SOCRATIC PERSPECTIVES ON AMERICAN CONSTITUTIONALISM

STEPHEN R. MORRIS*

...that democratic dignity which, on all hands, radiates without end from God; Himself! The great God absolute! The centre and circumference of all democracy! His omnipresence, our divine equality!

Melville

I. INTRODUCTION

One premise of the American constitutional tradition is an abiding suspicion of the “Platonic” conceit in political theory. Plato believed that the collective good may be secured most effectively by an elite class, having the necessary expertise to discern the collective good and determine how it may best be attained.1 America’s Founders disdained the Platonic aspiration in politics at least as much as they did its antithesis, the Athenian aspiration to radical democracy.2 Modern commentators often echo their sentiments, although seldom as memorably as Judge Learned Hand, who observed: “[f]or myself, it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”3

* Law clerk to the Honorable I. Leo Glasser, Senior Judge of the U.S. District Court, Eastern District of New York, 1999–2000 term. He received his J.D. from the New York University School of Law in 1998, and his Ph.D. in Philosophy from the University of Pennsylvania in 1991. He extends special thanks to David Richards and Tim Mahoney, as well as the editors of the Stanford Agora: A Journal of Legal Perspectives.

1 This conceit is properly called “Platonic” because its fullest exposition and defense is to be found in PLATO, REPUBLIC (George Maximilian Anthony Grube trans., 1974) [hereinafter REPUBLIC].

2 Madison says that in a “nation of philosophers,” the “voice of enlightened reason” would be sufficient to inculcate “a reverence for the laws,” but adds that such a nation “is as little to be expected as the philosophical race of kings wished for by Plato.” THE FEDERALIST No. 49 (James Madison). The sentiment expressed here of the hopeless impracticality of Platonic political theory was pervasive among the Founders. See RICHARD GUMMERE, THE AMERICAN COLONIAL MIND AND THE CLASSICAL TRADITION 178–79 (1963) (asking why “Plato is absent” from the Founders’ debates, while Aristotle, Cicero, Polybius, Demosthenes and Thucydides figure so prominently, and answering that Plato “was consulted by the colonists as a spiritual adviser rather than as a political scientist”). Gummere notes Adams’s complaint, evidently born of extensive research, that the Republic and the Laws are “a bitter satyre upon all republican government.” Id. at 195.

3 LEARNED HAND, THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES 73 (1958). Hand’s quip is offered in the context of concluding reflections on the status of democracy under American constitutionalism. He observes that the “Founding Fathers were acutely, perhaps over-acutely, aware of the dangers that had followed that sort of rule [“the kind of democracy that so often prevailed in Greek cities during the sixth to fourth centuries before our era”], though . . . they differed widely as to what curbs to impose.” He then concludes:

If they [the bevy of Guardians] were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture. If you retort that a sheep in the flock may feel something like it; I reply, following Saint Francis, “My brother, the Sheep.”

Id. at 73–74.
The constitutional tradition’s hostility to Platonism coexists, strangely, with an equally entrenched cultural tradition: veneration of Socrates, both as an avatar of individualism and as an exemplar of the dialectic acumen that is often viewed as the special province of lawyers. The image of the “Socratic public lawyer,” and the irony it conjures, are manifold. It is often said that the ability to “think like a lawyer,” just is the ability to “argue both sides of the question.” But Socrates would have viewed this notion as a variant on the sophist art of “making the weaker argument appear stronger.” Yet Socrates did not play the role of lawyer, deliberately avoiding both the courts and the legislature. Rather, he insisted that “anyone who really fights for justice must lead a private, not a public, life, if he is to preserve himself for even a little time.” Lawyers provide services for fees, an arrangement that is the material foundation of their professionalism. Socrates, however, emphasizes his penury, insisting that, despite public misapprehensions, he does not teach for money.

So, American constitutionalism is marked simultaneously by disdain for Platonic elitism, and a fractured spiritual affinity with Plato’s teacher. This article explores the ideological terrain compassed within this conflicting disdain and affinity. My focus throughout this article is on how, in the space between Platonism and Socratism, the problem of democracy arises: how (and whether) it can be sustained, and why

---

4 PLATO, APOLOGY, in Five Dialogues 18c. (George Maximilian Anthony Grube trans., 1981) [hereinafter APOLOGY]. See also Euthydemus 272b–c (Rosamund Kent Sprague trans., 1993); PLATO, PHAEDO 90b–91d (David Gallop trans., 1975) [hereinafter PHAEDO]; Here, and throughout, I shall refer to the Platonic dialogues by the dialogue’s name, and the standard Stephanus number of the passage (which permits reference to the original text by way of most available translations).

5 See APOLOGY, supra note 4, at 17d, 31d–32b.

6 Id. at 32a. I shall complicate the apparent quietism of this claim in infra Parts II and III by arguing that Socrates’s position in the Apology is in fact profoundly at odds with the one Plato ended up taking on the matter—that philosophers who live in corrupt societies should abstain rigorously from public affairs. See REPUBLIC, supra note 1, at 496be.

7 See APOLOGY, supra note 4, at 19d, 31ac, 33ab, 37c.

8 See PLATO, SYMPOSIUM, at 215b and notes accompanying text (Alexander Nehamas & Paul Woodruff trans., 1989) [hereinafter SYMPOSIUM] (where Socrates’s resemblance to the satyr Silenus and also to the statues of Silenus, available in “any shop in town,” forms the central motif of Alcibiades’s speech). The famous peroration of Alcibiades’s speech concludes that Socrates is like Silenus not just in his famously vulgar looks, but also in his ideas and arguments. Id. at 221e.

On the helplessness of the philosopher in court, see PLATO, GORGIAS, 486b, 521d–522e (Terence Irwin trans., 1979) [hereinafter GORGIAS], and PLATO, THEAETETUS 172c (Robin A.H. Waterfield trans., 1987) [hereinafter THEAETETUS]. Callicles’s image of Socrates struck dumb before the jury appears to be the source of an ancient account that this is what actually happened. See MAXIMUS OF TYRE: ORATIO 38 (H. Hobein ed., 1910); cf. REPUBLIC, supra note 1, at 405bc:

But is it not shameful not just to spend a good part of one’s life in lawcourts as defendant or plaintiff, but to believe that one should preen oneself on the skills that flourish there—cleverness at exploiting others, the ability to take advantage of all the twists and turns of argument, and of every trick to escape conviction, even in the most unimportant and worthless cases? Are not the denizens of the lawcourts contemptible in their ignorance of this truth: that it is a far better thing, and finer, to arrange one’s life so that one never stands in need of a sleepy judge?

Id. (trans. modified by author).
(and whether) it is worth sustaining.  

In Part II, I argue that the Socrates depicted in the *Apology* is far more sympathetically engaged with the Athenian democracy than has usually been thought. To be sure, the Socrates of the *Apology* is ceaselessly critical of his home *polis*, but he is at the same time, unstintingly concerned about it, and about its citizens. I call this distinctively Socratic combination of critique and concern “polypragmatics,” from a Greek work meaning literally, “the art of doing many things,” but more colloquially, the quality of being a “busybody.”

In Part III, I survey Plato’s anti-democratic doctrine. As much as Plato admired Socrates’s stubborn, yet heroic, defiance of the proceedings against him, Plato would probably not have declined the many opportunities Socrates had to evade them.  

The reason stems not from any flaw in Plato’s character, but rather from Plato’s hostile attitude toward democracy, and to its Athenian variant in particular.  

In Part

9 The prospect of drawing sharp distinctions between Socrates and Plato raises the perennial problem of Socrates’s historicity—of how the various literary sources are to be weighed and assessed as evidence for the life of a fifth century Athenian named “Socrates.” My approach to this problem is to evade it, on the ground that my arguments do not rely on its resolution. So, even if Socrates were an entire fiction, my argument may proceed as an interpretive strategy for reading the discrete moments in which that fiction unfolds. That is, in arguing for a Socrates who speaks in “his own” voice in the *Apology*, and as Plato’s “surrogate” in all others, I rely entirely on textual evidence—the fact, in short, that the Socrates of the *Apology* sounds different from the Socrates of the *Crito*, and still more, of the *Republic*.

