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The Living Constitution of Ancient Athens: A Comparative Perspective on the Originalism Debate, 42 J. Marshall L. Rev. 463 (2009)

Mark J. Sundahl

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THE LIVING CONSTITUTION OF ANCIENT ATHENS: A COMPARATIVE PERSPECTIVE ON THE ORIGINALISM DEBATE

MARK J. SUNDAHL*

I. Introduction	463
II. The Modern Debate: Originalism vs. a Living Constitution	467
III. A Brief Sketch of the Athenian Government and Legal System.....	474
A. The Sources	475
B. The Organs of Government in Athens.....	477
1. The Assembly	477
2. The Council.....	479
3. The Magistrates	479
4. The Courts	480
C. The Athenian Constitution.....	481
D. Judicial Review in Athens	484
IV. The Living Constitution of the Athenians.....	487
A. The “Open Texture” of Athenian Law	488
B. Arguments of Underlying Principle in Actions of Unconstitutionality.....	493
1. The Action against Ctesiphon’s Decree	494
2. The Action against Aristocrates’ Decree.....	499
V. Conclusion: The Lessons of Ancient Athens.....	502

I. INTRODUCTION

The central debate in the field of constitutional law is whether the Constitution should be interpreted strictly in accordance with the original public meaning of its text—a form of originalism known as “original public meaning originalism”—or whether the courts should adopt a more flexible approach to interpretation. This more flexible approach could take into consideration a variety of factors including, for example, the underlying principles of the Constitution, the intent of the

* Assistant Professor of Law, Cleveland State University, Cleveland-Marshall College of Law. The author would like to thank the participants at the 2006 Annual Meeting of the Association for the Study of Law, Culture, and the Humanities for their helpful comments and suggestions on an early draft of this Article as well as my fellow members of the Ancient Greek Law panel at the 2008 Annual Meeting of the American Society of Legal History.

Framers, contemporary understanding of the text, or the changing sensibilities, needs and values of American society. For the purposes of this Article, this more flexible approach shall be referred to generally as the “living constitution” approach to interpretation. The phrase “living constitution” has a long history and has been given a variety of meanings through the years—but is used here to describe any approach to interpretation that frees the reader from the strict confines of the Constitution’s text and allows for a reading that preserves the spirit of the law.¹ While this dichotomy between “original meaning originalism” and the “living constitution” runs the risk of over-simplifying the debate on how best to interpret the Constitution, it serves the purpose of setting up the primary tension that animates the debate, namely, the choice between a text-based approach and an approach that gives life to the underlying principles, or spirit, of the document.

The debate over originalism has not only divided academics, but has become an inflammatory political issue. Republican candidates swear to appoint only originalist judges (and often deride non-originalist judges as “activists” that threaten to override the will of the legislature), while Democrats reject originalism with equal passion, regarding its adherents as rigid formalists who are insensitive to modern realities.² The most

1. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 693 (1976). Justice William Rehnquist has noted that the phrase “living constitution” has about it a teasing imprecision that makes it a coat of many colors.” *Id.* In his article, Rehnquist identifies two manifestations of the “living constitution” approach—one manifestation views the Constitution as drafted in general language that succeeding generations are free to interpret and apply according to modern needs, while the other manifestation believes that the Supreme Court Justices have the power to, in effect, amend the Constitution by reading their own values into the document. *Id.* at 694-95. Regarding the meaning of “living constitution” see also Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319, 1322-23 & n.6 (2008).

2. See, e.g., John McCain, Senator and then Republican Presidential Candidate, Remarks on Judicial Philosophy at Wake Forest University (May 6, 2008) (transcript available at <http://209.157.64.200/focus/f-news/2012562/posts>)

With a presumption that would have amazed the framers of our Constitution, and legal reasoning that would have mystified them, federal judges today issue rulings and opinions on policy questions that should be decided democratically. Assured of lifetime tenures, these judges show little regard for the authority of the president, the Congress, and the states. They display even less interest in the will of the people.

Id. Likewise, in a campaign appearance in Westerville, Ohio on March 2, 2008, Barack Obama, then Democratic candidate for the presidency, made clear that he supported the appointment of judges in the tradition of former Chief Justice Earl Warren—and then subtly insinuated that originalists are unsympathetic to the needs of the citizens by saying that he “want[ed] people on the bench who have enough empathy, enough feeling, for what ordinary

contentious debates about the merits of originalism take place in the chambers of the Supreme Court where Justices Scalia, Thomas, Roberts, and Alito press for an originalist interpretation of the Constitution—and do so with increasing success—while the other five justices generally take a more flexible approach to interpretation. The originalism debate was thrown into high relief in the recent case of *District of Columbia v. Heller* where the Court addressed the controversial issue of whether the Second Amendment creates an individual right to bear arms.³ In *Heller*, a majority of the Court joined Justice Scalia in his originalist interpretation of the Amendment, thus indicating a renewed ascendancy of the theory. This case highlights the Supreme Court's shift away from the more liberal approach to constitutional interpretation that was espoused by the Warren and Burger courts and which resulted in several landmark decisions expanding the scope of civil liberties. Despite the current ascendancy of originalism, the debate regarding the proper approach to constitutional interpretation will undoubtedly continue to be the central question of constitutional law.

This Article provides a fresh perspective on the originalism debate by undertaking a comparative study of constitutional interpretation in the United States and ancient Athens. By observing how the ancient Athenians resolved the same interpretational problems that face the Supreme Court today, we are able to gain a better understanding of the issues that drive the originalism debate. This Article will focus on Athenian practice in 350 B.C., which falls late in the history of the Athenian democracy, well after the legal system had achieved its final form.⁴ This was also the year in which Aristotle published the *Constitution of the Athenians*, which provides extraordinary detail about the nature of the Athenian government and legal system as it existed at that time.⁵

people are going through." Michael Powell, *Strong Words in Ohio as Obama and Clinton Press On*, N.Y. TIMES, Mar. 3, 2008, at A16.

3. D.C. v. *Heller*, 128 S. Ct. 2783, 2787-88 (2008).

4. See Mark J. Sundahl, *The Rule of Law and the Nature of the Fourth-Century Athenian Democracy*, 54 CLASSICA ET MEDIAEVALIA 127, 127-32 (2003) (explaining some of the more important legal reforms enacted by the Athenians to strengthen the rule of law in Athens). To provide some historical orientation, 350 B.C. falls some 130 years after the Athenians defeated the Persians at Salamis—a victory that resulted in Athens' military supremacy in Greece—and some forty-nine years after the execution of Socrates in 399 B.C. See generally RAPHAEL SEALEY, A HISTORY OF THE GREEK CITY STATES 700-338 B.C. (1976).

5. ARISTOTLE, THE POLITICS AND THE CONSTITUTION OF ATHENS (Stephen Everson trans., Cambridge University Press 1996). Whether *The Constitution of the Athenians* is an authentic work of Aristotle, or was written by one of his students, has been subject to debate. *Id.* at xii.

The many similarities between ancient Athens and the United States make Athens a suitable subject for a comparative analysis of this type. Although not directly modeled on Athens, the American government and legal system share many features of the Athenian democracy, such as the separation of powers between the executive, legislative, and judicial branches; a written constitution; judicial review; the right to a trial by jury; and, most importantly, the fundamental democratic concept of “one man, one vote.”⁶ Athens also shares a similar historical arc with the United States marked by a meteoric rise from a relatively minor population center to a world power.⁷

During the 299 years of Athenian history, stretching from the enactment of their first written laws in 621 B.C. to their loss of independence to the Macedonians in 322 B.C., Athens transformed from an undistinguished aristocracy suffering from deep social tensions to a vibrant democracy that controlled an empire.⁸ In the course of this spectacular growth, Athens acquired great wealth, became a hub of international trade, and emerged as the intellectual center of the Mediterranean.⁹ At the same time, Athens underwent one of the most profound cultural revolutions in history due to the influence of a new breed of philosophers and sophists who brought about an era of rapidly changing societal values.¹⁰ In the 220 years that have elapsed since the ratification of the United States Constitution, The United States has undergone a similar transformation—growing from a young nation to the world’s sole superpower. Like Athens, the United States’ growth in wealth and power has been accompanied by significant changes in popular culture and values.

In both Athens and the United States, questions of constitutional interpretation arise in the context of the judicial review of new legislation. Like the United States, Athens had a

6. See generally DAVID J. BEDERMAN, *THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION* 85-94 (2008) (illustrating that the Framers clearly took examples of ancient democracies into account as evidenced by frequent references to antiquity in the Federalist Papers and other writings). However, the Framers also harshly criticized certain aspects of the ancient forms of government. For example, Alexander Hamilton wrote:

It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy.

THE FEDERALIST NO. 9, at 71-72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

7. See generally SEALEY, *supra* note 4, at 238-321.

8. *Id.*

9. *Id.*

10. ROBIN WATERFIELD, *ATHENS, FROM ANCIENT IDEAL TO MODERN CITY: A HISTORY* 130-35 (2004).

strong tradition of judicial review. Several of the Athenian courtroom speeches delivered in actions for unconstitutionality have been preserved to the present day. These speeches provide valuable evidence, which will be analyzed in this Article, about how the Athenians approached the same fundamental question that faces the members of the Supreme Court: Should the constitution be read narrowly in accordance with its original meaning or should the courts interpret the constitution in a manner that implements its underlying principles and purpose without being constrained unduly by the text? In the end, this Article shows that the Athenians had a surprisingly flexible “living constitution” that protected the underlying principles of the constitution and accommodated the changing needs of a society that, like the United States, evolved in breathtaking ways over the course of hundreds of years.

The following section launches this comparative analysis by describing the contours of the originalism debate in the United States. Part III then shifts the focus of the Article to ancient Athens and provides, for background purposes, a sketch of the Athenian government and legal system. Part IV forms the core of the Article and explores how Athens developed a living constitution that resulted from the “open texture” of its legal system coupled with an approach to interpretation that protected the fundamental underlying principles of the Athenian constitution. Finally, Part V discusses the lessons that can be drawn from the Athenian example.

II. THE MODERN DEBATE: ORIGINALISM VS. A LIVING CONSTITUTION

The modern debate regarding the merits of originalism as a method of constitutional interpretation has been traced back to two seminal articles that appeared in the 1970s: Robert Bork’s 1971 article *Neutral Principles and some First Amendment Problems*¹¹ and Justice William Rehnquist’s 1976 article *The Notion of a Living Constitution*.¹² However, the originalism

11. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

12. Rehnquist, *supra* note 1; see also RAOUL BERGER, GOVERNMENT BY THE JUDICIARY (1977) (providing additional insight into the growing originalism movement of the 1970s); Lawrence B. Solum, *The District of Columbia v. Heller and Originalism* 3, (Ill. Pub. Law & Legal Theory Research Paper No. 08-14, 2008), available at <http://ssrn.com/abstract=1241655> (describing the originalism debate prior to the 1970s). Of course, the use of the Framers’ understanding and intent for purposes of interpretation is not a recent invention, but arose in the very earliest years of the republic. The Supreme Court first referred to the intent of the Framers in the 1798 case of *Calder v. Bull*. 3 U.S. (3 Dall.) 386, 391 (1798):

The celebrated and judicious Sir William Blackstone, in his commentaries, considers an *ex post facto* law precisely in the same light

movement entered the political arena and received greater public attention in 1985 when former Attorney General Edwin Meese delivered a series of speeches in which he called for a “return to the jurisprudence of original intention” in the wake of *Roe v. Wade* and other Supreme Court decisions that were based, in Meese’s opinion, on an intolerably loose reading of the Constitution.¹³ That same year, H. Jefferson Powell published his seminal work, *The Original Understanding of Original Intent*, which posited that the Framers expected the Constitution to be interpreted just as a statute would be interpreted under the common law—according to the meaning of its words from the perspective of a modern reader (rather than pursuant to an historically reconstructed original meaning), thus giving new support to the argument for a living constitution.¹⁴ A flood of scholarship soon followed regarding the role of the Framers’ intent in the interpretation of the Constitution.¹⁵

The originalist approach continued to evolve over the years. In the 1980’s and 1990’s, originalists were primarily concerned with interpreting the Constitution in accordance with the original intent of the Framers.¹⁶ However, the methodological difficulties of determining intent led to a shift of focus from original intent to the original meaning of the text as understood by the public at the

I have done. His opinion is confirmed by his successor, Mr. Wooddeson; and by the author of the *Federalist*, who I esteem superior to both, for his extensive and accurate knowledge of the true principles of Government.

Id. (emphasis added). The *Federalist Papers* were mentioned even earlier in litigants’ briefs before the Supreme Court as a guide to the meaning of the Constitution. See *Commonw. v. Schaffer*, 4 U.S. 26 (1797); *Penhallow v. Doane’s Adm’rs*, 3 U.S. 54 (1795); see also Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 GEO. WASH. L. REV. 1324 (1998) (examining the Supreme Court’s references to the *Federalist Papers*); Raoul Berger, “*Original Intention*” in *Historical Perspective*, 54 GEO. WASH. L. REV. 296 (1986) (discussing the earliest evidence regarding the use of original intent in constitutional interpretation).

