suggests that this precaution failed to serve its purpose at a critical juncture in the city's history.

### C. Lot, Rotation, and Collegiality: Problems of Jeopardy

The trio of precautionary institutions aimed at limiting executive power—selection by lot, rotation, and collegiality—worked in the sense that individual Athenian officials were not able to amass significant power or to challenge the Assembly's sovereignty, let alone threaten tyranny. Athenian politicians could not implement policies through executive offices; they had to persuade the people in the Assembly to adopt each of their proposals.<sup>103</sup> While these institutions may have succeeded in preventing their target risk of tyranny, they also introduced other risks into the system, namely incompetence and

<sup>102</sup> For discussion of the other surviving *graphe paranomon* cases, see HANSEN, THE SOVEREIGNTY OF THE PEOPLE'S COURT, *supra* note 44, at 28–52; Lanni, *supra* note 45, at 246–56.

<sup>103</sup> The elected office of general did permit some individuals to gain significant political power, particularly in the fifth century. SINCLAIR, *supra* note 33, at 81–82. But even Pericles—whose influence moved Thucydides to declare that in his time Athens was a democracy in name only, but in fact ruled by one man, see THUCYDIDES, *supra* note 60, bk. 2.65, at 163—served on a board of ten; was subject to election, an accounting that could lead to prosecution for malfeasance, and the possibility of ostracism each year; and had to persuade the Assembly to vote for each of his policies, including military decisions such as whether and how to conduct a military campaign that in any modern democracy would rest entirely in the discretion of the executive. On the accountability of Athenian officials, see SINCLAIR, *supra* note 33, at 77–83, 146–51.

inefficiency. This is not to say that these countervailing risks necessarily outweighed the risk of tyranny. In fact, while we do not aim to offer a comprehensive evaluation of the success of the Athenian democracy; a strong argument can be made that the Athenian approach toward executive offices functioned well, and in this sense that these institutions were successful, possibly even optimal, precautions.

Selection by lot, rotation, and collegiality illustrate the problem of jeopardy. Selection of officers by lot distributes political power throughout the citizen population, reducing the risk that any individual citizen will accumulate significant influence. At the same time, electing magistrates at random rather than based on qualifications increases the risk that the magistrates chosen will be incompetent or lack specific skills or knowledge that are useful in performing their duties.<sup>104</sup> Annual rotation in office insured that a magistrate, once selected, could not amass power over a period of time, but also presented the risk that magistrates would not be able to learn from their mistakes and become more effective as they gained experience. Collegiality distributed power among the various members of the board, preventing any one officer from gaining too much influence, but could also introduce inefficiency. Disagreements among board members could cause delay or even inconsistency if board members carried out their duties differently; these problems may have been particularly acute in military affairs.<sup>105</sup> Under lot, rotation and collegiality, two of Popper's precautionary arguments for democratic institutions—weeding out tyrannous leaders, and weeding out incompetent ones—are substitutes rather than complements, trading off against one another rather than working hand in hand.

Did the countervailing risks of incompetence and inefficiency outweigh the advantages of these precautionary institutions? It is impossible to answer this question with any certainty or objectivity; it touches on a very old debate about how well democracy worked in Athens and a more general debate about how important it is for the trains to run on time. Athens took the precaution against tyranny to an extreme, with executive power entrusted to ad hoc teams of amateurs for nearly all offices. This has made Athens notorious down the ages,<sup>106</sup>

<sup>104</sup> Citizens had to volunteer to be part of the lot, which may have eliminated those who were obviously incompetent. Selected magistrates could be challenged and disqualified for office at a procedure known as *dokimasia*, but as far as we know magistrates were challenged based on arguments that they did not have the formal qualifications (e.g., citizenship) or the requisite character (e.g., that they were corrupt or had oligarchic sympathies), not that they were incompetent or lacking in knowledge or experience. For discussion, see HANSEN, *supra* note 14, at 239.

<sup>105</sup> Harris provides several examples where dividing power among generals produced bad outcomes, both for Athens and other city-states. Edward Harris, *The Rule of Law and Military Organisation in the Greek Polis*, in SYMPOSIUM 405, 405–15 (2009).

<sup>106</sup> See, e.g., JENNIFER TOLBERT ROBERTS, ATHENS ON TRIAL: THE ANTIDEMOCRATIC

but it is undeniable that executive power was wielded without the gross lapses that modern lawyers might see as the inevitable outcome of such amateurism.<sup>107</sup> In fact, according to one influential modern account, the amateurism of the Athenian democracy actually fostered efficient and effective government by promoting the use of social networks, teamwork, and other mechanisms for organizing and deploying useful knowledge dispersed among the population. In any case, any disadvantages associated with Athens' executive institutions were not severe enough to prevent Athens from achieving extraordinary success in both military and economic terms, at least for a time.<sup>108</sup>

#### CONCLUSION

Ancient Athens offers an interesting case of a precautionary constitutional order, precisely because its precautions were so extreme. In an ostracism, potential tyrants could be exiled for ten years by the vote of a plurality, without any particular factual finding in support. In the *graphe paranomon*, allegedly unconstitutional or irregular legislation could be referred by *any* member of the Assembly to a popular jury for approval or rejection. And of course, most executive posts were held by a rotating group of amateurs selected by lot. These precautions were plagued by some of the problems endemic to precautions generally. Thus, ostracism was supposed to be a tool for the *demos* to get rid of dominant personalities—but instead the dominant personalities, such as Pericles and Themistocles, used it to get rid of their adversaries. The *graphe paranomon* was supposed to be a safeguard against inflamed popular passions, but in at least one key instance this very same passion arguably prevented its deployment. And the decision to place executive power in the hands of randomly-selected citizens created at least a risk of mismanagement. And yet, the Athenians' extreme brand of precautionary constitutionalism was surprisingly successful. Thanks to Thucydides<sup>109</sup> and other critics of democracy,<sup>110</sup> we seldom notice that

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TRADITION IN WESTERN THOUGHT (1997) (tracing the criticisms of Athenian democracy, including its rejection of expertise, through history).

<sup>107</sup> See, e.g., HANSEN, *supra* note 14, at 208–09 (discussing the advantage of lack of professionalism in the case of political leaders); SINCLAIR, *supra* note 33, at 211–18 (discussing, inter alia, the benefit of the “collective wisdom of the masses”).

<sup>108</sup> See OBER, *supra* note 42, at 39–79; SINCLAIR, *supra* note 33, at 211–18 (rehearsing the familiar debate about whether Athens' success occurred because of, or in spite of, the democracy).

<sup>109</sup> See, e.g., THUCYDIDES, *supra* note 60, bk. 2.65, at 164 (giving his famous discussion of how demagoguery and the weaknesses of the democracy led to mistakes such as the Sicilian expedition).

<sup>110</sup> The democracy's condemnation of Socrates memorialized in Plato's *Apology* may be the most prominent example.

(apart from two brief, externally imposed interruptions) this radical system endured for nearly 200 years, and was ended only by what was essentially a force of nature, the Macedonian army that went on to conquer a good part of Eurasia.<sup>111</sup>

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<sup>111</sup> On the success of Athens, see OBER, *supra* note 42, at 40–79.