These differences can be attributed to historical circumstances: that Plato wrote the *Apology* in close proximity to the actual event; that one of his goals at the time was to vindicate his teacher, by displaying to the people who had witnessed the spectacle how shameful its outcome truly was; that this goal would have been best served by an account of Socrates’s speeches that reasonably approximated the substance of Socrates’s own words. Moreover, these circumstances seem to gain some corroboration from the unique status of the *Apology*, as the sole Platonic document (excepting the *Epistles* [Glenn R. Morrow trans., 1962] [hereinafter *Epistles*] in which Plato records his own presence. *See* *Apology*, supra note 4, at 34a, 38b; *see also* *Phaedo*, supra note 4, at 59b (where Plato mentions himself to note his absence on the occasion of Socrates’s death). Nevertheless, I do not rely on these circumstantial indications to treat the *Apology* as a source for a Socrates different in substantial respects from his Platonic alter-ego. *See generally* Charles Kahn, *Plato and the Socratic Dialogue* (1996) (presenting a brilliant entelechy of almost two decades of systematic investigation and reflection); Gregory Vlastos, *Socrates: Ironist and Moral Philosopher* 45-80 (1991) (forming the basis of my treatment of this problem).  


10 The *Crito* makes little sense if Crito’s proposal—to arrange for Socrates’s escape from the jail where he awaits execution of the death sentence—could not have been conveniently implemented. Crito specifically mentions that money is available for the necessary bribes, and houses of refuge ready to ease Socrates into a new life in exile. *See* Plato, *Crito*, *in The Trial and Death of Socrates* 45ac (George Maximilian Anthony Grube trans., 1975) [hereinafter *Crito*].

11 *Epistle VII*, supra note 9, at 324c–326b (offering an account of the development of Plato’s views, in the context of the calamities which befell Athens between 404 and 399 B.C.E., when Plato was still in his early 20’s. Plato was related, by ties both social and familial, to members of the Thirty Tyrants, who, under Spartan sponsorship, overthrew the democracy, conducted purges and expropriations, and were overthrown in turn within a year of assuming power by the exiled democrats, led by Thrasybulus and Anytus (the latter, one of Socrates’s accusers). Plato observes in *Epistle VII* that between the depredations of the Thirty, and the shameless persecution of Socrates, he became disillusioned with practical politics, concluding that “the ills of the human race would never end until either those who are sincerely and truly lovers of wisdom come into political power, or the rulers of our cities, by divine grace, learn true philosophy.” *Epistles*, supra
III, I explore the dimensions of that attitude through an analysis of its origins in Plato’s *Crito*.

In Part IV, I take up a thought experiment: if Socrates’s conviction came before the United States Supreme Court on direct review, would principles of First Amendment jurisprudence sustain a reversal? I focus on the subversive advocacy and the public forum cases, and argue that reflection on Socrates’s sympathetic critique of democracy helps clarify the principles at stake. Is Socrates more accurately conceived as a “subversive” of the fragile Athenian constitutional regime of 399 B.C.E., or as a principled dissident, posing no greater threat to it than does the institution of free speech itself? The question reveals the difficulty of distinguishing between protected dissidence and unprotected subversion, while also suggesting how close a case Socrates’s conviction actually presents. Indeed, under the prevailing subversive advocacy standard, Socrates would have no recourse: his *elenctic* activities are too easily construed as extending beyond “abstract teaching” to posing a real and imminent threat of violence to American democracy.

I look for an alternative ground of relief in public forum doctrine. Highlighting the Supreme Court’s failure to find a public forum in *FCC v. Pacifica Foundation*, I argue that Socrates’s implicit critique of his accusers’ understanding of public and private space may be used to illuminate the anemic understanding of the public forum that prevails today. Specifically, I argue that Socrates, in the process of inventing a new kind of politics, polypragmatics, also invented a new kind of public forum—the *elenctic Agora*—in part, by transplanting politics outside of its traditional setting of lawcourts and the Assembly. Socrates’s conception of the public forum mirrors that described by Justice Brennan in his *Pacifica* dissent, but to which the majority in *Pacifica*, like majorities since, have been blind. Ultimately, I conclude that Socrates is no more likely to prevail under an argument tailored to the public forum cases, than he is under the subversive advocacy doctrine.

Part V focuses on how Socratic polypragmatics might be used as a vehicle for analyzing the current

---

12 This distinction is adapted from Owen M. Fiss’s distinction between First Amendment cases protecting the “streetcorner speaker” and cases apparently deferring on First Amendment grounds to corporate money’s dominance of public debate and the media. See Owen M. Fiss, *Free Speech and Social Structure, in A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution* 346, 349-355 (Jules Lobel ed., 1988).


14 This is the Greek term that, according to the *Apology*, epitomizes Socrates’s philosophical practice. See *Apology*, supra note 4, at 21c, 21e, 23b, 27ab, 29de, 36c, 38a for examples of Socrates’s use of the word. In Epic usage, as a verb, the word means to dishonor another, but not necessarily by refutation in argument. In the *Iliad*, Phoenix pleads with Achilles not to “dishonor the argument,” which he makes alongside Nestor and Odysseus to persuade Achilles to return to the fighting. See *Homer*, *Iliad* 9.522 (Richmond Lattimore trans., 1961) [hereinafter *Iliad*]. In Attic Greek, the word came increasingly to refer to the special contexts of verbal contest—cross-examination in a law court, or more generally, testing, scrutiny, refutation. See Henry George Liddell & Robert Scott, *A Greek-English Lexicon* 531 (9th ed., rev. by Henry Stuart Jones et al., 1940) [hereinafter *Greek-English Lexicon*].


status of democracy in America. I offer a hypothesis concerning the historical and theoretical roots of the public forum concept, and connect this genealogical speculation to some main themes of contemporary liberal theory. I conclude with a parable about the impoverishment of the public forum that reflects on American constitutionalism’s profound ambivalence about democracy.

II. SOCRATIC POLYPRAEGRAMATICS:17
SOCRATES’S ETHICAL CRITIQUE OF DEMOCRACY

In 1988, I.F. Stone published The Trial of Socrates, the fruit of his final years’ labor devoted to learning classical Greek and surveying the scholarship of the Platonic dialogues and the Athenian democracy. His goal in writing the book, he said, was to provoke a deeper understanding of the tradition of free speech and the “American constitutional system.”18 Stone’s arguments, motivated by the desire to “tell the Athenian side of the story,” may be criticized as a rough handling of materials that require more refined treatment.19 But his book also eloquently makes the case for Socrates’s enduring relevance to the ongoing collective project of American constitutional interpretation.

From avowedly partisan motives, tendentious findings are apt to follow. Thus, Stone’s Socrates is something of a fanatic in religion, an oligarch and reactionary in politics, an obscurantist who despised democratic culture, and a pettifogging sophist who fiddled over such matters as the “good condition of the soul” while his city was convulsed by war and insurrection. Stone contends that the political subtext of Socrates’s case was a crucial factor in its origin and disposition. Stone concludes that Athens was untrue to itself when it sentenced Socrates to death, but he also shows that the freest city in the ancient world did not act without reason.20 I agree with Stone’s conclusion, but not his characterization of Socrates, which stems from misunderstandings not unlike those of the jurors who voted to convict Socrates. Like those jurors, Stone does not hear Socrates when he tries to explain that their image of him is a correctable distortion, contrived by years of widespread malice and ignorance.

This article extends beyond answering Stone, however, and also beyond offering yet another interpretation of Platonic texts. Still, I share Stone’s insistence on Socrates’s continued importance. I also hope to use Socrates as Stone did: to intervene in contemporary constitutional debates over the nature, viability, and value of democracy to American constitutionalism.21 I have already noted that in his sympathy

17 I call the distinctively Socratic combination of critique and concern “polypragmatics,” from a Greek work meaning literally, “the art of doing many things,” but more colloquially, the quality of being a “busybody.”


19 See STONE, supra note 18, at xi.

20 See id. at 210–30 (arguing that Socrates could have avoided conviction by invoking his right as an Athenian to free speech).

21 Stephen Holmes is the most insistent contemporary critic of this kind of intervention. See generally STEPHEN HOLMES, ARISTIPPUS IN AND OUT OF ATHENS, 73 AM. POL. SCI. REV. 113 (1979) (arguing that the “principles of Greek politics become flagrant and despotic archaisms when transported, even with the best of intentions, into the institutional context of modern society”). See also PETER EUBEN, THE TRAGEDY OF POLITICAL THEORY: THE ROAD NOT TAKEN 5–18 (1990)
with Athenian democracy, Socrates is critical—relentlessly so, in a manner and to a degree that often struck
his friends and enemies alike as unseemly. But Socrates’s criticism of Athens must be rightly
appréhended, and distinguished from the fundamental doctrinal hostility of Plato. Consider the famous
metaphor in which Socrates compares himself to a gadfly, stationed to the city as the fly would be upon a
“great and noble horse,” which, “somewhat sluggish because of its size,” needs stirring. Socrates explains
his metaphor by observing: “I never cease to rouse each and every one of you, to persuade and reproach
you all day long and everywhere I find myself in your company.”