13. Murray Dry, *Federalism and the Constitution: The Founders’ Design and Contemporary Constitutional Law*, 4 CONST. COMMENTARY 233, 233-34 (1987).

14. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 895-96 (1985).

15. Larry Simon, *The Authority of the Framers of the Constitution: Can the Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985); Raoul Berger, *The Activist Flight from the Constitution*, 47 OHIO ST. L.J. 1 (1986); RAOUL BERGER, *FEDERALISM: THE FOUNDER’S DESIGN* (1987); J. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); Edwin Meese, *Toward a Jurisprudence of Original Intent*, 11 HARV. J. L. & PUB. POL’Y 5 (1988); Jack M. Balkin, *Constitutional Interpretation and the Problem of History*, 63 N.Y.U. L. REV. 911 (1988); LEONARD LEVY, *ORIGINAL INTENT AND THE FRAMING OF THE CONSTITUTION* (1989).

16. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 553-54 (2003).

time of ratification.¹⁷ Today, the primary contention of originalists, in the strain of Justice Scalia, is that the majoritarian nature of the American democracy demands that judges adhere to the original meaning of the Constitution's text as it was understood by the voting public at the time of its ratification. Justice Scalia, who is among the most influential proponents of originalism, describes his "original public meaning" approach to constitutional interpretation in the following manner: "What I look for in the Constitution is precisely what I look for in a statute; the original meaning of the text, not what the original draftsmen intended."¹⁸ Underlying this majoritarian theory is the idea that the sovereign power of the United States resides in the majority vote of the citizenry and that this sovereignty is violated when judges veer from the meaning that the people had adopted and consented to when ratifying the Constitution in the eighteenth century.¹⁹ Originalists also assert that originalism offers the only method of ensuring that the integrity of the law is shielded from the ever-changing sensibilities of the bench.²⁰ Any other approach, they argue, would result in a chaotic range of interpretations that flow from the variable values of different judges at different times.²¹

On the other side of the originalism debate are the non-originalists, who promote the "living constitution" approach, which places far greater emphasis on the underlying principles of the Constitution in questions of interpretation, rather than focusing narrowly on the meaning of the black-letter language.²²

17. *Id.* Justice Scalia was instrumental in initiating this shift. *Id.* at 554-55; see also Solum, *supra* note 12, at 3-15 (providing a far more nuanced description of the evolution of originalism and its different schools).

18. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 38 (Antonin Scalia & Amy Gutmann, eds., 1998).

19. See, e.g., Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1098 (1989) (explaining that, pursuant to the majoritarianism argument, "[i]f judges get their authority from the Constitution, and the Constitution gets its authority from the majority vote of the ratifiers, then the role of the judge is to carry out the will of the ratifiers.").

20. Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 19-20 (2006) (pointing out that "because the underlying principles are not themselves in writing and are often far from incontestable, the principles may simply represent the preference of whoever is doing the 'interpreting.'").

21. *Id.*

22. *Id.* at 19. Professor Randy Barnett, although himself an avowed originalist, provides a concise description of the "underlying principles" approach. Barnett explains that, "[adherents of the 'underlying principles' approach] discern from the text the deeper underlying principles that underlie its particular injunctions . . . [and] then appeal to these underlying principles to limit the scope of the text or ignore it altogether." *Id.*; see also Terrance

Proponents of a living constitution view originalism as a rigid and formalistic approach to constitutional interpretation that prevents the Constitution from fulfilling its intended purpose as a “living and breathing” document that was meant to evolve with changing times.²³ This flexibility, they argue, is necessary in order for the Constitution to continue to survive over centuries of change in the political, economic, and social landscape.²⁴ They also argue that the Framers themselves rejected originalism and intended the Constitution to be interpreted in accordance with the changing nature of society.²⁵ To these objections, opponents of originalism add that it is simply wrong for citizens today to be bound by eighteenth-century interpretations of the law and, in effect, be ruled by the “dead hand” of the past.²⁶

The living constitution approach has led to some of the most significant Supreme Court decisions in recent history. Perhaps the best known is *Brown v. Board of Education* where the Court held that segregation in public schools was a violation of the Equal Protection Clause of the Fourteenth Amendment.²⁷ It is widely accepted that the decision in *Brown* could not be supported by the plain language of the Constitution and could only be achieved by way of a living constitution approach that would give the Justices sufficient latitude to interpret “equal protection” broadly in light of the harsh realities of segregation.²⁸ But *Brown* was not the only civil rights case that relied on a living constitution approach to interpretation. For example, in the 1925 case of *Gitlow v. New York*, the Court held that the Bill of Rights implicitly limits the

Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1039 (1981) (explaining that the United States has a living constitution that gives expression to current values).

23. See, e.g., Eric R. Claeys, *Respondent: The Limits of Empirical Political Science and the Possibilities of Living-Constitution Theory for a Retrospective on the Rehnquist Court*, 47 ST. LOUIS U. L.J. 737, 742 (2003) (explaining that the Constitution serves as a “legal transmitter” for the American people’s changing understanding of fundamental law).

24. *Id.*

25. Powell, *supra* note 14, at 895-96. Alternative views regarding interpretation did exist among the Framers. For example, Madison thought that the meaning of the Constitution could at times be clarified by reference to the legislative histories of the ratifying conventions. *Id.* at 932; see also Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159, 160 (1996) (explaining that Madison “affirmed that evidence of what the Constitution meant to its legal ratifiers in the state conventions was pertinent”).

26. Barnett, *supra* note 20, at 8; see also Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381, 382 (1997) (describing some problems in the logic of originalism as a method of interpreting the Constitution).

27. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

28. See, e.g., MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 110 (1998).

powers of state, as well as federal, government.²⁹ Similarly, in *Katz v. United States*, the Court held that the language of the Fourth Amendment, protecting citizens against “unreasonable searches and seizures,” should be read broadly to apply not only to searches of physical belongings of the type that were common at the time of ratification, but also to modern techniques of electronic surveillance.³⁰

Perhaps the most controversial Supreme Court decision applying the living constitution approach was *Roe v. Wade*, where the Court held that a Texas law criminalizing abortion violated a constitution right to privacy.³¹ In *Roe*, the Court admits that “[t]he Constitution does not explicitly mention any right of privacy,” but then proceeds to recognize a right of privacy that emanates, from the *Roe* Court’s perspective, primarily from “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action,” but also from the First, Fourth, Fifth, and Ninth Amendments, as well as from the “penumbras of the Bill of Rights.”³²

Roe was not decided in a vacuum, but came at the end of a line of cases that had held that the Constitution contains a right of privacy that emanates from the different constitutional provisions just mentioned. For purposes of illustrating how this implied right of privacy has come to be recognized by the Supreme Court, the case of *Griswold v. State of Connecticut* provides perhaps the best example.³³ In *Griswold*, the Court held that Connecticut’s law criminalizing the use of contraceptives was unconstitutional on the grounds that it violated an individual’s constitutional right to privacy.³⁴ In support of its decision, the Court famously stated “that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance” and that these “[v]arious guarantees create zones of privacy” that cannot be violated.³⁵ For example, the Court explained how the First Amendment rights to free speech and assembly have a penumbra of implied rights, including the right to free association, that are “necessary in making the express

29. *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925); see also William P. Gray, Jr., “*We the People*” or “*We the Judges*”: A Reply to Robert R. Baugh’s Response, 49 ALA. L. REV. 607, 607-08 (1998) (discussing how the Supreme court “invented the theory—by assumption only—that the Bill of Rights limits the states as well as the federal government”).

30. *Katz v. United States*, 389 U.S. 347, 359 (1967).

31. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

32. *Id.* at 152-53; see generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (critiquing the reasoning of *Roe v. Wade*).

33. *Griswold v. Conn.*, 381 U.S. 479 (1965).

34. *Id.* at 485-86.

35. *Id.* at 484.

guarantees fully meaningful.”³⁶ The Court found other “facets” of privacy in the Third Amendment, which creates a zone of privacy by prohibiting the quartering of soldiers in homes; in the Fourth Amendment, which creates a zone of privacy by prohibiting unreasonable searches and seizures; and in the Fifth Amendment, which creates a zone of privacy by allowing a defendant to remain silent to avoid self-incrimination.³⁷ In these repeated protections of personal privacy, the *Griswold* Court identified a general underlying principle that citizens should be protected from governmental intrusions into their privacy—a principle that the Court believed was violated by the Connecticut statute criminalizing the use of contraceptives. The *Griswold* case shows how the Supreme Court was able to extract a fundamental underlying principle that was repeatedly expressed in the Constitution, although never in a general manner, and give that principle life.

Despite the long run of distinguished decisions influenced by the concept of a living constitution, the tide is turning. As seen recently in *Heller*, the originalists now appear to be gaining ascendancy in the Supreme Court with the addition of Justices Roberts and Alito—who now typically join Scalia, Thomas, and, at times, Kennedy to form a majority. Justice Scalia’s majority opinion in *Heller*, joined by Justices Roberts, Alito, Thomas, and Kennedy, focuses on the text of the Second Amendment, in which Justice Scalia sees an unqualified individual right to own guns.³⁸ The majority’s reliance on the “original meaning” of the Second Amendment is clearly set out early in the opinion:

In interpreting this text, we are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.”³⁹

After finding that the opening clause of the Second Amendment does not limit the “operative clause” of the amendment, Scalia undertook a lengthy investigation into the historical meaning of “to keep and bear arms.” He concluded that the phrase would have been understood originally as guaranteeing an *individual* right to keep and bear arms, rather than a right to bear arms only as part of a militia.⁴⁰

36. *Id.* at 482-83.

37. *Id.* at 484.

38. *Heller*, 128 S. Ct. at 2792.

39. *Id.* at 2788; see also Randy Barnett, *News Flash: The Constitution Means What it Says*, WALL ST. J., June 27, 2008, at A13 (describing Justice Scalia’s opinion in *Heller* as “the finest example of what is now called ‘original public meaning’ jurisprudence ever adopted by the Supreme Court”).

40. See *Heller*, 128 S. Ct. at 2797. Justice John Paul Stevens’ dissent (joined by Souter, Ginsberg, and Breyer) is also focused primarily on the text

Even the most stalwart proponents of originalism admit that the theory suffers from certain defects that render it an imperfect method of interpretation. For example, most would agree that originalism relies on the reader's ability to determine the original meaning of the Constitution and that determining this meaning can prove to be a difficult, if not an impossible, task due to two fundamental problems. First, determining the commonly understood meaning of a constitutional clause in the eighteenth century requires a rigorous historical investigation that most judges do not have the time, resources, or desire to undertake.⁴¹ Second, even the most rigorous historical inquiry may still produce an ambiguous result due to multiple meanings that certain words may have carried in the eighteenth century. An example of this can be found in *Heller* where both Justices Scalia, in the majority opinion, and Stevens, in his dissent, undertook a historical inquiry into the meaning of the phrase "to bear arms" as it was understood in the eighteenth century, but reached different conclusions. On the one hand, Justice Scalia argued that "to bear arms" simply meant "to carry a gun" whether or not it was in the context of military service.⁴² On the other hand, Justice Stevens comes to the conclusion that "to bear arms" always referred to carrying a gun for military purposes.⁴³

of the Second Amendment, but Stevens' interpretation of the text is guided by his understanding of the intent of the Framers which he believes was to limit the right to bear arms in the context of a well regulated militia, as is suggested by the amendment's prefatory clause. Stevens' reliance on the Framers' intent when interpreting the amendment is perhaps most clearly reflected in his statement that "the Framers' single-minded focus in crafting the constitutional guarantee 'to keep and bear arms' was on military uses of firearms, which they viewed in the context of service in state militias." *Id.* at 2826 (Stevens, J., dissenting). Of the three opinions written in *Heller*, Justice Stephen Breyer's dissent (joined by Stevens, Souter, and Ginsburg) comes perhaps closest to embracing the "living constitution" approach by allowing his decision to be guided primarily by the purpose of the law and the interests of modern Americans, rather than the language of the law (with which he shows little interest). *Id.* at 2847-70. Justice Stevens argues that the Constitution grants an individual right to bear arms only in connection with service in a state militia on the grounds that the clear purpose of the amendment, "[a]s evidenced by its preamble," was "to assure the continuation and render possible the effectiveness of [militia] forces" *Id.* at 2847-48. However, the bulk of Breyer's opinion makes the argument for the need for an interest-analysis (taking into account among other things the risk of accidental deaths, suicide and domestic violence) to be carried out when determining the constitutionality of gun-control laws. *Id.* at 2851-70.

41. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989) (admitting that it can be "exceedingly difficult to plumb the original understanding of an ancient text.").

42. *Heller*, 128 S. Ct. at 2789.

43. *Id.* at 2790 (discussing Justice Stevens' dissent).