The gadfly metaphor and Socrates’s explanation are best understood as indications of the depth and
intensity of Socrates’s critical commitment to the Athenian democracy, a commitment he took no less
seriously than the mission to which he had been appointed by the god of Delphi (precisely because the
former was coextensive with the latter). Indeed, Socrates insists on yoking his meritorious military service
during the Peloponnesian War to his public elenchus of Athens and his fellow-Athenians, noting that he is
ready to sacrifice interest and comfort in the service of his philosophical station, as he was with his military
station. Socrates’s allegiance is to both philosophy and to Athens (indeed, to philosophy on behalf of
Athens). Thus, when Socrates declares himself ready to disobey the jurors if they order him to cease
practicing philosophy, he makes clear that his obedience to “the god rather than [the jurors]” would
redound entirely to Athens’s benefit (because Athens would continue to enjoy the good service of
Socrates’s “questioning, examining, and testing”).

A. The Private Busybody

It sometimes seems that Socrates’s ethical engagement with the people of Athens takes the form of
an indefatigable commitment to annoying them. In reflecting on what makes him such a boon to his fellow-
Athenians that he can be called a “gift of the god,” Socrates declares: “I rouse you. I persuade you. I
upbraid you. I never stop lighting upon each one of you everywhere, all day long.”

(agreeing with “Holmes’s general argument and the view of politics and theory advocated, presupposed, or implied by it.”)

22 See infra, notes 120–122 and accompanying text for a description of how Plato makes his disapproval clear in retrospect.
23 APOLOGY, supra note 4, at 30e–31a.
24 See id. at 21a–23b (describing the mission’s origin with the declaration of the Oracle at Delphi that no one was wiser
than Socrates, which inaugurated Socrates’s public career).
25 This is the Greek term that, according to the Apology, epitomizes Socrates’s philosophical practice. See APOLOGY,
supra note 4, at 21c, 21e, 23b, 27ab, 29de, 36c, 38a for examples of Socrates’s use of the word. In Epic usage, as a verb,
the word means to dishonor another, but not necessarily by refutation in argument. In the Iliad, Phoenix pleads with
Achilles not to “dishonor the argument,” which he makes alongside Nestor and Odysseus to persuade Achilles to return
to the fighting. See Iliad, supra note 14, at 9.522. In Attic Greek, the word came increasingly to refer to the special
contexts of verbal contest—cross-examination in a law court, or more generally, testing, scrutiny, refutation. See GREEK-
ENGLISH LEXICON, supra note 14, at 531.
26 See APOLOGY, supra note 4, at 28de, 31ab.
27 Id. at 29de.
28 Id. at 30de (trans. modified by author).
29 Id. at 30e–31a (trans. modified by author).
Two features of Socrates’s public persona provide the context for understanding how such activity might constitute a “great blessing” to Athens.\(^3^0\) First, Socrates says, his manner of speaking is the commonplace style “of the Agora, by the bankers’ tables.”\(^3^1\) And second, he addresses and is open to dialogue with “anyone [he happens] to meet, young and old, citizen and stranger, . . . rich and poor . . . .”\(^3^2\) Socrates’s self-description stands in striking contrast to Plato’s literary custom, which shows Socrates in dialogue with luminaries of the intellectual and political elite of Athens and the Greek world.\(^3^3\) In fact, Socrates is available to potential interlocutors without discrimination. And he is so devoted to his public appointments that when the sun rises upon the waning of Agathon’s drinking-party, Socrates departs to spend the day as he always does, in search of conversation at the Lyceum.\(^3^4\)

Socrates’s appropriation of the Achillean paradigm of excellence and virtue offers another example of his common touch.\(^3^5\) For Socrates, excellence and virtue (what the Greeks called, \textit{arete}) is \textit{not} a matter of accumulating “as much wealth, reputation, and honor as possible,” which is what it was for Achilles.\(^3^6\) Rather, for Socrates \textit{arete} is a condition of the soul, and more precisely, it is the sustained life-practice of \textit{caring for or tending} the soul.\(^3^7\) It follows that \textit{arete} is attainable by anyone with a soul. Socrates does not shrink from this implication. In fact, he embraces it, zealously pressing it upon his auditors in the Agora and the Lyceum. By a deft metaphoric transposition, Socrates democratizes the Homeric concept of \textit{arete}.

The essence of this democratizing turn lies in Socrates’s peculiar notion of the activity at the heart of a life spent in service of \textit{arete}: \textit{elenchus}. Socrates characterizes \textit{elenchus} in moral terms. For Socrates, \textit{elenchus} is the medium of the highest form of a human life, namely “\textit{logos-making about arete}.”\(^3^8\) We

\begin{footnotesize}
\begin{enumerate}
\item Id. at 29d, 30a (trans. modified by author).
\item Id. at 17c (trans. modified by author).
\item Id. at 30a, 33b (trans. modified by author).
\item \textit{Cf. PLATO, MENO} (W.R.M. Lamb trans., 1967) (depicting Socrates’s conversation with a slave-boy as an unlikely foil for illustrating Plato’s theory of recollection, premised upon the innateness of certain kinds of rational understanding).
\item \textit{See PLATO, SYMPOSIUM, supra} note 8, at 223d.
\item \textit{See APOLGY, supra} note 4, at 29e–30b (where Socrates characterizes the good life in terms of his \textit{elenctic} mission). The Greek term \textit{arete} spans a range of meanings that includes both the moral connotations of the English “virtue,” and the more strictly instrumental connotations of “excellence.” \textit{See GREEK-ENGLISH LEXICON, supra} note 14, at 238.
\item \textit{See APOLGY, supra} note 4, at 29e. Peleus sends Achilles to Troy with this pithy summation of the heroic code: “Always be the best in battle and pre-eminent beyond all the others.” \textit{ILIAD, supra} note 14, at 11.783. The prize of course is honor, and public acknowledgment of pre-eminence achieved, in the form of wealth, and reputation. \textit{See MARK W. EDWARDS, HOMER: POET OF THE ILIAD} 150–52 (1987) (providing a useful guide to the voluminous bibliography on this subject). There is a more complex story about Achilles: the story of Achilles’s agonizing withdrawal from and interrogation of the heroic ideal, as attested in embassy scene of Book Nine, and subsequently in his reconciliation with Priam in Book Twenty-Four. \textit{See JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING}, 48–58 (1984) (discussing the ethical dimension of the Achean appeal to Achilles); \textit{EUBEN, supra} note 21, at 218–26.
\item \textit{See APOLGY, supra} note 4, at 30b. The Greek word, \textit{psyche} translates to “soul,” and \textit{epimeleia psyches} means “caring for” or “tending the soul.”
\item \textit{APOLGY, supra} note 4, at 38a (trans. modified by author). Observe the complex interplay between the concepts of \textit{logos-making, arete}, and \textit{elenchus} in the famous passage of the Apology at 38a: “[T]he greatest good for a human being [is] to discuss [literally, to “make logos about”] virtue [arete] every day and those other things about which you hear me conversing and testing [elenchthein] myself and others, for the unexamined [elenchthein, again] life is not worth living
\end{enumerate}
\end{footnotesize}
have seen that Socrates’s conception of arete is an ideal democratically conceived (insofar as it is available, aspirationally, to everyone). The means by which that ideal is to be realized, through continually renewed elenchus, is also quintessentially democratic, in at least two ways.

First, there is a structural similarity between the Socratic elenchus and the Athenian institutional practice of the euthyna (a public accounting to which every Athenian office-holder was subject at the end of his term). Unlike his sophist contemporaries, Socrates did not deploy the elenchus in order to demonstrate dialectical acumen, but rather as a tool for holding his fellow citizens to account, just in the way the euthyna was the best tool for holding public officials to account.

Pericles’s defense of the role that collective deliberation plays in Athenian politics reflects another congruence between Socrates’s elenctic praxis and Athenian democratic culture. In Pericles’s view, dialogue is “not a stumbling-block in the way of action, but rather its indispensable preliminary.” The animating goal of elenchus for both Athenians and Socrates is a synthesis of the ethical and the practical. The distinctive form of certain Athenian political activities, deliberative-epideictic talk (the medium of all their political institutions), and theoretic-theatric display (the medium of their public ceremonies, the tragic and comic festivals) was indispensable to the realization of substantive civic ideals. As an individual citizen, Socrates made the sophist technique of elenchus indispensable to the realization of a good human life—in

for a human being.” Such a passage is apt to give the impression that, in the Apology, Socrates emphasizes the form of his ideal over its content. What, it might be asked, does this “logos-making” come to? What conclusions does it arrive at? Socrates offers no direct answer to such questions in the Apology, which is entirely consistent with his spirited denial that he ever held himself out as a teacher. See Apology, supra note 4, at 33ab. However, he does give voice to his convictions, which may be taken as exemplars of the kind of convictions that a well-tended soul (a soul that had lived an examined life) would end up adopting. (But note that, since Socrates is always open to having his convictions challenged, and potentially overturned, these are neither the only possible convictions an examined life might sanction, nor even the only ones Socrates might have adopted. They are simply the convictions he has come to, by way of the examined life he happens to have led.) They include, notably, the conviction that a person “should look to this only in his actions, whether what he does is right or wrong, whether he is acting like a good or bad human being;” that no one does wrong voluntarily; and that the greatest harm a person can suffer is psychic harm; that doing injustice is the gravest source of psychic harm; and that therefore, it is worse to do than to suffer injustice, even where the injustice suffered extends to disfranchisement, exile, or death. See id. at 28b, 25c–26a, 30cd. Cf. Gorgias, supra note 8, at 461b–480c (the elenchus of Polus, in which Plato offers systematic arguments in support of these Socratic principles); Critias, supra note 10, at 49ae (in which Socrates expounds related convictions, as principles without which there is “no common ground” for an elenctic examination of whether he should escape or not). There is extensive commentary, a substantial portion of which is focused on making philosophical sense of the relation implicit within “Socratic ethics” between arete and happiness (eudaimonia—literally, the condition of existing under a beneficent daimon). See Gerasimos Santas, Socrates: Philosophy in Plato’s Early Dialogues (1979); Gregory Vlastos, Happiness and Virtue in Socrates’s Moral Theory, in Socrates: Ironist and Moral Philosopher, supra note 9, at 200–32; and Thomas Brickhouse & Nicholas D. Smith, Plato’s Socrates 103–36 (1994), for an overview of the rather dense terrain.

39 Chosen by lot from the Council of 500 (which performed a variety of administrative, bureaucratic, and agenda-setting tasks on delegation from the Assembly of all citizens), three boards of ten officers conducting the proceedings sat continuously in hearings on the general conduct of office-holders completing their service. The proceedings themselves were open to all citizens, who had the right to raise any complaints against the official. Office-holders who had handled public funds were subject to examination by a separate board. Criminal prosecutions could issue upon preterment of charges by either board. See Popular Sovereignty, supra note 11, at 55–62; S.C. Todd, The Shape of Athenian Law 112–14, 302–05 (1993) [hereinafter Athenian Law].

40 Thucydides, The Peloponnesian War II.40, 110 (Richard Crawley trans., rev. by T.E. Wick, 1982) [hereinafter Peloponnesian War].
the process, transforming prevailing concepts both of the technique, and of the good life.

Finally there is Socrates’s own revealing confession of the paradoxically democratic quality of his Athenian “mission:” “It may seem strange that while I go around and give this advice privately [idios] and interfere in the affairs of others [polupragmono], I do not venture to go to the assembly [demos] and there advise the polis.”41 The terms of Socrates’s confession are striking, and profoundly idiosyncratic. Indeed, from the standpoints of both orthodox Athenian democratic theory, and Platonic elitism, Socrates’s statement is contradictory.42 Within contemporary Athenian parlance, to act “privately”43 was the antithesis of acting “polypragmatically,” that is, to act as a “busybody,” “interfering” in the affairs of others.44 For many contemporaries, this term epitomized the public character of Athens. The Corinthian ambassador, seeking to rouse the phlegmatic Spartans into action against the Athenians in the early stages of the Peloponnesian War, declares that Athenians “were born into the world to take no rest themselves, and to give none to others.”45 The Athenians themselves embraced this image, making polypragmatics into an integral part of what Pericles called the “happy versatility” of the Athenian citizenry.46 It follows for Pericles that the private man, who spurned politics and the public fora, was not just “unambitious, but useless.”47 In claiming to unite both orientations in his persona, Socrates was claiming to reconcile a breach Pericles had considered a fixed point of Athenian civic ideology.

Socrates’s claim, that he is the first private busybody,48 derives from Socrates’s peculiarly individualistic orientation to politics and ethics (indeed, to politics as ethics). Socrates “interferes” with others (practices polypragmatics) by subjecting them to elenchus as part of his ongoing process of self-elenchus (the outward form of the examined life). Thus Socrates’s elenchus of his own life compels his elenctic engagement with his fellow-citizens.49 For Socrates, elenctic polypragmatics is the form of the just life.

---

41 APOLOGY, supra note 4, at 31c (trans. modified by author).
43 The Greek term, idiotes, can also mean “amateur,” or “layman.” See GREEK-ENGLISH LEXICON, supra note 14. Socrates uses it in this sense, with evident irony in PLATO, PHAEDRUS 236d (Alexander Nehamas & Paul Woodruff trans., 1995).
45 PELOPONNESIAN WAR, supra note 40, at I.70. Gomme said of this phrase that it is “the true definition of the polypragmon, whether individual or State.” ARNOLD WYCOMBE GOMME ET AL., HISTORICAL COMMENTARY ON THUCYDIDES 232 (1948).
46 See PELOPONNESIAN WAR, supra note 40, at II.41.
47 Id. at II.40.
48 The Greek, idios polupragmon is literally a “private busybody.”
49 But, in every instance, this activity is “private”—face-to-face, one-on-one, requiring as an enabling condition the personal, sincere engagement of both interlocutors. Cf. GORGIAS, supra note 8, at 474b (observing that Socrates cannot conduct an elenchus with the many [hoi politai], only with an individual). Thus, Socratic polypragmatics, unlike the Periclean version, shuns the fora provided by the Assembly and the law-courts.
The idea that justice may be summed up as "elenctic polypragmatic" expresses the exact opposite of the view later taken by Plato. Consider this passage from the *Republic*, concerning the "source of excellence [arete—i.e. justice] in the polis": "Does it not come to this: that each person, a unity in himself, performs his own task, and does not meddle with that of others?"\(^50\) It should not surprise one to find an express repudiation of Socrates’s eccentric polypragmatics in the record of Plato’s doctrinal maturity. As I demonstrate in Part III, the dialectics of unity and plurality are central to Platonic philosophy in both metaphysics and politics. For this reason, polypragmatics looks suspect to Plato. What is striking is how clearly the concept is associated with the Socrates of the *Apology*.

In contrast to the Platonic vision of Socrates as a philosopher-king, the Socrates of the *Apology* is a democrat, in the sense that he could only have arisen and thrived in a democratic culture.\(^51\) To be sure, Socrates is scathingly critical of the Periclean democrat’s arrogance and complacency. Socrates is not a law-courts democrat, either. His single entanglement with an Athenian legal proceeding left him convinced that justice had little chance of prevailing in the courts.\(^52\) Nor was he a notable public speaker; he avoided the *demos* in its plenary character, and distrusted its penchant for arbitrariness.\(^53\) Nevertheless unlike his greatest disciple, Socrates was forever wandering in his native city. In doing so, he exemplified another quintessentially Athenian characteristic: *amphidromophilia*.\(^54\) This may explain why a great comedy was written about Socrates, but not Plato; Socrates made himself a public figure simply by being so visible. Socrates’s notoriety was remarkable, moreover, because he attained it while shunning the "official" public fora. As we have seen, he did not need those fora, having invented a new kind of public vocation, and a new kind of public forum within which to practice it. This was a hybrid public-private variation on the traditional fora which had no place for polypragmatics.

---

\(^{50}\) *Republic*, *supra* note 1, at 433d (trans. modified by author) (where "to meddle" translates *polypragmono*). Cf. *Gorgias*, *supra* note 8, at 526c (representing the philosopher and the *polupragmon* as opposites in the dialogues’ concluding myth); *Plato, Charmides, in Laches and Charmides* 161d (Rosamond Kent Sprague trans., 1973) (casting the *polupragmon* as antithesis to the temperate person).

\(^{51}\) Socrates himself recognizes this as his natural medium. Plato draws our attention to the remarkable fact that Socrates never left Athens, except under compulsion of military duty. *See Crito, supra* note 10, at 52bc. Socrates’s profound and intimate attachment to the city is also recalled in the opening scene of the *Phaedrus*, when Socrates explains his apparent ignorance of the Attic countryside by remarking, “I’m a lover of learning [philomathes], and trees and open country are not likely to teach me anything, whereas human beings in town do.” *Phaedrus, supra* note 43, at 230d (trans. modified by author).

\(^{52}\) *See Apology, supra* note 4, at 32ac. The incident is recounted in *Xenophon, Hellenica* 1.4–1.7 (Carleton L. Brownson trans., 1985).

\(^{53}\) *See Apology, supra* note 4, at 31c–32a.