Justice Scalia himself has acknowledged that originalism, when applied in its pure form, is problematic because it may at times lead to results that would be a “too bitter a pill” for the American public to swallow in those cases where an originalist interpretation offends modern values or results in overturning long-standing precedent.⁴⁴ In light of this, Justice Scalia admits that he himself also has a tendency to follow a “faint-hearted” originalism that is tempered by a respect for precedent under the principle of *stare decisis*.⁴⁵ Despite its inherent flaws, proponents of originalism continue to promote the method as the best available technique—or, as Justice Scalia puts it, as “the lesser evil” when compared with other non-originalist methods of interpretation.⁴⁶ On the other hand, non-originalists would respond that there is no need to choose one method over another. It is far better, they would argue, to take into account a full range of factors when deciding how best to apply the Constitution, including precedent, doctrine, and contemporary social values—as well as the original meaning of the text.⁴⁷

III. A BRIEF SKETCH OF THE ATHENIAN GOVERNMENT AND LEGAL SYSTEM

We now shift our focus from modern America to ancient Athens to explore how the Athenians resolved questions of constitutional interpretation. In order to provide the reader with some essential background, this section describes the Athenian government and legal system, including its process of judicial review.

44. Scalia, *supra* note 41, at 861.

45. See *id.* at 864 (confessing that “in a crunch [he] may prove a faint-hearted originalist.”). Even in *Heller*, Justice Scalia tempers his originalist approach when he supports his argument for the individual right to bear arms by taking into account the modern preference for handguns as the weapon of choice for self-defense. *Heller*, 128 S. Ct. at 2818.

46. Scalia, *supra* note 41 at 862.

47. Farber, *supra* note 19, at 1105. Precedent is the practice of abiding by prior decisions, while doctrine is a rational framework of ideas that emerges from prior decisions, as well as, from the writings of commentators. Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1141-42 (1994); see also Gary S. Lawson, *An Interpretivist Agenda*, 15 HARV. J.L. & PUB. POLY 157, 161 (1992) (discussing whether the judiciary has the right to adhere to precedent rather than reach a decision on the basis of doctrine). *Contra* Akhil R. Amar, *On Lawson on Precedent*, 17 HARV. J.L. & PUB. POLY 39, 39-43 (1994) (criticizing Lawson’s analysis). See generally Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990) (discussing the similarities and differences between precedent and philosophy).

A. The Sources

Our understanding of the Athenian government and legal system is derived from the limited amount of evidence that has survived the 2,400-year span that separates us from classical Athens. The primary source of evidence is *The Constitution of the Athenians* by Aristotle, which provides a detailed explanation of the evolution of the Athenian democracy and also describes the structure of the government and legal system as it stood in 350 B.C. An equally illuminating source of information about the Athenian legal system is found in the corpus of 106 speeches that were delivered in the Athenian courtrooms by litigants and were later transmitted to us through the efforts of medieval scribes, or were preserved on ancient papyrus in the sands of Egypt.⁴⁸ The authors of these surviving speeches are the ten canonical Attic Orators: Aeschines, Andocides, Antiphon, Demades, Demosthenes, Hypereides, Isaeus, Isocrates, Lycurgus, and Lysias. Admittedly, the number of surviving speeches is a small fraction of the total number of speeches that were delivered during the fourth century, when the Athenians were holding perhaps as many as 2,400 trials a year.⁴⁹ Moreover, since most of the extant speeches were written by either Demosthenes or Lysias (and all of them were written by expert speechwriters), the speeches may not be representative of the typical speech delivered in an Athenian courtroom. Nevertheless, the speeches provide a rich source of information regarding the substance, procedure, and rhetoric of Athenian law that allows us to reconstruct the Athenian legal system with a respectable degree of certainty.

The aforementioned sources are further supplemented by legal inscriptions as well as the writings of historians, playwrights, and poets, who occasionally shed light on the nature of the democracy and legal system. Despite the existence of an Athenian public program dedicated to the inscription of all extant statutes, only eleven statutes inscribed in stone have survived to the present day.⁵⁰ However, these few inscriptions provide

48. See, e.g., DAVID WHITEHEAD, *HYPEREIDES: THE FORENSIC SPEECHES 27* (Oxford University Press 2000) (noting how the six speeches of Hypereides have come down to us (some only in fragments) on a single sheet of Egyptian papyrus acquired by the British Museum in 1890). Fragments of two previously unknown speeches by Hypereides were discovered in 2002 in the pages of the *Archimedes Palimpsest*. Felicia R. Lee, *A Layered Look Reveals Ancient Greek Texts*, N.Y. TIMES, Nov. 27, 2006, at E1.

49. See ALAN L. BOEGEHOLD, *THE LAW COURTS AT ATHENS: SITES, BUILDINGS, EQUIPMENT, PROCEDURE, AND TESTIMONIA* 30, 36 (1995) (calculating 2,400 trials per year based on the assumption of 200 court days during which three trials were held in each of the four courtrooms contained in the fourth-century Square Peristyle courthouse).

50. RONALD STROUD, *THE ATHENIAN GRAIN-TAX LAW OF 374/3 B.C.* 15-16 (1998). The eleven surviving classical Athenian inscriptions of statutes are:

invaluable evidence about the Athenian legal system by providing reliable evidence about the wording of some important Athenian statutes, such as Drakon's homicide laws. In an example of how ancient authors can help to illuminate the operations of the democracy, the historian Xenophon describes, in his *Hellenica*, the so-called "Arginousae Affair." The Arginousae Affair was a notorious event in Athenian history when a number of Athenian generals were summarily sentenced to death for malfeasance without trial, an incident which is traditionally viewed as the nadir of the radical Athenian democracy.⁵¹ On the comic side, Aristophanes' play, *The Wasps*, satirizes the litigiousness of the Athenian people and reveals much about the Athenian jury system.⁵² Similarly, the great legislator Solon tells us in his own poetry about the political reforms that he enacted. In fact, much of what we know about his accomplishments comes from his own poetry.⁵³

(1) Drakon's homicide laws; (2) the law on the naval trierarchy; (3) the law on silver coinage; (4) the grain tax law; (5) a law concerning public finance; (6) the law on Eleusinian first-fruits; (7) the law on the reconstruction of the walls; (8) the law against tyranny; (9) the law on the Lesser Panathenaic Festival; (10) a law concerning offerings; and (11) the law regarding the sanctuary of Artemis at Brauron. *Id.*

51. XENOPHON, *HELLENICA*, BOOKS I-V, 73 (Charlton L. Brownson trans., Loeb Classical Library 1961). Xenophon tells us that when, in the course of the debate, Euryptolemos threatened to challenge the legality of the proposal to execute the generals, a group of citizens violently protested that "it was monstrous if the people were to be prevented from doing *whatever they wished.*" *Id.* (Xen.Hell.1.7.12) (emphasis added); see also MARTIN OSTWALD, *FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW: LAW, SOCIETY, AND POLITICS IN FIFTH-CENTURY ATHENS* 431-445 (1986) (describing in detail the Arginousae Affair).

When appropriate, citations to ancient texts are followed in parentheses by the standard reference used by classical legal historians. These citations indicate the author, the particular speech in that author's corpus, and the paragraph in that speech. For example, Dem.18.36 refers to the thirty-sixth paragraph in the eighteenth speech in Demosthenes' corpus. The abbreviations used for the Attic orators and other relevant authors are as follows: Aeschines (Aeschin.), Andocides (And.), Antiphon (Ant.), Aristotle (Ar.), Aristophanes (Arist.), Demades (Demad.), Demosthenes (Dem.), Dinarchus (Din.), Hypereides (Hyp.), Isaeus (Is.), Isocrates (Isoc.), Lysias (Lys.), and Xenophon (Xen.).

52. ARISTOPHANES, *THE ACHARNIANS, THE CLOUDS, THE KNIGHTS, THE WASPS* 213 (Benjamin B. Rogers trans., Loeb Classical Library 2003).

53. For example, in one of his poems Solon predicts that his new laws will cure Athens of its ailments:

[My law] takes crooked judgments and makes them straight,
 Calms arrogant deeds, stops seditious acts,
 And ends the anger of troublesome strife. And so under it,
 Everything for mankind becomes just and wise.

1 ELEGY AND IAMBUS 120 (J. M. Edmonds trans., Loeb Classical Library 1968).

B. *The Organs of Government in Athens*

The Athenian government was composed of four organs: the Assembly, the Council, the magistrates, and the courts. Although the analogy is not perfect, this constellation of organs resembles the tripartite separation of powers that is found in the United States. The Assembly was the legislative branch (with the Council serving as a sort of lower house), while the courts and magistrates served as the judicial and executive branches, respectively. That being said, the nature and relationship of the branches differed significantly from their analogs in the United States. The most notable difference is that the United States has a representative, rather than a direct, democracy. Moreover, no single Athenian magistrate was nearly as powerful as the American president. And the separation of powers between the legislature and the courts in Athens was rather weak due to the fact that the jurors in court were drawn from the same body of citizens who populated the Assembly.⁵⁴ This meant that an Athenian citizen might very well vote to enact a law in the Assembly on one day and soon thereafter sit on the jury that to decide the constitutionality of that same law. The following paragraphs provide a concise overview of each of the four organs of the Athenian government.

1. *The Assembly*

The central organ of the Athenian democracy was the popular Assembly, or *ekklesia*, which held the legislative power in Athens (together with a college of lawgivers, or *nomothetai*).⁵⁵ The Assembly was composed of all adult male citizens who voted by hand to approve or reject the proposals that were put before them.⁵⁶ The Assembly issued two types of legislation: statutes (*nomoi*) and decrees (*psephismata*). The most salient distinction between these types of legislation was procedural: decrees were passed merely by a majority vote of the Assembly, while statutes were subjected to a slightly more rigorous procedure prior to enactment, as explained below. Decrees were also distinct from statutes with respect to subject matter, in that they addressed specific issues of a temporary nature and lost their force as soon as their purpose was served.⁵⁷ In contrast, statutes were permanent rules of a general nature that were not restricted to any particular event.⁵⁸

54. Sundahl, *supra* note 4, 132-37.

55. MOGENS HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES* 155-56, 165-66 (J.A. Crook trans., 1991).

56. *Id.* at 129.

57. *Id.* at 171.

58. *Id.*

Prior to 403 B.C., statutes were enacted by the simple vote of the Assembly, thus giving the Assembly tremendous unchecked power to legislate.⁵⁹ However, new legislative procedures enacted in 403 B.C. required that statutes be ratified by a college of 1001 citizens, known as the *nomothetai*.⁶⁰ Although new statutes were still proposed and debated in the Assembly, no statute passed into force until it was reviewed and approved by the *nomothetai*.⁶¹ This review took the form of a trial in which the *nomothetai*, functioning as a type of jury, listened to arguments for and against the proposed statute before voting either to enact or reject it.⁶² The author of the statute would argue the merits of his proposed statute before the *nomothetai*, while elected advocates, or *sundikoi*, argued against the enactment of the new law.⁶³ At the close of the "trial", the *nomothetai* voted by hand to decide whether or not to enact the new law.⁶⁴

Any Athenian citizen had the right to propose new legislation and to speak during the Assembly meeting. In fact, the hallmark of the Assembly was the doctrine of *isegoria*, or "equality of speech," which permitted any Athenian to take to the speaker's platform and join the legislative debate.⁶⁵ Due to this egalitarian nature of the Assembly, certain gifted orators, such as Demosthenes, were able to gain influence over their fellow citizens on the strength of their rhetorical skills and, as a result, came to hold political power in the city.

59. DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 44-45 (Cornell University Press 1978).

60. *Id.* at 48-49; see also HANSEN, *supra* note 55, at 167 (setting the number of citizens in the *nomothetai* at 1001).

61. DEMOSTHENES, AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON 385-89 (J.H. Vince trans., Loeb Classical Library 1935) (Dem.24.21-26); see also HANSEN, *supra* note 55, at 169 (explaining the framework for passing legislation).