\(^{54}\) This is a Greek term meaning, “love of wandering around.” Indeed the democracy, with its great public spaces, its fantastic emporia, “open to the world,” is uniquely accommodating to wanderers and passers-through. *See Peloponnesian War, supra* note 40, at II.39. Plato likened the democracy, in its openness and liberality, to a “cloak of many colors”—seemingly beautiful in its pluralism, toleration, and egalitarianism. *See Republic, supra* note 1, at 557c–558c.
B. A Melancholy Optimism

In the Apology, Socrates expresses surprise at the closeness of the vote to convict him.\(^{55}\) He even muses that if he had been given more time, he could have convinced the jurors who had voted against him through elenchus.\(^{56}\) Socrates is strangely sanguine about the prospects for rational discourse in democratic contexts; he seems to think that his calamity is simply the result of a convergence of unfortunate circumstances. This melancholy optimism is the typical attitude of Socratic polypragmatics, and I conclude this Part with two passages of the Apology that epitomize it.

The first occurs in the course of Socrates’s allusion to the debacle of the Arginusan generals, which had transpired seven years earlier.\(^{57}\) The purpose of the allusion is to point out that “a man who really fights for justice must lead a private, not a public life if he is to survive for even a short time.”\(^{58}\) But we know that this cannot be all Socrates is saying, since Socrates never retreated to a truly private life either before or after Arginusae. To understand the subtext we must briefly review the events.\(^{59}\)

Following a resounding Athenian naval victory off the Arginusae Islands, in 406 B.C.E., the rescue of shipwrecked sailors was frustrated by a storm. The survivors from twelve wrecked ships perished. Upon receiving word (both of the victory and of the failure to rescue survivors), the Assembly ordered the eight generals to return to Athens and to submit to euthynai.\(^{60}\) With apprehension, the generals returned and addressed an emotional Assembly in plenary session. That session was adjourned upon a motion that the Council of 500 should recommend how the Assembly should proceed.

A few days later, the Assembly reconvened to hear that recommendation. Callixenus, its sponsor, proposed that the Assembly should immediately vote on the guilt or innocence of the generals as to their failure to rescue the shipwrecked survivors. Since the Assembly had already heard both the accusations and the generals’ defense at the previous plenary session, he argued, an immediate vote would be appropriate.

Euryptolemus immediately served Callixenus with a summons for making an unconstitutional proposal in Assembly.\(^{61}\) Euryptolemus argued that Callixenus had illegally treated the previous Assembly

\(^{55}\) See Apology, supra note 4, at 36a. Socrates says a swing of thirty votes would have secured his acquittal. Thus, assuming a jury of five-hundred (the standard size for a panel hearing a “public” case), the vote was two-hundred-eighty for conviction, two-hundred-twenty for acquittal. See Todd, Shape, supra note 39, at 82; John Burnet, Plato: Euthyphro, Apology of Socrates, Crito 230 (1924).

\(^{56}\) See Apology, supra note 4, at 37b, 34b, 35c. Socrates also believed he would be able to convince the jurors without the need to resort to shameful methods like the appeal ad misericordiam. See id.

\(^{57}\) See id. at 32ab.

\(^{58}\) Id. at 32a.

\(^{59}\) See Popular Sovereignty, supra note 11, at 431–45 (describing the emergence of principles of popular sovereignty and due process of law in the trial and execution of the eight generals in Athens).

\(^{60}\) See Athenian Law, supra note 45, at 112–13 (describing the euthynai procedure).

\(^{61}\) The action was called a graphe paranomon—actions against public officials proposing an illegal decree available against the sponsor of an “unconstitutional” proposal in Assembly. See Athenian Law, supra note 39, at 108–09, 159–60.
session as a judicial proceeding, when, in fact, it had been a deliberative meeting, insufficient to provide the generals “due process.” By calling for the Assembly to render a summary verdict, Callixenens was attempting to circumvent the traditional right of trial by jury. Euryptolemus called for sanctions against Callixenus, and for the generals to be given both individual and collective trials.

At first, the Assembly voted in favor of Euryptolemus’s motion. But Callixenens’s faction moved for a new vote, amidst fervent appeals for vengeance on behalf of the perished sailors. With loose talk of violence and retribution rumbling through the aisles, the Assembly succumbed, and Euryptolemus was compelled to withdraw his action, apparently under threat that he would otherwise be tried in the same vote for attempting to obstruct the Assembly. All the tribal presidents after initial expressions of sympathy for Euryptolemus’s proposal, gave way as well—all, that is, except Socrates, who refused to join them in putting Callixenens’s motion to a vote.62

The generals were convicted illegally, without a trial, and the six present in Athens were executed.63 Soon, Arginusae became a watchword for the demise of popular sovereignty and it was certainly on the lips of the Thirty Tyrants just two years later when they supplanted the democracy with Spartan arms. The echo of this cry across the centuries has been profound. It can still be heard in Madison’s grave warning against the dangers of unrestrained majoritarianism: “In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”64 Of course, leaving aside the inscrutable problematics of counterfactuals, if every citizen had been a Socrates on that day, the Assembly would not have been a mob, since members would have behaved as Socrates did, and refused to be manipulated by Callixenens’s tactics.

Looking back on their atrocious conduct in the dreadful wake of the reign of the Thirty Tyrants, the Athenian Assembly did behave as Socrates, by collectively recognizing the illegality of the summary conviction and execution of the generals of Arginusae.65 Socrates credits his fellow-citizens for this insight,

62 Tribal presidents were those presiding over the Assembly proceedings. The Council of 500 was composed of fifty members drawn by lot from each of the ten tribes of Athens. Each of the ten tribal groups selected presiders, prytaneis, by lot from its Council representatives to oversee Assembly proceedings, each group serving for a tenth of the year. During the Arginusan affair, Socrates was serving his year on the Council, and had also been selected by lot to serve as one of his tribe’s presiders during that month’s Assembly sessions. See Socrates On Trial, supra note 9, at 176.

63 The six executed included the younger Pericles, son of the legendary Athenian leader.

64 The Federalist No. 55, (James Madison). See David A.J. Richards, Foundations of American Constitutionalism 47–55 (1989) (setting this passage in the context of Madison’s psycho–political theory of faction and fame, and his rejection of classical republicanism). See also Madison’s allusion in Federalist No. 14 (James Madison) to the “turbulent democracies of ancient Greece” which had been cited by some anti-Federalists as illustrating the difficulties of establishing “republican” government within a large territory. As should become evident in Part III, Madison expresses a view in these passages that derives directly from Plato’s metaphysical critique not just of the Athenian democracy, but also of Socratic polypragmatics.

65 Callixenens was arrested, most likely in the spring of 405 B.C.E., and the Assembly approved a prosecution against him for “deceiving the people.” This was merely a preliminary action, prefatory to formal proceedings in a lawcourt. Xenophon tells us that Callixenens escaped before his trial, remaining absent until the restoration of the democracy in 403 B.C.E. “Hated by all,” Xenophon concludes, “he died of starvation.” Xenophon, supra note 52, at 1.7.35.
which amounts to more than a mere regret over a disgraceful incident. With the restoration of the democracy in 404 B.C.E., also came the Amnesty and fundamental constitutional reforms aimed at securing against the kind of arbitrariness that made the Arginusan proceedings a miscarriage of justice.

In recognizing the wisdom of his fellow citizens’ remorse, even as he contemplates their relapse into mob action at his trial, Socrates expresses faith that despite their fearful gullibility, they are capable of rational self-criticism. Of course their conduct will not spare them the agonies of elenctic challenge. Socrates prophesizes that after his death, younger, angrier disciples will demand that the luminaries of Athenian culture and politics account for their lives.

Yet moments following this prophecy, Socrates speaks with warmth and familiarity to the convicting jurors, so intent on ridding themselves of his afflicting presence. Socrates again expresses faith in his benighted fellows. Summing up his consolations to his friends who had voted for acquittal, Socrates says that by condemning him to death the other jurors had done him no real harm. However, because they

66 See APOLOGY, supra note 4, at 32b.

67 The terms of the Amnesty of 403 prohibited prosecutions of former oligarch partisans for acts undertaken on the oligarch’s behalf. See ATHENIAN LAW, supra note 46, at 232–36. Ostwald states that these reforms represented a triumph of nomos [law] not only over arbitrary government [of the sort epitomized by the Thirty] but even over the kind of popular sovereignty that found its extreme expression in the clamor of the masses at the Arginusae “trial” that “it would be a terrible thing not to let the demos do whatever it pleases.” POPULAR SOVEREIGNTY, supra note 11, at 509–10 (quoting XENOPHON, supra note 52, at 1.7.12).

The heart of the reforms, besides the Amnesty, were provisions for a system of judicial review of all decrees carried by the Assembly, to determine suitability for inclusion among the laws, and a written, publicly posted codification of all laws. See id. at 497–524; JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS 95–103, 299–304 (1989) (“The first major change . . . was the institution of the procedure of graphe paranomon; whereby the proposer of a decree passed in Assembly could subsequently be tried in court for having proposed a measure contrary to democratic principles and to Athens’s laws”). Cf. ARISTOTLE, THE POLITICS OF ARISTOTLE 168–69 (Ernest Barker trans., 1946) [hereinafter POLITICS]:

It is popular leaders who, by referring all issues to the decision of the people [demos] are responsible for substituting the sovereignty of decrees for that of the laws. Once the people are sovereign in all matters, they are sovereign themselves over its decisions; the multitude follows their guidance; and this is the source of their great position. But the critics of the Magistrates are also responsible. Their argument is “The people ought to decide.” The people accept that invitation readily; and thus the authority of all the Magistrates is undermined. There would appear to be solid substance in the view that a democracy of this type is not a true constitution. Where the laws are not sovereign, there is no constitution.

Id. at 168–69.

68 See APOLOGY, supra note 4, at 39cd.

69 Socrates distinguishes in his final (third) speech between the “gentlemen of the jury” who voted to convict, and the “judges” who did not. See id. at 40a, 41cd. See also SOCRATES ON TRIAL., supra note 9, at 210–14. Implicit within this distinction is another that was often obscured in Athenian judicial proceedings: the distinction between fact and law. In fact, the Athenian jury was the ultimate judge of both, even if the question of law were a constitutional one. Socrates suggests a criticism of this practice, by noting that his “judges” had acted as they were bound to do so by law, whereas the “gentlemen of the jury” had followed their fears and prejudices. See APOLOGY, supra note 4, at 35c (“It is not the purpose of a juryman’s office to give justice as a favour to whoever seems good to him, but to judge according to law, and this he has sworn to do.”); BUT see DEMOSTHENES, AGAINST TIMARCHUS, in DEMOSTHENES, ORATIONS 24.149–51 (J.H. Vince trans., 1935) (noting that Athenian jurors swore the following oath: “I will judge according to the laws and decrees
meant to, “they deserve blame.” Then instead of pressing this point, Socrates makes a request of his seeming enemies, those who had voted to convict:

This much I ask of [you]: when my sons grow up, avenge yourselves by causing them the same kind of grief that I caused you, if you think they care for money or anything else more than they care for virtue, or if they think they are somebody when they are nobody. Reproach them as I reproach you, that they do not care for the right things and think they are worthy when they are not worthy of anything. If you do this, I shall have been justly treated by you, and my sons also.

Rather than curse his enemies, Socrates admonishes them once more. He declines to sever all ties with them (even as they fervently attempt to do so with him), instead reaffirming the ineluctable ties of family and tradition that will keep Socrates and the Athenians bound together, even after Socrates’s death. The Athenians attempt to banish philosophy from politics by convicting him, but Socrates gently reminds them that, some day when they realize their mistake, it will hopefully not be too late to make peace.

III. Socrates in the Crítos: The Genesis of Plato’s Anti-Democratic Politics

Plato believed that Athenian democracy, like any democracy, was corrupt, and therefore not a possible (much less sensible) locus of ethical commitment. Plato came to view Socrates’s belief to the contrary as the most culpable aberration in his eccentric make-up.

It has been said that Socrates hurt his own case by his cross-examination of Meletus, one of his three accusers. In the Popular Court, one of the bastions of Athenian democracy, Socrates seems to mock openly one of its foundational principles: that, since every citizen knows the laws, every citizen is an apt judge of them. He begins by eliciting from Meletus the claim that “all Athenians” (save Socrates, of Athens, and matters about which there are no laws I will judge by the justest opinion.”); Athenian Law, supra note 39, at 53–63, (arguing that Athenian juries acted as judges of law due to lack of existence of the principle of stare decisis in the Athenian system, vaguely worded statutes, lack of legal scholarship influencing judicial decisions, and no rules of statutory interpretation). The Athenian juror, engaging in no deliberations with other jurors, thus had “complete discretion as he saw fit to interpret or reinterpret statutory law—or even perhaps to ignore it, if he felt that this did not conflict excessively with his conscience and his oath.” Id. at 62.

70 Apology, supra note 4, at 41e.
71 Id. at 41e–42a.
72 See Euben, supra note 21, at 227 (making the “estrangement between philosophy and politics” the central theme of his reading of the Apology). There is an ancient tradition concerning the remorse of the Athenians after Socrates’s death. The tradition evolved late, and is probably untrustworthy. See George Grote, 8 A History of Greece 302 (1888).
73 See, e.g., Allen, supra note 9, at 20 (suggesting that Socrates’s refutation of Meletus, provoked and angered the jurors due to Socrates’s criticism that men like Meletus who claim to be virtuous cannot ever teach their own sons virtue); Thomas G. West, Plato’s Apology of Socrates 79 (1979) (“When Socrates says he will tell the whole truth, yet refuses to give that an outward order and attractiveness, he guarantees that the jurors will not believe it.”).
74 For an account of the development of the dikasteria (the system of jury courts), see Popular Sovereignty, supra note 11, at 47–77.
course) improve the young, because they all know the laws. Socrates then invites Meletus to analogize. Would he say that “all Athenians” improve horses? Or would he say that only those who know the art of horse-breeding can improve horses, “whereas the majority, if they have horses and use them, corrupt them”? Furthermore, is this not the case “both with horses and all other animals” (including humans)?

Meletus makes no response; he cannot. He is too inept to defend his crude parroting of democratic ideology. But this is precisely Socrates’s point: if democrats cannot explain how they intend to maintain standards of civic competence, then the rhetoric of equal rights really is vacuous. Perhaps a society founded upon the ideal of political equality can sufficiently devote both training in the civic arts, and control over the economic means of civic life, to sustain that equality in practice. Protagoras argued that this was possible, and that democracy therefore was sustainable. But Meletus, like other Athenians who used the rhetoric of democracy to further their political ends, lacks the skill to make such an argument.

Socrates observed such facts and turned straightaway to *elenchus*. Plato, however, observed them

---

75 *See Apology*, supra note 4, at 24e–25a.
76 *Id.* at 25b.
77 *Id.* (where Socrates notes that it would be impossible if only one person corrupted the youth while all others improved them).

78 In fact, Meletus’s democratic sentiments probably derive not from conviction, but from opportunism, if Martin Ostwald’s speculations about Meletus’s identity are correct. Ostwald offers a hypothetical resolution of the conflicting and sketchy traditions about Meletus. So, if Socrates’s accuser is the same Meletus whom independent testimony places among the band sent by the Thirty Tyrants to arrest Leon of Salamis (the same band Socrates refused to join, in defiance of a direct order from the Thirty), then he is also the Meletus who abandoned the Thirty just before the civil war that drove them from power. This in turn would have given him a powerful motive to burnish somewhat tarnished democratic credentials—perhaps by means of a public indictment against a man resented by many within the popular party. *See Apology*, supra note 4, at 32ce; *Popular Sovereignty*, supra note 11, at 495, 543. Cf. *Socrates on Trial*, supra note 9, at 27–28 (expressing skepticism that the Meletus who prosecuted Socrates is the same person sent by the Thirty to arrest Leon, and arguing that Meletus was a relatively obscure figure to Athenians in 399 B.C.E.).

79 *See Christopher Lasch, The Revolt of the Elites and the Betrayal of Democracy* 80–92 (1995) (arguing that “the recognition of equal rights is a necessary but insufficient condition of a successful democracy deserving to survive”).