62. HANSEN, *supra* note 55, at 169.

63. *Id.*

64. *Id.* According to both the so-called Review Law and the Repeal Law, the procedure for enacting new statutes could proceed along two paths. Mogens Hansen, *Athenian Nomothesia*, 26 GREEK, ROMAN & BYZ. STUD. 345 n.3 and accompanying text (1985). Both paths required that the proposal of a new statute always be accompanied by the simultaneous repeal of a standing law, thus resulting in a contest between the two laws. HANSEN, *supra* note 55, at 166. The Review Law allowed an individual to propose a new statute during the annual review of the law code conducted in the Assembly. *Id.* During the review, which took place every year in the first meeting of the Assembly, new proposals were accepted to replace any challenged law. *Id.* The Repeal Law, on the other hand, allowed a citizen to propose a new law on his own volition at any time during the year. *Id.*

65. See HANSEN, *supra* note 55, at 141-50 (detailing the Assembly procedure).

2. The Council

The Council, or *boule*, was composed of 500 citizens (fifty from each of the ten Athenian tribes) who were selected by lot to serve for one year.⁶⁶ The representatives—*prytaneis*—of each tribe would take turns serving as the executive committee of the Council for a one-month period (the Athenian calendar containing ten months).⁶⁷ At the end of the month, the representatives of another tribe would assume the duties of this executive committee.⁶⁸ The committee would meet daily, with the exception of holidays, to issue decrees, prepare for upcoming meetings of the Assembly, and conduct other state business.⁶⁹ The Council's primary function was preparing the agenda for the Assembly, although it also handled a number of other ministerial duties, including overseeing minor military matters and issuing regulations regarding religious festivals.⁷⁰

3. The Magistrates

A significant number of magistrates of various types were also needed to run the day-to-day operations of the city.⁷¹ The total number of magistrates reached approximately 700 as the population of Athens peaked in the fourth century.⁷² The elected generals—*strategoï*—were the magistrates with the greatest political power in the fourth century, while the nine archons were the magistrates charged with primarily judicial functions, such as receiving complaints, holding preliminary hearings, and overseeing trials.⁷³ However, recent studies show that despite the integral role they played in the operation of the judicial system, the archons appeared to exert little influence over the outcome of the trials and instead served a more bureaucratic purpose.⁷⁴ The other magistrates carried out various other tasks that required oversight in the bustling city, such as regulating the marketplace, maintaining public infrastructure, managing the city finances, commanding the armed forces, and organizing religious festivals.⁷⁵

66. *Id.* at 246-48.

67. *Id.* at 250.

68. *Id.*

69. *Id.* at 250-51.

70. *Id.* at 256-60.

71. See ARISTOTLE, *supra* note 5, at 255-57 (identifying these magistrates as the nine archons, a group that consisted of the King Archon, the Eponymous Archon (who gave his name to the year of his term), the Polemarch, and six others referred to as *thesmothetai*).

72. HANSEN, *supra* note 55, at 240.

73. *Id.* at 190, 233-34; see also ARISTOTLE, *supra* note 5, at 255-57.

74. See, e.g., Edward M. Harris, *Open Texture in Athenian Law*, 3 DIKE 27, 75-76 (2000) (discussing how magistrate judges were fearful of the ramifications of their decisions and instead focused on procedural matters).

75. HANSEN, *supra* note 55, at 243.

Although magistrates were generally selected by lot, the Athenians held elections to fill those magistracies that required special skills, such as the office of general.⁷⁶

4. The Courts

The heart of the ancient Athenian legal system was the People's Courts, or *dikasteria*, where disputes were resolved by massive juries of at least 200 Athenian citizens—which number climbed to 500 for public cases and could, in some cases, reach into the thousands.⁷⁷ In addition to the large juries, one of the most distinctive features of the Athenian judicial system was that the litigants represented themselves in court.⁷⁸ This meant that there were no lawyers in Athens per se, although there was a thriving black market of speechwriters (or *logographers*), who were knowledgeable about the law and legal rhetoric, and who could be hired by litigants to write a speech for a fee—which would then be delivered by the litigant in court.⁷⁹

Athenian trials proceeded with great efficiency, lasting no longer than a day.⁸⁰ On the morning of the trial, the jurors (*dikastes*) were selected for duty, assigned to a particular courtroom, and seated through a complex procedure that ensured the random seating of each juror in order to prevent bribery or the stacking of juries.⁸¹ After the jury was seated, the litigants were introduced and the court secretary (*grammateus*) read the complaint to the jury.⁸² In addition to the court secretary, the court personnel consisted of only a magistrate, who oversaw the proceedings to ensure that proper procedure was followed, but otherwise took no active part in the trial.⁸³

After the complaint was read, the plaintiff stood up before the jury and delivered a speech calling for the conviction of the defendant. Following the plaintiff's speech, the defendant rose to deliver a speech in his defense. Each litigant had a limited amount of time to speak which was measured by a water clock.⁸⁴ At any time during the course of his speech, a litigant could ask

76. *Id.* at 239-40.

77. MACDOWELL, *supra* note 59, at 36-40.

78. *Id.* at 249.

79. S.C. TODD, THE SHAPE OF ATHENIAN LAW 95-96 (Clarendon Press Oxford 1993). Although representing oneself in court was certainly the general rule in Athens, there were occasions where a litigant could ask a supporter (*sunegoroi*) to speak on his behalf (however, the use of *sunegoroi* may have required the permission of the jurors). *Id.* at 94.

80. MACDOWELL, *supra* note 59, at 249.

81. BOEGEHOLD, *supra* note 49, at 32.

82. A.R.W. HARRISON, THE LAW OF ATHENS 156 (2d ed. Oxford University Press 1971) (1968).

83. TODD, *supra* note 79, at 78-79.

84. MACDOWELL, *supra* note 59, at 249.

the secretary to read a document aloud to the jury.⁸⁵ This document might be a statute, a witness statement, an oracle, an oath, or any other type of writing. After the litigants had spoken, the jury voted by secret ballot to convict or acquit.⁸⁶ One by one, the jurors would drop their ballots into an urn, which would then be counted on the spot.⁸⁷ The vote of the majority carried the day and the verdict was announced immediately.

If the jury voted to convict, the defendant was either subject to the penalty established by law or, if no penalty was set, the jury was required to assess a penalty.⁸⁸ In the event that the jury had to assess a penalty, this assessment took place immediately following the announcement of the verdict. The jurors would return to their seats to listen to another set of speeches in which each litigant would propose a penalty that could range from a small fine to execution.⁸⁹ The jury would then vote for a second time to select either the plaintiff's proposed penalty or the defendant's proposal.⁹⁰ As before, the majority vote decided the issue and the selected penalty was promptly imposed without the possibility of appeal.⁹¹

C. *The Athenian Constitution*

Some scholars are likely to reject the idea that ancient Athens had a constitution. These scholars would be right, if by "constitution" they meant a single document that was superior to any other legal norm, was entrenched (*i.e.*, difficult to amend), and not only established the organs of government with their respective powers, but also enumerated the individual rights of citizens—that is, the type of constitution that is found in the United States and certain other modern democracies. Athens had no such document. However, the concept of a constitution need not be so narrowly defined. Some modern democracies, such as Britain, Israel, and New Zealand, are said to have constitutions even though these countries lack a single supreme document of the type just described.⁹² These countries are said to have unwritten constitutions which nonetheless provide for stable governments that are established by "political fact" or "convention," rather than the written word, and protect civil liberties by way of the

85. BOEGEHOLD, *supra* note 49, at 34.

86. TODD, *supra* note 79, at 132-33.

87. *Id.*

88. MACDOWELL, *supra* note 59, at 253-54.

89. *Id.*

90. *Id.*

91. *Id.*

92. WALTER F. MURPHY, CONSTITUTIONS, CONSTITUTIONALISM, AND DEMOCRACY (1993), reprinted in COMPARATIVE CONSTITUTIONAL LAW 195, 199 (Vicki C. Jackson & Mark Tushnet, eds., Foundation Press 1999).

legislature's respect for traditional legal principles rather than by enshrinement in a supreme statute.⁹³

Rather than attempting to shoehorn the Athenian constitution into a modern classification, it makes more sense to recognize it as a unique type of constitution that shares certain features with modern written constitutions, while differing in other ways. Stated briefly, ancient Athens had an unentrenched constitution that was, at least partially, written. Instead of employing a supreme document containing laws that trumped all subsequent legislation, as is found in the United States, Germany, and other modern democracies, Athens' constitution was composed of the entire body of existing statutes (*nomoi*). This body of laws operated as a supreme set of legal norms with which all subsequent legislation had to conform. All new decrees (*psephismata*) had to comply with the existing statutes pursuant to a law enacted in 403 B.C., which stated, "no decree of the Council or the people was superior to any statute."⁹⁴ Similarly, new statutes had to conform to the standing laws because they could be challenged as unconstitutional if they were found to be "contrary to any existing statute."⁹⁵ Athens can be said to have had a *written* constitution because the laws that made up the supreme set of legal norms were either inscribed on stone *stelae* erected throughout the city or were painted onto wooden boards and kept at the state archive.⁹⁶

The argument can also be made that the Athenians had an *unwritten* constitution—similar to the unwritten constitutions of the United Kingdom, New Zealand, and Israel—because Athens had no supreme document like the United States Constitution. It is true that the Athenian system resembles that of the United Kingdom where Acts of Parliament, rather than any single supreme constitutional document, are the highest law of the land.⁹⁷ However, the constitution of the United Kingdom is viewed as unwritten, in part, because Parliament's legislative power is not prescribed by law, but simply exists as a "political fact."⁹⁸ In this

93. JAMES T. MCHUGH, *COMPARATIVE CONSTITUTIONAL TRADITIONS* 50-53 (Peter Lang Publishing 2002).

94. 1 ANTIPHON & ANDOCIDES, *MINOR ATTIC ORATORS* 407 (K.J. Maidment trans., Loeb Classical Library 1961) (1941) (And.1.87); DEMOSTHENES, *supra* note 61, at 273-75 (Dem.23.86); RAPHAEL SEALEY, *THE ATHENIAN REPUBLIC: DEMOCRACY OR THE RULE OF LAW?* 32-34 (Penn State Univ. Press 1987).

95. DEMOSTHENES AGAINST MEIDIAS, *supra* note 61, at 393 (Dem.24.33) (translation modified by author).

96. James P. Sickinger, *The Laws of Athens: Publication, Preservation, Consultation*, in *THE LAW AND THE COURTS IN ANCIENT GREECE* 93, 93-94 (Edward Harris & Lene Rubinstein eds., Gerald Duckworth & Co. Ltd. 2004).

97. Mark Elliott, *United Kingdom: Bicameralism, Sovereignty, and the Unwritten Constitution*, 5 INT'L J. CONST. L. 370, 373 (2007).

98. *Id.*

respect, the Athenian system more closely resembles a written constitutional system since the legislative power of the Assembly is enshrined in law, rather than being a mere political fact.⁹⁹ Moreover, an Athenian law enacted in 403 B.C. states that magistrates are to use “written laws” only, which indicates that the Athenians rejected unwritten law.¹⁰⁰ This being said, constitutional systems can have both written and unwritten elements, therefore, it can be difficult to classify a given constitution as being one or the other. For example, some commentators characterize the British constitution as both written and unwritten.¹⁰¹ Some modern constitutional scholars argue that the United States Constitution has unwritten elements that emerge when judges apply certain ideals, rooted in tradition, natural law, or other sources external to the four corners of the Constitution.¹⁰² Likewise, despite the Athenian focus on written law, there is some evidence for the use of unwritten law in Athens, whether based on notions of equity or on respect for fundamental legal principles embodied by certain written statutes.¹⁰³

Although the Athenian constitution can be said to have been written, it was an *unentrenched* written constitution because the body of standing laws could be amended at any time by an act of ordinary legislation—not unlike the British constitution.¹⁰⁴ However, as illustrated below, the Athenians compensated for the lack of procedural entrenchment by making efforts to respect the fundamental principles that animated their law code, *i.e.*, the spirit of the law, in order to ensure that such principles would not be abrogated by new legislation. This reliance on the respect for the fundamental legal principles as a bulwark against the violation of these principles, although perhaps weaker than

99. See *supra* Part III.B.1. (discussing the legislative process and its underlying statutes).

100. 1 ANTIPHON & ANDOCIDES, *supra* note 94, at 407 (And.1.87).

101. See, *e.g.*, MCHUGH, *supra* note 93, at 47 (noting that some commentators characterize the British constitution as both written and unwritten).

102. See, *e.g.*, CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* 43 (Putnam 1978) (1890) (arguing that the presence of unwritten elements affect interpretation of the United States Constitution); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) (finding an unwritten constitution in “the courts’ additional role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution”); J. Richard Broughton, *The Jurisprudence of Tradition and Justice Scalia’s Unwritten Constitution*, 103 W. VA. L. REV. 19, 24 (2000) (finding an unwritten constitution in Justice Scalia’s use of tradition when interpreting the constitution).

103. See, *e.g.*, RUDOLF HIRZEL, *AGRAPHOS NOMOS* (1900).

104. S.E. FINER ET. AL., *COMPARING CONSTITUTIONS* (1995), *reprinted in*, *COMPARATIVE CONSTITUTIONAL LAW* 358, 360 (Foundation Press 1999).

procedural protections, can nevertheless be effective—as exemplified by the British parliament’s similar respect for ancient legal principles or “conventions.”¹⁰⁵

In the end, the bedrock of the Athenian legal system was a written body of laws with which all new legislation had to conform, just as the United States Constitution is a written set of norms that trumps all non-conforming legislation. Like the Justices of the Supreme Court, the Athenian jurors had to face the difficult task of how to interpret the written text of their constitution as well as the conundrum of how to protect the underlying principles of their constitution when such protections were not explicitly provided for by the written word.