80 Protagoras’s argument is discussed in Plato’s dialogue, *Protagoras*. *See Plato, Protagoras* (Christopher Charles Whiston Taylor trans., 1976) 319a–328d [hereinafter *Protagoras*]. Protagoras’s speech is offered in response to a dilemma posed by Socrates, designed to force Protagoras to choose between the oligarchs (who disdain the many, and believe firmly that the art of politics cannot be conveyed to them), and the democrats (who believe that the many are the very source of the art of politics). In a delicate position (as a foreign sophist, looking for business among the city’s elites), Protagoras dissolves the dilemma by telling a magnificent story in which he vindicates the Athenian practice of allowing all citizens to deliberate on political issues, but stops short of endorsing the radical democratic account of why this practice is legitimate. Of course, for Protagoras, the most famous relativist of all time, legitimacy in politics derives entirely from custom and socialization, as much in democracies as in any society. But Protagoras also preserves in his theory a rationale for his own profession (sophistry, or the art of politics). In a city of flautists, where everyone plays with a certain basic competence (“compared with people who can’t play [the flute] at all”), there would still be differences of skill and proficiency, and therefore room for expert instruction. Thus, in a democracy, everyone learns the art of politics (from everyone else, each one according to his ability). But people of pre-eminent political skill will still arise. See *id.* at 327c-328d. For commentary, see *Cynthia Farrar, The Origins of Democratic Thinking: The Invention of Politics in Classical Athens* 44–98 (1988) (discussing the historical Protagoras in the context of the development of radical democracy in Athens).
and theorized an anti-democratic politics. Thus, where Socrates dismisses Meletus’s feeble expression of
democratic principle through a largely *ad hominem* attack, Plato contends with it on principle, promulgating
an elaborate doctrine in opposition to democracy. I do not attempt a comprehensive survey of that doctrine
here, but I will indicate in some detail where its roots lie in Plato’s *Crito*. I focus on the *Crito* for three
reasons. First, it is generally treated as indistinguishable from the *Apology* for the purposes of interpreting
Socrates. In contrast to such interpretations, I argue that there is a sharp distinction between the image of
Socrates presented in the *Crito* and the *Apology*. Specifically, I show that the Socrates of the *Crito* is a
principled anti-democrat in a way that the Socrates of the *Apology* is not. Second, analyzing the genesis of
a distinctively Platonic philosophical project as early as the *Crito* shows just how deeply embedded Plato’s
anti-democratic leanings are. Thus, if we wish to recover a distinct “Socratic” voice from the Platonic
dialogues, we must approach these texts with a severe and skeptical ear, particularly when the issue is
democracy. Finally, I give careful scrutiny to the *Crito*’s argument against democracy because it is the
ultimate source of European political theory’s implacable antipathy to democracy. This antipathy was
indelibly stamped upon the Founders’ original conception of the notion of federalism itself, and modern
American constitutionalists must therefore reckon with it.

A. *Metaphysics and Politics in the Crito*

I begin with a close reading of the dialogue’s pivotal moment. Socrates’s initial overture seems
innocuous: “Was it well said on each occasion or not,” he asks Crito, “that we ought to pay attention to
some opinions but not to others?” Socrates observes that it had always been a premise of their *elenctic*
inquiries that some human opinions are worth heeding, others not. Indeed, the very purpose of *elenchus* is
to differentiate between wise and unwise opinions.

Socrates calls opinions worth honoring “useful,” and says that they are the ones held by the “wise,”

---

81 This is not to say that the apparent contradiction between Socrates’s argument for the duty of obedience to law in the
*Crito* and his putative defiance of the Assembly at certain junctures of the *Apology* has not preoccupied commentators.
common assumptions, but reaches conflicting conclusions in the *Apology* and the *Crito* and that the two are inconsistent
with respect to Socrates’s view of the duty to obey the law). Most commentators unanimously treat the *Crito* as
equivalent to the *Apology* with respect to reconstructing the views of a “historical” Socrates. See, e.g., Richard Kraut,
*Plato’s Apology and Crito: Two Recent Studies*, 91 *Ethics* 651 (1981) (reviewing Gerasimos Xenophon Sanas’
Socrates: Philosophy in Plato’s Early Dialogues (1979) and A.D. Woolley’s Law and Obedience: The Arguments
of Plato’s Crito (1979) (addressing the tension between the *Crito* and the *Apology*); Gregory Vlastos, *Socrates on
Obedience and Disobedience*, 43 *Yale Rev.* 517 (1974) (discussing seemingly conflicting Socratic views of obedience in
the *Crito* and the *Apology*). *But see Kahn, supra* note 13, at 75–95 (arguing that while the character portrait of Socrates is
consistent between the *Crito* and the *Apology*, the historical Socrates and his philosophy is more likely to be found in the
*Apology*, due to its unique status among the dialogues as a quasi-historical document.).

82 Notwithstanding the Founders’ professed indifference to Plato, they internalized the first premise of his political
theory: that democracy by its nature is a corrupt and unsustainable form of social organization. See generally Gordon S.
among the Founders); Jennifer Tolbert Roberts, *Athens on Trial: The Antidemocratic Tradition in Western
Thought* 179–93 (1994) (surveying the reception of the antidemocratic tradition among the Founders).

83 *See Crito, supra* note 10, at 47a–48a.

84 *Id.* at 46e (trans. modified by author).
not the foolish. Socrates exploits an ambiguity between the claim that not every opinion is true, and the claim that the opinion of everyone cannot be true. The first is true if the principle of non-contradiction is.

The second is not; it might turn out that everyone agreed on a true and useful opinion. It might even turn out, in some city, that everyone was wise. In such a case, farfetched though it may be, we should want to value everyone’s opinion, since they are all wise, and their opinions all useful.

In the passage before us, Plato denies the very possibility of this case. He begins with a brief induction. Should the athlete who wants the optimal regime value the advice of everyone, or “of the one man only, namely a doctor or trainer?” He should value the opinion “of the one only,” Crito responds pointedly. “Then he ought to fear the blame and esteem the praise of that one, but not that of the many [hoi polloi].” Socrates’s objective is not to establish a merely logical point about the relative value of belief. Instead he seeks to establish a firm normative distinction between the agency of the many and that of “the one.”

Socrates sees no need to discuss all the other examples. His general point is that only “the one” knows “what is just and unjust, honorable and shameful, good and evil;” Applying this principle to our most important possession—the soul—Socrates asks once more whether we ought to fear and follow the opinion of the many, or that of “the one, if there is one who has knowledge of these things”? Socrates offers a sweeping response to his own question: “Perhaps, finally, we ought not to give much thought to what the many [hoi polloi] tell us, but rather we ought to heed what the one who knows says about justice and injustice, the one and the truth itself.”

If Meletus claims that all citizens know the laws, or know what is best for the young, then, so far as Plato has set forth the problem, he is wrong in principle. No more do the many know the truth about justice and injustice than they do the crafts of medicine and horse-training. The case imagined above, of a city where all citizens are wise, is impossible. Accordingly, by not making a distinction between “every opinion” and the “opinion of everyone,” Plato does not consider the possibility that the many might, in some cases...

---

85 Id. at 47a.
86 See id.
87 Recall Protagoras’s city of flautists, where all citizens play the flute and teach is to each other; in such a city, all citizens would seem as competent flute players when compared with people who can’t play the flute at all. See Protagoras, supra note 80, at 327ac.
88 Crito, supra note 10, at 47b.
89 Id. at 47b5–7 (trans. modified by author).
90 Id.
91 See id. at 47b.
92 Id. at 47d.
93 Id. at 47c (trans. modified by author).
94 Id. at 47cd (trans. modified by author).
95 Id. at 48a (trans. modified by author).
96 Id.
circumstances (such as those described in Protagorean political theory), achieve collective wisdom about their own governance.

They might occasionally get it right by accident. When Crito asserts that recent events prove the necessity of caring about what the many think—since they are capable of doing such great harm—Socrates’s response hints at a general theory of the agency of the many: “Would that the many could inflict the greatest evils, for then they might also work the greatest good as well. But, as they can do neither, they can neither make someone wise nor foolish. They act only at random.”

The italicized phrase, one of the leit-motifs of Platonic doctrine, is Plato’s usual way of characterizing the nature of the many’s capacity for collective action. In the Protagoras, Protagoras challenges Socrates to explain “why it is necessary for us to investigate the opinion of the many, who say whatever comes to them.” In the Symposium, Pausanias describes the kind of Eros associated with “Pandemos Aphrodite” as one that “works at random.” Pausanias adds that such Eros is especially characteristic of those who “look only to getting what they want, not caring whether it is a fine thing or not.” It follows that acolytes of Pandemos Aphrodite “answer to whatever comes their way, indifferent to whether it be good or bad.” In this respect, the acolyte of “democratic” Eros is no different from the