D. Judicial Review in Athens

Judicial review in Athens took place by means of two actions: the *graphe paranomon* and the *graphe nomon me epitedeion theinai* (which can be literally translated as “action for illegality” and “action for authoring an unfitting law,” respectively). These two actions prevented the Assembly from acting either illegally or imprudently by allowing the courts to annul any Assembly decree that ran contrary to standing law, while the *graphe nomon me epitedeion theinai* permitted a similar review of new statutes.¹⁰⁶ Like the Supreme Court, a jury in a *graphe paranomon* or a *graphe nomon me epitedeion theinai* had the power to declare a law “unconstitutional” and order its repeal. However, as described below, the procedure for challenging the constitutionality of a law in Athens differed from the procedure in the United States in that the constitutionality of a new law was not challenged in the context of existing litigation, but was instead challenged in an action that could be brought by any citizen solely for the purpose of challenging the constitutionality of the law.

The *graphe paranomon* and the *graphe nomon me epitedeion theinai* followed the procedure typical of public actions in Athens.¹⁰⁷ Any citizen had a right to initiate an action and call for

105. MCHUGH, *supra* note 93, at 47, 50-51.

106. HANSEN, *supra* note 55, at 209; Sundahl, *supra* note 4, at 131. Others have noted that the *graphe paranomon* was similar to judicial review in the United States and other modern democracies. See, e.g., 1 ROBERT J. BONNER & GERTRUDE SMITH, *THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE* 296-97 (University of Chicago Press 1930).

107. See, e.g., MACDOWELL, *supra* note 59, at 56-57 (explaining the differences between *graphe paranomon* and *graphe nomon me epitedeion theinai*). Unlike modern legal systems, the Athenian system was not bifurcated into civil and criminal segments. *Id.* Instead, the available actions were of two general types: either a *dike*, frequently described as a “private action,” or a *graphe*, commonly translated as a “public action.” *Id.* Examples of available actions include a *dike blabes* (an action for injury), a *dike kakegorias* (an action for slander), a *graphe paranomon* (an action challenging

a trial to test the constitutionality of a new statute or decree. Both actions were heard before a jury of at least 500 citizens and, as was true in all Athenian trials, the litigants represented themselves in court.¹⁰⁸ This meant that the citizen who challenged the statute would speak for the prosecution, while the citizen who authored the challenged statute would personally mount the defense. The trial would last approximately six hours, with one-third of the time being allotted to the prosecution's speech, one-third to the defense, and, in the event of a finding of unconstitutionality, the final third to the assessment of the penalty.¹⁰⁹ After the litigants delivered their speeches, the jury voted either to annul the challenged piece of legislation or to let it stand.¹¹⁰ If the jury voted to annul the new legislation, the defendant was in most cases subject to a penalty assessed by the jury.¹¹¹

The arguments made by the plaintiff in a *graphe paranomon* and a *graphe nomon me epitedeion theinai* can be generally divided into two broad categories: legal arguments and political arguments. Legal arguments were designed to prove that the challenged statute or decree in some way violated or was inconsistent with standing law.¹¹² These arguments were commonly presented in the opening section of the speech before the plaintiff launched into the political arguments. When making these legal arguments, a plaintiff generally had to show that the defendant failed to follow proper legislative procedure or that the text of the statute or decree somehow violated a standing law. For example, Demosthenes alleged that Timocrates' law was invalid

a proposed law as unconstitutional), and a *graphe asebeias* (an action for impiety). *Id.* Rather than the public/private dichotomy, a clearer distinction between the two types of actions is procedural in nature: the principal difference being that any citizen could bring a *graphe*, even if the plaintiff had no involvement with the case, whereas only a victim could instigate a *dike*. *Id.* at 57-58.

108. TODD, *supra* note 79, at 83, 92. In some cases, the number of jurors increased to one thousand or more. *Id.* at 83.

109. MACDOWELL, *supra* note 59, at 249.

110. TODD, *supra* note 79, at 132-33.

111. *See, e.g.,* DEMOSTHENES, AGAINST MEIDIAS, *supra* note 61, at 281 (Dem.23.94); DEMOSTHENES, OLYNTHIACS, PHILIPPICS, MINOR PUBLIC SPEECHES, SPEECH AGAINST LEPTINES (J.H. Vince trans., Loeb Classical Library 1930) (Dem.20.1); TODD, *supra* note 79, at 134 (discussing how the jury decided on a fine).

112. DEMOSTHENES, *supra* note 61, at 393 (Dem.24.33) (translation modified by author). The Repeal Law allowed for a new statute to be challenged as unconstitutional if the statute were "contrary to any established law." *Id.* Likewise, the authority for challenging a new decree on the basis that it contradicted an existing statute can be found in the statute enacted in 403 B.C. stating that "no decree, whether of the Council or Assembly, shall override a statute." 1 ANTIPHON & ANDOCIDES, *supra* note 94, at 407 (And.1.87) (translation modified by author).

because it was directed at a particular individual in contravention of the statutory prohibition of *ad hominem* legislation.¹¹³ Legal arguments of unconstitutionality could also be based on the allegation that the challenged law or decree violated certain broad principles that were embodied by one or more standing laws (a category of arguments referred to hereinafter as “arguments of underlying principle”). When making this argument, the plaintiff would first extract a general legal principle from a standing law and then argue that the challenged law somehow offends this principle. For example, in the following passage from his speech against Leptines, Demosthenes explains that Solon’s testamentary law, which allowed a man to leave his property to an heir of his choice, engendered healthy competition among relatives to gain the favor of the testator, which, in turn, brought out their best qualities:

If Solon made a law that every man could grant his property to whomsoever he pleased [so] that by making the prize open to all he might excite a rivalry in doing good one to another; and if you have proposed a law that the people shall not be permitted to bestow on any man any part of what is their own, how can you be said to have read or understood the laws of Solon?¹¹⁴

In this passage, Demosthenes first extracts a principle from the Solon’s long-standing testamentary law which, in short, is the principle that a law should offer incentives to promote good behavior. He then points out that Leptines’ proposed law, which eliminated exemptions from certain liturgical taxes that had been granted to benefactors of Athens, was contrary to this principle because, by extinguishing rewards for good behavior, the law removed incentives that motivated benefactors.¹¹⁵ As discussed in greater detail below, these arguments of underlying principle played a significant role in the development of Athens’ living

113. DEMOSTHENES, AGAINST MEIDIAS, *supra* note 61, at 411 (Dem.24.59). This prohibition against *ad hominem* legislation parallels the constitutional ban on bills of attainder. U.S. CONST. art. I, § 9, cl. 3. In an example of a plaintiff alleging the violation of proper legislative procedure, Demosthenes accuses Timocrates of repeatedly violating the legislative procedures laid out in the Review Law and the Repeal Law. DEMOSTHENES, AGAINST MEIDIAS, *supra* note 61, at 387-89 (Dem.24.26-38). In the first of these allegations, Demosthenes points out that Timocrates failed to display the text of his proposed statute for public perusal prior to its enactment. *Id.* He then argues that when Timocrates’ law was ratified the decree which set forth the agenda for the *nomothetai* did not include a hearing on Timocrates’ law. *Id.* at 391 (Dem.24.29). Finally, Demosthenes alleges that Timocrates neglected to follow proper procedure by failing to repeal all contradictory laws prior to making his proposal. *Id.* at 397 (Dem.24.38).

114. DEMOSTHENES, OLYNTHIACS, *supra* note 111, at 559-61 (Dem.20.102-03).

115. *Id.*

constitution.

On the other hand, political arguments of unconstitutionality were comprised of all arguments that were not legal in nature. In their most typical incarnation, political arguments alleged that the challenged law was detrimental to Athens.¹¹⁶ Political arguments also included those arguments designed to disparage the opponent by means of either political or personal attacks.¹¹⁷ Although the relative importance of legal and political arguments in the minds of the jurors has been extensively debated, it is probably fair to say that in order to be successful in either a *graphe paranomon* or *graphe nomon me epitedeion theinai*, the plaintiff would have to make convincing arguments of both a legal and political nature.¹¹⁸

Of the hundreds of speeches presumably delivered during the fourth century in the course of *graphe paranomon* or *graphe nomon me epitedeion theinai* trials, only seven have been preserved to the present day. These seven speeches include Aeschines' speech *Against Ctesiphon* (Aeschin.3), Demosthenes' speech *On the Crown* (Dem.18), Demosthenes' speech *Against Androtion* (Dem.22), Demosthenes' speech *Against Aristocrates* (Dem.23), and Hypereides' speech *Against Philippides* (Hyp.2). Two of the speeches (Dem.20 and Dem.24) were delivered in *graphe nomon me epitedeion theinai* trials while the other five were written for *graphe paranomon* trials. All of the speeches apart from Demosthenes' oration *On the Crown* were written for the prosecution. Unfortunately, Hypereides' speech comes down to us in only fragmentary condition. The following section will show how these speeches, despite their limited number, still enable us to observe in considerable detail how judicial review worked in Athens.

IV. THE LIVING CONSTITUTION OF THE ATHENIANS

The following analysis of the Athenian legal system reveals a constitution that had a great degree of interpretational flexibility. This flexibility enabled the Athenians to protect the fundamental principles of their constitution when the laws did not provide explicit protection for these principles and allowed the constitution to evolve with the changing values of a dynamic society. In other words, the Athenians can be said to have had a "living constitution." The Athenian constitution achieved this flexibility

116. DEMOSTHENES, AGAINST MEIDIAS *supra* note 61, at 393 (Dem.24.33). Such arguments of detriment could serve as grounds for bringing a *graphe nomon me epitedeion theinai* as is clearly expressed in the Repeal Law which forbids the proposal of statutes that were "disadvantageous to the Athenian democracy." *Id.*

117. Harvey Yunis, *Law, Politics and the graphe paranomon in Fourth-Century Athens*, 29 GREEK, ROMAN & BYZ. STUD. 361, 361-62 (1988).

118. *Id.* at 364.

for two reasons. First, Athenian jurors enjoyed broad interpretational discretion due to the “open texture” of the legal system. This open texture was a product of (i) the vague wording of Athenian statutes and (ii) certain features of the trial system that increased juror discretion such as the lack of binding precedent, the lack of published opinions, and the permission granted to jurors to apply equity where the law was not clear. Second, the flexibility of the Athenian constitution was a result of the ability of litigants to transcend the plain language of the Athenian statutes and promote the underlying principles of their constitution through the creative use of arguments that relied on implicit constitutional principles rather than the statutory text. Taken together, these aspects of Athenian law created a living constitution that protected the fundamental principles embodied by the standing laws.

A. The “Open Texture” of Athenian Law

When first empanelled, Athenian jurors took the Dikastic Oath which required the jurors to issue a verdict “in accordance with the statutes of Athens.”¹¹⁹ Although this oath required that jurors apply the law, they still enjoyed a great deal of discretion in the interpretation of those laws. Edward Harris has written extensively about this interpretational flexibility, or “open texture,” of Athenian law and has shown how it resulted from the vague language of Athenian statutes coupled with the lack of any official canons of statutory interpretation.¹²⁰ According to

119. DEMOSTHENES, *supra* note 61, at 469 (Dem.24.149) (translation modified by author). The purported text of the entire Dikastic Oath is preserved in Demosthenes’ speech *Against Timocrates*. *Id.*; see also Max Fränkel, *Der attische Heliasteneid*, 13 HERMES 452 (1878) (discussing the Dikastic Oath); 2 R.J. BONNER & G. SMITH, *THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE* 152-54 (1938) (discussing various interpretations of the validity of the oath in Demosthenes and attempts to reconstruct the “true” oath); David C. Mirhady, *The Dikasts’ Oath and the Question of Fact*, in *HORKOS: THE OATH IN GREEK SOCIETY* 48-59 (Alan H. Sommerstein & Judith Fletcher eds., 2007).

120. See Harris, *supra* note 74; see also Edward Harris, *More Thoughts on Open Texture in Athenian Law*, in *NOMOS ESTUDOS SOBRE DIREITO ANTIGO* 241 (D. Leao, D. Rosetti & M. Fialho eds., 2004). Some scholars do not recognize the “open texture” of the Athenian legal system and argue instead that Athenian jurors adhered strictly to the dictates of the applicable statutes in an almost mechanical fashion, thus allowing little room for interpretation of the law or the consideration of non-legal arguments (regarding character, expediency, etc.). See, e.g., HARALD MEYER-LAURIN, *GESETZ UND BILLIGKEIT IM ATTISCHEN PROZESS* (1965); Joachim Meinecke, *Gesetzesinterpretation und Gesetzesanwendung im Attischen Zivilprozess*, 3 REV. INT’L DES DROITS DE L’ANTIQUITÉ 275 (1971). On the other end of the spectrum, some scholars believe that law was only a subsidiary factor in the mind of the typical Athenian juror and that Athenians could even ignore the law if they chose to do so. See, e.g., TODD, *supra* note 79, at 64-66 (stating that Athenian jurors

Aristotle, some Athenians believed that the vague language of their laws was a deliberate innovation of Solon, which he embraced “in order that the final decision might be in the hands of the people.”¹²¹ In this sense, the vague language of the Athenian laws can be compared to the “majestic generalities” of the United States Constitution, which has been heralded as an innovation of the Framers that allowed for the broad protection of civil liberties enumerated in the Bill of Rights.¹²²

A prime example of the vague laws that populated the Athenian legal code is the law that provided a cause of action against anyone who committed an act of *hubris*.¹²³ Although *hubris* in its colloquial sense suggests an act involving great arrogance, it was used in this statute to describe a type of physical assault that was more severe than simply battery (*aikēias*).¹²⁴ However, the exact meaning of *hubris* is not explicit in the statute, thus leaving it to the Athenian jurors to decide whether an act of violence was a mere battery or qualified as a more serious act of *hubris*. In the fourth century cases dealing with *hubris*, we see the emergence of an understanding that *hubris* requires, in addition to a physical attack, the humiliation of the victim—but this is not required by the letter of the law, thus indicating an evolution of the definition as Athenian society and values changed.

Aware of the jurors’ freedom to interpret the laws as they saw fit, litigants engaged in kaleidoscopic rhetorical manipulation of the laws. Aristotle promoted this manipulation of the law in his *Rhetoric* when he wrote that “[i]f the meaning of the law is equivocal, we must turn it about, and see in which way it is to be

placed more emphasis on the procedure of the trial and less emphasis on the substance of the arguments). The truth is undoubtedly to be found somewhere between these two camps. See Harris, *supra* note 74, at 33-34; see also Arnaldo Biscardi, *La gnome dikaiotatē et l’Interpretation des Lois dans la Grèce Ancienne*, 17 REVUE INTERNATIONALE DU DROIT D’AUTEUR 219 (1970); MICHAEL HILLGRUBER, DIE ZEHNTE REDE DES LYSIAS: EINLEITUNG, TEXT UND KOMMENTAR MIT EINEM ANHANG ÜBER DIE GESETZESINTERPRETATIONEN BEI DEN ATTISCHEN REDNERN 105-20 (1988).

121. ARISTOTLE, *supra* note 5, at 216 (Arist.Ath.9.2). Aristotle himself did not agree with this theory. *Id.* Moreover, Solon did not author all of the Athenian laws and therefore the generally vague nature of Athenian statutes cannot be attributed entirely to Solon—although he may have set a standard that was followed by subsequent legislators.

122. See, e.g., W Va. State Bd. Of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (describing the translation of the Bill of Rights into concrete restraints dealing with newly emerging problems).

123. DEMOSTHENES, AGAINST MEIDIAS *supra* note 61, at 36-37 (Dem.21.47) (translation modified by author). “If anyone commits an act of *hubris* against any man, woman, or child, whether free or slave, or commits any unlawful act against anyone of these, any Athenian who desires to do so, being qualified, may indict him before the Thesmothetai.” *Id.*

124. TODD, *supra* note 79, at 270.

interpreted so as to suit the application of justice or expediency.”¹²⁵ Some of the techniques of interpretation used by Athenian litigants included (1) adhering to the plain language of the statute and the ordinary meaning of the words,¹²⁶ (2) relying on precedent,¹²⁷ (3) interpreting a statute in accordance with legislative intent,¹²⁸ (4) comparing the disputed statute with the meaning of other statutes,¹²⁹ and (5) interpreting statutes in a manner consistent with democratic ideals and Athenian values.¹³⁰ Although one might expect that a legal system based on vague laws without standardized methods of interpretation would lead to judicial chaos, Harris has shown that Athenian laws were applied in a surprisingly consistent manner due to the tendency of Athenian juries to reject radical interpretations of a statute.¹³¹ In other words, the Athenians appear to have maintained respect for the law, while simultaneously taking advantage of the flexibility that came with the law’s open texture.

Other features of the Athenian legal system also contributed to the open texture of the law by serving to expand the jurors’ discretionary powers. One such feature was the lack of binding precedent. Although used with some frequency by litigants as a guide to the interpretation and application of statutes, precedent was not reliable and, in any event, was not binding on jurors.¹³² Adriaan Lanni has shown that the use of precedent as a method of ensuring the consistent interpretation of the law was, despite the good intentions of the litigants and jurors, nothing more than a “noble lie” since Athens had no system of recording the prior verdicts of juries, let alone the reasoning underlying such verdicts.¹³³ Even if the jurors’ memory of recent cases was

125. ARISTOTLE, ARISTOTLE: “ART” OF RHETORIC 155 (John Henry Freese trans., Loeb Classical Library 1975) (1926) (Arist.*Rh.*1.15.10); see also David C. Mirhady, *Aristotle on the Rhetoric of Law*, 31 GREEK, ROMAN, & BYZ. STUD. 393 (1990); David C. Mirhady, *Non-Technical Pisteis in Aristotle and Anaximenes*, 112 AMER. J. PHILOLOGY 5 (1991).

126. Harris, *supra* note 74, at 38, 42, 44, 55-56.

127. *Id.* at 38, 64, 71.

128. *Id.* at 50, 56-57, 61, 66, 73.

129. *Id.* at 65. For example, a litigant may argue that a given statute should be interpreted in a manner that is consistent with other existing statutes (in light of the presumption that the collection of Athenian statutes was free of inconsistencies after its revision at the end of the fifth century). *Id.*

130. *Id.* at 66.

131. *Id.* at 78-79.

132. Adriaan Lanni, *Precedent and Legal Reasoning in Ancient Athenian Courts: A Noble Lie?*, 43 AM. J. LEGAL HIST. 27, 46 (1999) (showing that precedent was used in one-fifth of the extant Athenian courtroom speeches).

133. *Id.* at 51; but see Edward 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 (Craig Cooper ed., 2007) (arguing that precedent was effective in promoting the consistent application of law).

accurate, the cultural tendency to abide by prior interpretations of the law was certainly less developed than the concept of *stare decisis* that guides Supreme Court decisions—and which occasionally even overshadows doctrine as the primary consideration for deciding a case in a particular way.¹³⁴ This freedom from precedent made it far easier for Athenian juries to abandon prior interpretations of a statute in favor of an interpretation that was in line with current cultural values, thus expanding the discretion of jurors and promoting the living constitution. Of course, freedom from binding precedent has distinct disadvantages as well, such as a lack of the predictability and consistency in the law that is necessary to protect reasonable expectations.¹³⁵

The open texture of Athenian law was further facilitated by the lack of published opinions. Written opinions would have been an impossibility given the large number of jurors. Moreover, the reasoning behind the votes of the jurors would have been diverse and would have reflected each juror's own understanding of the facts and interpretation of the law, as well as other motivations peculiar to each juror. Ultimately, the absence of written opinions allowed jurors greater freedom to adopt their own interpretation of the law. Because a juror was not required to explain his vote, he could apply the law in the manner that he personally felt was fair. However, the lack of reasoned opinions brings all the ills of unaccountability. First of all, a juror could cast a vote on any basis whatsoever since nobody would ever know the reasons behind his vote (nor even how he voted due to secret balloting). Therefore, jurors could choose to ignore the law altogether—although this would be a violation of the *Dikastic Oath*. Moreover, this lack of reasoned opinions prevents the evolution of doctrine. Doctrine evolves over time as jurists build on prior legal thought by examining the application of legal principles in the context of a variety of fact patterns.¹³⁶ Because there were no archives of written opinions, the Athenians could not effectively create doctrine that would guide future courts in the proper application of the law.¹³⁷

134. See Fried, *supra* note 47, at 1143 (explaining how in *Planned Parenthood v. Casey*, Justices O'Connor, Kennedy, and Souter relied primarily on precedent rather than doctrine when upholding *Roe v. Wade* "almost as if the decision could not stand on its own and needed an apology").

135. *Id.* at 1156.

136. See *supra* note 47 (describing the difference between precedent and doctrine).

137. See Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459, 490 (2008) (examining the difficulty in creating doctrine in the context of commercial arbitration where arbitral awards are rarely reasoned); see also Nicholas R. Weiskopf, *Arbitral Injustice—Rethinking the Manifest Disregard Standard for Judicial Review of*

Athenian jurors were given further license to interpret statutes broadly by a portion of the Dikastic Oath that required jurors to apply equity—or, more literally, their “fairest judgment” (*gnome dikaiotate*)—when the law did not clearly address the matter at hand.¹³⁸ Demosthenes reminds the jurors of their duty to apply equity in his speech *Against Leptines*:

Again, men of Athens, you must also consider well and carefully the fact that you have come into court today, sworn to give your verdict according to the laws, not of Sparta or Thebes, nor those of our earliest ancestors, but those under which immunities were granted to the men whom Leptines is now trying to rob by his law; and *where there are no statutes to guide you, you are sworn to decide according to your fairest judgment.*¹³⁹

Exactly how and when jurors were to apply equity is a matter of debate among legal historians. Some scholars believe that equity was to be applied only as a subsidiary guideline and only in those situations where no law existed that addressed the issue at stake.¹⁴⁰ Although this strict approach is supported by some passages in Demosthenes, other scholars have taken a more permissive view of the use of equity by the Athenian jurors and argue that equity could be utilized by the jurors not only in those cases where a lacuna existed in the law code, but also in the interpretation of applicable statutes.¹⁴¹ For example, in his speech *Against Theomnestus*, Demosthenes urges the jury not to apply the law against slander, which prohibited the use of the word “murderer,” in an unreasonably strict fashion:

Well, it may be, gentlemen, that he will make no defense on these points, but will state again to you what he had the boldness to say before the arbitrator—that it is not a use of a forbidden word to say that someone has killed his father, since the law does not prohibit that, but does disallow the use of the word “murderer.” For my part, gentlemen, I hold that your concern is not with mere words but with their meaning, and that you are all aware that those who have

Awards, 46 U. LOUISVILLE L. REV. 283, 287 (2007) (discussing standards of judicial review of arbitration awards).

138. DEMOSTHENES, OLYNTHIACS, *supra* note 111, at 569 (Dem.20.118); DEMOSTHENES, AGAINST MEIDIAS, *supra* note 61, at 281-83 (Dem.23.96).

139. DEMOSTHENES, OLYNTHIACS, *supra* note 111, at 569 (Dem.20.118) (emphasis added).

140. *See, e.g.*, Hans Julius Wolff, *Die Grundlagen des Griechishcen Vertragsrechts*, 74 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE 26, 34 (1957); HANS JULIUS WOLFF, GEWOHNHEITSRECHT UND GESETZESRECHT IN DER GRIECHISCHEN RECHTSAUFFASSUNG 18 (1962); MEYER-LAURIN, *supra* note 120, at 28-31.

141. *See* Biscardi, *supra* note 120, at 219-20; UGO E. PAOLI, STUDI SUL PROCESSO ATTICO 11, 33 (1933). Some have also argued that jurors applied equity when determining which of two conflicting laws should govern an issue. Biscardi, *supra* note 120, at 219-20.

killed someone are murderers, and that those who are murderers have killed someone. For it was too much of a task for the lawgiver to write all the words that have the same effect, but by mentioning one he showed his meaning in regard to them all.¹⁴²

Professor Paoli sees in this passage an appeal to the jurors' sense of justice in the interpretation of the law.¹⁴³ And in light of this passage, and others like it, Paoli argues that equity operated as a sort of "safety valve" (*soupe de sûreté*) in the Athenian courtroom to ensure a just and reasonable outcome when the strict application of the laws might otherwise produce an unfair result.¹⁴⁴ When considered in the context of the actions for unconstitutionality, this use of equity as a factor in the application of the laws may have been one of the reasons that we observe Athenian litigants moving beyond the literal language of the standing laws and making arguments of unconstitutionality based on underlying principles when the literal language provided insufficient protection of these principles—a phenomenon that is explored in greater detail in the following section.

B. Arguments of Underlying Principle in Actions of Unconstitutionality

The ancient Athenians would have frequently found themselves facing new legislation that was thought to run contrary to a fundamental legal principle that was not explicitly stated in the text of the standing laws. This scenario was precisely the situation faced by the Supreme Court in *Brown*, *Gillow*, *Katz*, *Griswold*, and *Roe*. As we know, the Supreme Court responded in each of these cases by looking beyond the plain language of the Constitution and basing its decision on principles that are implicit in the document. As shown in this section, the Athenians appear to have relied on such arguments of underlying principle in very much the same way.

The Athenians had a great need to rely on arguments of underlying principle because, unlike our Constitution, the body of Athenian laws generally did not contain broad and abstract provisions requiring the preservation of legal rights, such as the right to trial, the right of free speech, and the freedom of religion.¹⁴⁵ Instead, the legal principles that were fundamental to the Athenian democracy were woven into laws that address

142. LYSIAS, LYSIAS 201 (W.R.M. Lamb trans., Loeb Classical Library 1930) (Lys.10.6-7).

143. Biscardi, *supra* note 120, at 231.

144. *Id.* at 232.

145. See *supra* note 113 and accompanying text (explaining that the Athenian legal system included only a few statutes that provided broad protections, such as the Athenian law prohibiting *ad hominem* legislation of any type).

specific situations. For example, although there was no statute proclaiming the basic right of the accused to seek a trial, this legal principle, which was clearly valued highly by the Athenians, was incorporated into various fact-specific laws, such as Dracon's homicide law (which states that in cases of intentional homicide the perpetrator had a right to trial before the Council of the Areopagus).¹⁴⁶ This lack of statutes providing broad protection for fundamental legal principles made it difficult for the Athenians to preserve and promote these principles. If a new decree was enacted that violated a fundamental principle without contravening a specific law, it would have been difficult for the Athenians to challenge the decree successfully unless jurors readily accepted the type of arguments of underlying principle described above in Section III.d. As shown below, the Athenians did in fact make use of arguments of underlying principle and did so in a highly creative manner that would have helped them protect the fundamental principles of their democracy (although as will be seen in the following analysis, not all of the surviving examples of this type of argumentation involve the protection of civil rights). A survey of the seven extant speeches delivered in actions for unconstitutionality revealed twenty-one passages where the speaker either uses the underlying principles of a statute for purposes of interpretation or argues that a new statute or decree is unconstitutional because it violates certain underlying principles embodied in the standing laws.¹⁴⁷ One of these passages, from Demosthenes' speech *Against Leptines*, has already been discussed above in Section III.d. The following sections explore the other vivid examples of such arguments.

1. *The Action against Ctesiphon's Decree*

The most famous examples of the use of arguments of underlying principle in statutory interpretation are found in the two speeches that were delivered in the action for unconstitutionality brought by Aeschines against a decree

146. DEMOSTHENES, AGAINST MEIDIAS, *supra* note 61, at 227 (Dem.23.22).

147. The following passages contain arguments based on the underlying principles of a standing law: AESCHINES, THE SPEECHES OF AESCHINES 341-43 (Charles Darwin Adams trans., Loeb Classical Library 1919) (Aeschin.3.43-44); DEMOSTHENES, DE CORONA AND DE FALSA LEGATIONE 97-101 (C.A. Vince & J.H. Vince trans., Loeb Classical Library 1953) (Dem.18.120-22); DEMOSTHENES, OLYNTHIACS, *supra* note 111, at 559-61 (Dem.20.102, 104); *id.* at 561 (Dem.20.104); *id.* at 581 (Dem.20.135); *id.* at 595-97 (Dem.20.158); DEMOSTHENES, AGAINST MEIDIAS, *supra* note 61, at 227 (Dem.23.22); *id.* at 229 (Dem.23.26); *id.* at 231 (Dem.23.28); *id.* at 233 (Dem.23.31); *id.* at 245 (Dem.23.50); *id.* at 245-47 (Dem.23.51); *id.* at 259-61 (Dem.23.67-69); *id.* at 263 (Dem.23.71); *id.* at 265 (Dem.23.74); *id.* at 267 (Dem.23.76); *id.* at 267-69 (Dem.23.77-78); *id.* at 269-71 (Dem.23.80); *id.* at 271 (Dem.23.82); *id.* at 403-405 (Dem.24.49).

authored by Ctesiphon, a political ally of Demosthenes, that called for Demosthenes' honorary crowning in the Theater of Dionysus. Aeschines delivered the speech for the prosecution, while Demosthenes delivered his rhetorical masterpiece *On the Crown* in defense of Ctesiphon's decree.¹⁴⁸ Aeschines and Demosthenes were the most powerful politicians in Athens at the time, being at the helm of the pro-Macedonian and anti-Macedonian parties, respectively, and they were bitter rivals.¹⁴⁹

One of the primary legal issues in the case was whether the laws permitted Demosthenes to be crowned in the theater—or whether he had to be crowned at the *Pnyx* (an outdoor amphitheater where the Assembly met) during a meeting of the Assembly.¹⁵⁰ If his crowning in the theater was illegal, Ctesiphon's decree would be found unconstitutional. In the course of the trial, two statutes are presented to the jury regarding the permissibility of the crowning in the theater. One statute required all crowns voted by the Assembly to be presented to the recipient at the *Pnyx*, while the other statute stated that crowns could not be presented to a recipient at the Theater of Dionysus “unless the people vote.”¹⁵¹ Putting aside questions about the authenticity of the laws as they were presented to the jury (which has itself generated scholarship), it is interesting to observe how both litigants use arguments of underlying principle to support their own interpretation of these laws.¹⁵²

Aeschines argues that the law allowing for crowning in the theater upon the vote of the people does not apply to crowns voted by the Assembly to Athenian citizens. In support of this interpretation, he argues that the author of the statute did not intend to change the law requiring the crowning to take place at the *Pnyx* whenever the Assembly bestowed a crown, but instead merely intended to prohibit other crowns, which were granted by a tribe or neighborhood association, from being proclaimed in the theater.¹⁵³ According to Aeschines, the author's rationale in drafting this law was to prevent the recipients of these lesser crowns granted by a tribe or neighborhood from receiving greater adulation from the theater crowds than those more deserving benefactors who were crowned by the Assembly would receive from

148. DEMOSTHENES, DE CORONA, *supra* note 147, at 97-101 (Dem.18.120-22); AESCHINES, *supra* note 147, at 305-511 (Aeschin.3). This pair of speeches is the only instance in the extant corpus of Athenian courtroom speeches where both the prosecution and the defense speeches of a single action have survived.

149. William E. Gwatkin, *THE LEGAL ARGUMENTS IN AISCHINES' AGAINST KTESIPHON AND DEMOSTHENES' ON THE CROWN*, 26 *HESPERIA* 129, 129 (1957).

150. AESCHINES, *supra* note 147, at 335-37 (Aeschin.3.32-37).

151. *Id.*

152. *See, e.g.,* Gwatkin, *supra* note 149, at 139-41.

153. AESCHINES, *supra* note 147, at 341-43 (Aeschin.3.43).

the citizens gathered at the Pnyx.¹⁵⁴ Aeschines' interpretation of the law here is clearly driven not by the statutory language, but rather by the underlying purpose of the law, which he identifies by examining the intent of the lawgiver.

Demosthenes proposes a very different interpretation of the statute—however, like Aeschines, he bases his interpretation on what he believes was the underlying principle that motivated the enactment of the statute.¹⁵⁵ In his speech, Demosthenes rejects Aeschines' argument that the law prohibiting crowning in the theater did not apply to crowns granted by the Assembly. He argues instead that the law does apply to such crownings and allows for their proclamation in the theater *provided that the Assembly votes for proclamation in the theater*.¹⁵⁶ In support of this interpretation, Demosthenes explains that the state enacted the law allowing for the proclamation of crowns in the theater with the approval of the Assembly so that the recipient could enjoy the adulation of the theater audience, which would serve as an incentive for everyone in the audience to seek their own crowning through beneficent works:

But, really now, are you so unintelligent and blind, Aeschines, that you are incapable of reflecting that a crown is equally gratifying to the person crowned wheresoever it is proclaimed, but that the proclamation is made in the Theatre merely for the sake of those by whom it is conferred? For the whole vast audience is stimulated to do service to the commonwealth, and applauds the exhibition of gratitude rather than the recipient; and *that is the reason why the state has enacted this statute*.¹⁵⁷

Thus, Demosthenes is asking the jurors to interpret the law in a way that promotes its core principle and purpose: to inspire those citizens who witness a crowning in the theater to seek their own crowning through good works. Demosthenes arrives at this underlying purpose of the law by inquiring into the intent of the legislator—who was, in this case, simply “the state,” *i.e.*, the body of citizens who voted to enact the law.

The use of legislative intent by both Aeschines and

154. *Id.* at 343 (Aeschin.3.44).

155. That Demosthenes and Aeschines espouse different ideas about the intent of the lawgiver and the principle that motivated the legislation is not so surprising. In fact, it is common even today for opposing sides to develop different theories regarding the true intent of the lawgiver. See Gregory Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 833-35 (2007) (discussing how the Federalist Papers, which are now used to gain insight into the original intent of the founders of the Constitution of the United States, contain multiple conflicting arguments).

156. DEMOSTHENES, DE CORONA, *supra* note 147, at 97-99 (Dem.18.120).

157. *Id.* (emphasis added).

Demosthenes to extract the underlying principles of the standing laws is strikingly similar to the use of legislative intent by Justices Stevens and Breyer in their *Heller* dissents described above.¹⁵⁸ Justice Stevens' dissent in *Heller* uses original intent to identify the underlying principles of the Second Amendment by inquiring into what the Framers intended to achieve when drafting the Second Amendment.¹⁵⁹ Justice Stevens' focus on the intent of the Framers is illustrated by the passage where he wrote that "the Framers' single-minded focus in crafting the constitutional guarantee 'to keep and bear arms' was on military uses of firearms."¹⁶⁰ He then argued that, in light of this intent, the Amendment should be "read to secure to the people a right to use and possess arms in conjunction with service in a well-regulated militia."¹⁶¹

Although the task of accurately determining the intent of the Framers often poses a significant challenge to the members of the Supreme Court, an Athenian litigant would have faced an even greater challenge in discovering the intent of the lawgiver. To begin with, it was not clear who the author of a particular law was. Moreover, there were no official legislative histories to provide reliable information about the circumstances and purposes of particular legislation. Nevertheless, the Athenians attempted to reconstruct legislative intent by other means. First, litigants could rely on the writings of Greek historians to gain an understanding of legislative intent through historical context.¹⁶² Second, litigants could look to other literary sources for information about a lawgiver's intent, such as Aristotle's *Constitution of the Athenians* or even the poems written by Solon

158. See *supra* note 40 (discussing Justice Stevens' and Justice Breyer's dissents in *Heller*).

159. *Heller*, 128 S. Ct. at 2822-36 (Stevens, J., dissenting). In his critique of Justice Stevens' "underlying principles" approach to the Second Amendment in *Heller*, Prof. Barnett points out how Stevens relies on legislative intent when identifying the principles underlying the Second Amendment:

[Scalia's] approach stands in sharp contrast to Justice John Paul Stevens's dissenting opinion that largely focused on "original intent"—the method that many historians employ to explain away the text of the Second Amendment by placing its words in what they call a 'larger context.' Although original-intent jurisprudence was discredited years ago among constitutional law professors, that has not stopped nonoriginalists from using "original intent"—or the original principles "underlying" the text—to negate its original public meaning.

Barnett, *supra* note 39, at A13.

160. *Heller*, 128 S. Ct. at 2826 (Stevens, J., dissenting).

161. *Id.* at 2831 (Stevens, J., dissenting).

162. For example, a litigant may have looked to Xenophon's description of the Arginousae Affair in order to gain an understanding of subsequent legal reforms that were undertaken to modify the radical democracy of the late fifth century. Regarding the Arginousae Affair see *supra* note 51 and accompanying text.

himself about his legislative reforms.¹⁶³ Third, litigants could gain information about the historical context, rationale, and intended purpose of particular laws through oral tradition. For example, in the excerpt from Aeschines' speech, we see Aeschines developing legislative intent from the historical context of the law's enactment which was likely to have been passed down orally (although the accuracy of this historical context is difficult to verify and may well be manufactured). Fourth, litigants frequently attempted to discover the intended meaning of a statute by analyzing other laws that provided clues as to the meaning of the statute at hand.¹⁶⁴ Fifth, litigants commonly based their claims regarding legislative intent on the plain language of the statute.¹⁶⁵ Finally, litigants were able, in some cases, to explain the intended meaning and purpose of a law by recalling from personal experience the Assembly debates and historical events that led to the enactment of the particular law at issue.¹⁶⁶ In the end, the difficulty of determining intent in no way prevented the Athenians from using legislative intent in their arguments. This is evident in the fact that in the seven speeches regarding the constitutionality of new legislation, the litigants discuss legislative intent some twenty-six times.¹⁶⁷

In sum, the speeches delivered by Aeschines and Demosthenes in the action against Ctesiphon's decree show how the statutes that made up the Athenian constitution could be interpreted in light of their underlying principles and purpose—rather than being interpreted strictly in accordance with the

163. For example, Solon wrote about his equal treatment of the rich and poor during his tenure as a lawgiver in the following lines:

I stood casting my strong shield around both parties,
And allowed neither to triumph unjustly.

ARISTOTLE, *supra* note 4, at 217 (Arist.*Ath.*12.1).

164. Aristotle recommends the practice of determining legislative intent by examining other laws written by the same legislator. *Id.* at 237 (Arist.*Ath.*35.2).

165. *See, e.g.,* AESCHINES, *supra* note 147, at 129 (Aeschin.1.160).

166. *See, e.g.,* DEMOSTHENES, DE CORONA, *supra* note 147, at 83-85 (Dem.18.102).

167. Legislative intent is discussed by the litigants in the following passages: AESCHINES, *supra* note 147, at 323-35 (Aeschin.3.20-21); *id.* at 335 (Aeschin.3.33); *id.* at 343 (Aeschin.3.44); *id.* at 345 (Aeschin.3.47); *id.* at 445-47 (Aeschin.3.175); DEMOSTHENES, DE CORONA, *supra* note 147, at 21-23 (Dem.18.6-7); *id.* at 83-85 (Dem.18.102); *id.* at 97-99 (Dem.18.120); DEMOSTHENES, OLYNTHIACS, *supra* note 111, at 551 (Dem.20.89); *id.* at 559-61 (Dem.20.102-03); DEMOSTHENES, AGAINST MEIDIAS, *supra* note 61, at 163 (Dem.22.11); *id.* at 173 (Dem.22.25); *id.* at 175-77 (Dem.22.30-31); *id.* at 229 (Dem.23.25), *id.* at 231 (Dem.23.29); *id.* at 237-39 (Dem.23.37-39); *id.* at 249 (Dem.23.54); *id.* at 253 (Dem.23.60); *id.* at 265 (Dem.23.74); *id.* at 271-73 (Dem.23.83); *id.* at 273-75 (Dem.23.86); *id.* at 393-97 (Dem.24.34-38); *id.* at 399-401 (Dem.24.43-44); *id.* at 405-407 (Dem.24.51-53); *id.* at 441 (Dem.24.106); *id.* at 447 (Dem.24.115).

statutory text.

2. *The Action against Aristocrates' Decree*

Demosthenes' speech *Against Aristocrates* provides another striking example of how the underlying principles of Athenian statutes were used to prove the unconstitutionality of a new decree. Demosthenes spoke for the prosecution in this action against the constitutionality of a decree authored by a certain political operative named Aristocrates. The challenged decree made the mercenary general Charidemos inviolate by providing for the seizure of anyone who might kill him:

If anyone kills Charidemos, he is liable to seizure and removal from the territories of our allies. If any person or any city rescue him, they shall be treated as *persona non grata*.¹⁶⁸

This decree had profound political repercussions because it would have supported the policies of Eubulus, a political opponent of Demosthenes, with respect to Thrace's effectiveness as a buffer state between Greece and Macedonia.¹⁶⁹

The speech against Aristocrates is distinctive in the way that Demosthenes uses underlying principles to prove the unconstitutionality of Aristocrates' decree. Instead of using underlying principles merely as a tool of interpretation, Demosthenes identifies the underlying principles of a number of standing laws and then argues that Aristocrates' decree is unconstitutional because it violates these principles (even though the literal dictates of the statutes themselves are not violated).

In the speech, Demosthenes delivers twelve arguments alleging the violation of legal principles that are implicit in the standing laws. Demosthenes extracts these legal principles from an array of homicide statutes and then proceeds to demonstrate how Aristocrates' decree offends these principles. For example, Demosthenes has the law regarding intentional homicide read out by the court secretary in order to illustrate how Aristocrates' decree offends one of the primary principles of Athenian law, namely, the right of the accused to stand trial.¹⁷⁰ In the following passage, Demosthenes impresses upon the jury how this right to trial was a fundamental principle of Athenian law that is demanded by "conscience" and the "religious feeling of the whole city":

The legislator, while he presumes the killing, has nevertheless

168. DEMOSTHENES, AGAINST MEIDIAS, *supra* note 61, at 223, 279 (Dem.23.16, 91) (translation modified by author).

169. A. W. PICKARD-CAMBRIDGE, DEMOSTHENES AND THE LAST DAYS OF GREEK FREEDOM 166-67 (1914).

170. DEMOSTHENES, AGAINST MEIDIAS, *supra* note 61, at 227-31 (Dem.23.22-27)..

directed a judicial inquiry before specifying what is to be done to the culprit, and thereby has shown a just respect, men of Athens, for the religious feeling of the whole city. He thought it scandalous to give credit to such accusations, when made, without a trial; and he conceived that, inasmuch as the avenging of the sufferer is in our hands, we ought to be informed and satisfied by argument that the accused is guilty, for then conscience permits us to inflict punishment according to knowledge, but not before.¹⁷¹

Although Demosthenes refers to conscience and religion, the true source of this right to trial is found in the written homicide law. Demosthenes is therefore attempting here to protect a principle that is implicit in a standing law.

In another argument of principle in the same speech, Demosthenes explains how the standing laws do not permit the maltreatment of murderers by vigilantes and then argues that Aristocrates neglects this humanitarian principle by failing to provide any safeguard against the potential physical abuse of Charidemus' killer.¹⁷² Similarly, Demosthenes has the secretary read the law that prohibits the pursuit of murderers who have fled Athens and then proceeds to point out that Aristocrates' decree violates this principle by allowing for the seizure of Charidemus' killer wherever he may be found, even if outside of Athens.¹⁷³

Later in the speech, Demosthenes argues that the decree also violates "two principles of justice" (*duo dikaiia*) embodied by the existing homicide law that allowed for the arrest by a magistrate of an exiled killer who returned to Athens.¹⁷⁴ These two principles are (1) that an exiled killer should only be arrested by a magistrate (and should not be subject to citizen's arrest) and (2) that such arrest should only be permitted if the killer returns to Athens.¹⁷⁵ In contrast, the challenged decree rendered Charidemus' killer subject to citizen's arrest and permits him to be seized wherever he may be found, thus violating these two principles.

Continuing this line of argument, Demosthenes has the court secretary read the following statute, which permits the family of a victim of violent homicide (which Demosthenes interprets as *intentional* homicide) to take as hostages those people in whose house the homicide occurred until they submit to trial themselves or surrender the perpetrators:

If any man die a violent death, his kinsmen may take and hold hostages in respect of such death, until they either submit to trial for bloodguiltiness, or surrender the actual manslaughterers. This right is

171. *Id.*

172. *Id.* at 231 (Dem.23.28).

173. *Id.* at 241 (Dem.23.44).

174. *Id.* at 245-47 (Dem.23.51).

175. *Id.*

limited to three hostages and no more.¹⁷⁶

After the statute is read out, Demosthenes argues that Aristocrates' decree fails to provide for a trial or even take into account the possibility that the killing may be unintentional or justifiable—thus ignoring two principles embodied by the statute.¹⁷⁷ Moreover, while the statute permits the family of the victim to take as hostages those in whose house the homicide occurred, Aristocrates' decree ignores the complicity of such people entirely.¹⁷⁸ Furthermore, Demosthenes argues that the fact that the challenged decree also punishes anyone who harbors Charidemus' killer by rendering him *persona non grata* violates the "universal law" that requires all men to receive fugitives with hospitality.¹⁷⁹ This reveals yet another type of argument of principle that resembles the arguments made today about the role of natural law in the meaning of the Constitution.¹⁸⁰ The natural law theory, which happened to have its roots in the writings of Plato and Aristotle, imports into the Constitution principles that emanate not from its text, but from other sources such as divine commandment, reason, or universal custom.¹⁸¹ Similarly, Demosthenes argues that the principle violated by Aristocrates' decree did not arise from the Athenian statutes, but is drawn instead from a "universal law" that is unwritten.

Finally, Demosthenes recites provisions from four different laws that contain references to the perpetrator's motives in order to illustrate the principle that a defendant's motives must always be taken into account prior to punishment:

Observe, gentlemen, that this is a universal distinction: it does not apply only to questions of homicide. "If a man strike another, giving the first blow," says the law. The implication is that he is not guilty, if the blow was defensive. "If a man revile another,"—"with falsehoods," the law adds, implying that, if he speaks the truth, he is justified. "If a man slay another with malice aforethought,"—indicating that it is not the same thing if he does it unintentionally. "If a man injures another with intention, wrongfully." Everywhere we shall find that *it is the motive that fixes the character of the act*.¹⁸²

Demosthenes then points out that Aristocrates' decree,

176. *Id.* at 271 (Dem.23.82)

177. *Id.* at 273 (Dem.23.84).

178. *Id.* (Dem.23.85).

179. *Id.*

180. See, e.g., Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1036 (1994) (discussing and defining natural law in general).

181. *Id.*

182. DEMOSTHENES, AGAINST MEIDIAS, *supra* note 61, at 245 (Dem.23.50) (emphasis added).

which simply states “whoever kills Charidemus is liable to seizure,” fails to consider motive, thus rendering the decree a violation of this legal principle as well. No longer is Demosthenes simply looking to the underlying principles of a law as a guide to interpreting that law, as seen in Aeschines’ speech against Ctesiphon. Demosthenes is instead extracting principles from various parts of the law code and then arguing that Aristocrates’ decree violated these principles. This is a more liberal use of underlying principle that parallels the reasoning used in *Griswold* and *Roe v. Wade* where the statutes criminalizing the use of contraceptives and abortion were deemed unconstitutional not because they violated a specific provision of the Constitution, but because they violated an implicit right to privacy that emanated from various clauses of the Constitution.¹⁸³

Although the actions against Ctesiphon’s decree and Aristocrates’ decree provide the best examples of the use of arguments of underlying principle, similar arguments are found in other speeches as well. In fact, we find similar arguments of unconstitutionality based on underlying principles in five of the seven extant speeches delivered in actions for unconstitutionality.¹⁸⁴ We know, therefore, that such arguments were presented with some frequency in the Athenian courtroom. However, whether these arguments of underlying principle were always successful is a different matter since, with the exception of Aeschines’ prosecution of Ctesiphon (which Aeschines lost), the sources do not inform us about the outcome of the trials. Nevertheless, the way in which Demosthenes and Aeschines—two of the great legal experts of the day—relied on arguments of principle in their speeches strongly suggests that such arguments were likely to be accepted by the jurors as legitimate arguments against the constitutionality of new legislation. Assuming that this is the case, the Athenians can be said with some confidence to have had a “living constitution” that was not impeded by the narrow reading of the statutory text, but was instead implemented in a manner that promoted the underlying principles of the law.

V. CONCLUSION: THE LESSONS OF ANCIENT ATHENS

Like the United States, ancient Athens struggled with the

183. See *supra* Section II (discussing the judicial approaches taken in both *Griswold* and *Roe*).

184. The five other passages in the extant speeches that allege unconstitutionality on the grounds that the challenged legislations violates the “underlying principles” of a standing law include the following: DEMOSTHENES, OLYNTHIACS, *supra* note 111, at 559-61 (Dem.20.102), 561 (Dem.20.104), 581 (Dem. 20.135), 595-97 (Dem.20.158); DEMOSTHENES, AGAINST MEIDIAS, *supra* note 61, at 403-05 (Dem.24.49).

question that lies at the core of the originalism debate: whether its constitution should be interpreted narrowly in accordance with its text or more broadly in a manner that implements its underlying principles in light of current cultural values. As this Article has shown, the Athenians were, in fact, able to interpret their constitution in a way that protected the fundamental principles embedded in their statutes and accommodated cultural shifts over time, thus liberating themselves from the “dead hand” of the past. This “living constitution” stemmed not only from the open texture of Athenian laws and procedures, but also from the Athenians’ ability to use arguments of principle in creative ways to liberate themselves from a strict reading of their statutes and implement the ideals embodied by their constitution. This enabled the Athenians to annul new laws that violated certain fundamental rights, such as the right to trial, even if that right was not explicitly expressed in a statute.

This is not to say that the Athenian system did not suffer from serious flaws. Legislative intent was virtually impossible to determine given the absence of written legislative histories, which, in turn, made it difficult to determine the principles that motivated particular laws. Even identifying the author of a specific law was a challenge. Furthermore, the lack of reasoned opinions left jurors unaccountable for their decisions, thus giving them license to ignore the law altogether. The absence of a developed concept of *stare decisis* also deprived Athens of one of the steadying forces that counterbalances the radical tendencies of the living constitution approach. All of these features of the Athenian system contributed to its open texture, but also threatened to reach dangerous extremes by granting too much discretion to the jury. In short, the Athenian constitution ran the risk of being overly susceptible to the whims of the jurors who could ride roughshod over the dictates of law without suffering any consequences.

Despite these flaws in the Athenian system, American jurists should look at ancient Athens as a successful model of a democracy with a “living constitution.” While the disadvantages of the living constitution approach may have been exacerbated in Athens due to the reasons stated above, the United States has remedied the shortcomings of the Athenian system and is therefore better able to reap the benefits of a living constitution approach while avoiding its excesses. For example, in contrast to the Athenian jurors, the members of the Supreme Court have access to copious historical documentation to assist them with the task of identifying legislative intent and the principles underlying the provisions of the Constitution. The Supreme Court also publishes reasoned opinions that allow for the methodical evolution of constitutional doctrine which serves as a steadying influence over

the Court's decisions. And, finally, the Supreme Court is guided by a strong concept of *stare decisis* which protects against radical shifts in constitutional interpretation. With these safeguards in place, the United States is protected from the dangers of excessive interpretational discretion and can confidently embrace the living constitution in order to protect the fundamental principles of the Constitution—just as Demosthenes looked beyond the black-letter law to ensure that the Athenian right to trial, among other principles, would not be trampled by Aristocrates' ill-conceived law.