97 See Protagoras, supra note 80, at 319a–328d.
98 See Crito, supra note 10, at 44d.
99 Id. at 44d (trans. modified by author).
100 The Greek—hoti an tuchos—is idiomatic, and is variously translated by phrases indicating randomness and happenstance (as the passages cited immediately below illustrate). The meaning of the expression derives from its connection to the word tyche, the name of the goddess of chance, later assimilated to the Roman goddess, Fortuna. See Marcel Detienne & Jean-Pierre Vernant, Cunning Intelligence in Greek Culture and Society 223 (Janet Lloyd trans., 1978) (describing tyche in archaic thought): “Tuche stands for . . . the individual buffeted by the waves, whirling with the winds, rolling helplessly hither and thither without respite. Tuche [also] stands for the opportunity to succeed, the desired goal reached, success attained;” and E.R. DODDS, THE GREEKS AND THE IRRATIONAL 242 (1951): “[The cult of tyche] is ‘the last stage in the secularizing of religion’; in default of any positive object, the sentiment of dependence attaches itself to the purely negative idea of the unexplained and unpredictable, which is Tyche.” (citing M.P. Nilsson, Greek Piety 86 (1948)). The notion that rational politics—or, in the classical republican tradition, civic virtue—has at its heart the control, containment and domination of chance and fortune becomes one of the founding principles of classical republican theory, as transmitted by Boethius and Polybius to the Florentine theorists of the fifteenth and sixteenth centuries. See J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition 31–48 (1975). Pocock notes that “Plato did not make use of the symbol of tuche in the Republic,” id. at 38, but, as I argue, he did not need the symbol, since the underlying concept as deployed in the abstract phrase hoti an tuchos was already in place as one of the cornerstones of his thought. See id. at 34.
101 Protagoras, supra note 87, at 353a (trans. modified by author).
102 Symposium, supra note 8, at 181b (trans. modified by author).
103 Id. (trans. modified by author).
104 Id. (trans. modified by author). See Greek-English Lexicon, supra note 14, at 1296 (suggesting the translation “vulgar” for the term, pandemos). Pausanias distinguishes vulgar from “heavenly” love, which is more mature, stable, mutual, and based on a broader range of pleasures, and interestingly, exclusively homosexual (but not, Pausanias emphasizes, exclusively pederastic). See Symposium, supra note 8, at 181ce; see generally John Boswell, The Marriage of Likeness: Same-Sex Unions in Premodern Europe 74–75 (1994) (discussing Athenian attitudes towards homosexuality, with particular reference to Plato).
democratic psyche more generally conceived in the Republic. This “fair and multicolored man,” whose life is full of the “paradigms of constitutions and tropes,” says and does “whatever chances to come to him.”

Thus, a phrase originally deployed to describe the deep irrationality of “the many” now embraces the irrationality of a disordered soul. To be a “many” of any kind is to be an agent, whose action is not bound by principle. It is, as Socrates says in the Crito, to be the sort of entity, civic or human, that “lightly kills and would raise to life again without a thought.”

In this pivotal passage of the Crito, Plato broaches one of the fundamental dichotomies of Greek ontology, between the “one” and the “many.” Parmenides argued that what is real must be unitary; the realm of the illusory is the realm of change and plurality. But the ethical-political purpose to which the distinction is applied in the Crito recalls Heraclitus. The essence of wisdom for Heraclitus is that “all things are one,” an insight attainable through attention to “that which is common to all.” Heraclitus says, “I went in search of myself,” and because of that investigation, becomes able to “distinguish each thing according to its nature, and say how it is.” The central dynamic tension of Heraclitean philosophy is in its movement between psyche and kosmos, via the polis—between the idea of the examined life devoted to the cultivation of an integrated character (conceived as attendance to the “logos common to all”) and the insight this devotion yields into the real unity of all things. Plato’s inheritance of this conceptual structure enables the seamless transition in the Crito, from the innocuous observation that only the belief of “the one,

105 Republic, supra note 1, at 1.561d. The phrase, “whatever chances to come” translates hoti an tuchei.

106 Crito, supra note 10, at 1.48c (trans. modified by author). Socrates’s image vividly recalls two stories, preserved by the fifth century historians. Herodotus tells of Cambyses, who, after ordering Croesus put to death, changed his mind. His servants, having anticipated his vacillation, inform him that they had spared Croesus. They in turn are put to death. See Herodotus, The Histories III.36 (Robin Waterfield trans., 1998). Compare this to Thucydides’s account of the fate of Mytilene. After suppressing a revolt in 428 B.C.E., the Athenian Assembly, following Cleon’s urging, send a trireme with orders to kill every man in the city and enslave the women and children. The next day, called to their senses by Diodotus, they reverse themselves. Mytilene is saved by vigorous rowing. See Peloponnesian War, supra note 40, at III.36 and notes accompanying text. Cf. Gorgias, supra note 8, at 1.521c (Socrates, in answer to Callicles’s prophetic warning, advises him that he is well aware that, in Athens, “anything might happen [tuchoi] to anyone.” (trans. modified by author)).

107 For a general account, see Michael C. Stokes, One and Many in Presocratic Philosophy (1971) (surveying the distinction between the one and the many in early Greek thought).


111 Id. at Heraclitus Fragment B101.

112 Id. at Heraclitus Fragment B1.
that is, and the truth itself” can be true.\textsuperscript{113}

The notion of being “one,” in the way that “the truth itself” is, looks ahead to doctrine Plato develops later, particularly in the \textit{Republic}.\textsuperscript{114} Socrates’s response to Crito’s entreaty to allow his friends to arrange his escape offers another instance of doctrinal anticipation:

\begin{quote}
We must investigate whether this thing is to be done or not, for I, not only now but always, have been the kind of person to be persuaded by no one thing \textit{[medeni]} among the [many] things of mine \textit{[ton emon]}, other than the \textit{logos} that on reflection \textit{[logizomenos]} seems best to me.\textsuperscript{115}
\end{quote}

It is striking to find here, in the distinction between the plural genitive form “my things” (\textit{ton emon}—usually not translated), and the dative “no single thing” (\textit{medeni}), a grammatical inscription of the problem Socrates is about to raise. Socrates, the text suggests, is a composition of many things. Rather than yield to the random impulses of desires and appetites that lie naturally within him,\textsuperscript{116} he seeks a unifying principle of action in the \textit{logos}. The allusion now is to Parmenides, who summoned Greek philosophy to “judge by \textit{logos},”\textsuperscript{117} the “way of persuasion, which attends truth,”\textsuperscript{118} which “never was nor will be, since it is now, all together, one, continuous.”\textsuperscript{119} Reason by \textit{logos}, Socrates says, and be persuaded by \textit{one} thing from within the manifold naturally constitutive of a human being.

So unified, Socrates presents an exemplary image of a kind of agency that is the metaphysical antithesis of the Athenian mob. And so imagined, Socrates is radically different from the eccentric polypragmatist of the \textit{Apology}. Plato has reconstructed him—subtly, but utterly. Plato’s Socrates has metamorphosized into a philosopher-king. His virtue no longer resides in the relentlessness with which he

\textsuperscript{113} \textit{Crito}, supra note 10, at 47–48 (trans. modified by author).

\textsuperscript{114} See, \textit{e.g.}, \textit{Republic}, supra note 1, at 443d.

\textsuperscript{115} \textit{Crito}, supra note 10, at 46b (trans. modified by author).

\textsuperscript{116} An account of a lost Socratic dialogue by Phaedo, the \textit{Zopyrus}, has it that Socrates was examined once by a “physiognomist” from the East, who upon looking at Socrates told him that he harbored within him a host of vices and bad appetites—to which, Socrates exclaimed in response, “You know me, sir!” \textit{See} 1 \textit{Gabriele Ganniotti}, \textit{Socratis et Socraticorum Reliquiae} 62–63 (vol. 4, 1990). Compare \textit{id.} with Nietzsche’s allusion to the \textit{Zopyrus}, \textit{in The Problem of Socrates, in 3 Friedrich Nietzsche, Twilight of the Idols: How to Philosophize with a Hammer} 30 (R.J. Hollingdale trans., 1968) (characterizing Socrates as “a monster of the soul”).

\textsuperscript{117} \textit{Fragments}, supra note 110, at Parmenides Fragment B7.

\textsuperscript{118} \textit{Id.} at Parmenides Fragment B2.

\textsuperscript{119} \textit{Id.} at Parmenides Fragment B8.
returns each day to his divine mission of calling his fellow-Athenians to self-scrutiny. In the Crito, we hear the first clear strains of a new Platonic theme: that virtue lies in ordering the natural plurality of the soul into a unity, in the image of “the truth” (and later, of the “forms”). In this new Platonic scheme, Socrates and the people of Athens are torn asunder, since a soul unified by logos can hardly have anything in common with a mob ruled by its whims and appetites.

The lines of tension in the Crito became more evident as Plato’s literary career matured. At the conclusion of the description of the philosopher’s curriculum in Book VII of the Republic, we find a sharp rebuke of the Socratic habit, testified to in the Apology, of engaging in public elenchus before crowds of young people. Still later, in the Sophist, the rebuke is gentler, and properly laudatory. Socrates, again unnamed, appears once more as the master of the ethical elenchus, designed above all to deflate the eternally recurring illusions of our own power and wisdom, and to deliver us “from great prejudices and harsh notions, in a way which is most amusing to the auditor, and produces the most lasting good effect on

---

120 For an exhaustive account of the development of this notion which has been so influential over the centuries (via its reception by Augustine) in Plato’s later dialogues, see CULBERT G. RUTENBERG, THE DOCTRINE OF THE Imitation of God in Plato (1946).

121 Plato puts the point succinctly:

The crowd then can never be philosophers?—It cannot . . . .

[The true philosopher, having] fully also realized the madness of the many, [is like a man] who has fallen among wild beasts, [unwilling] to join in wrongdoing and not being strong enough to oppose the general savagery alone for he would perish, useless both to himself and to others before he could benefit either his country or his friends. Taking all this into account he keeps quiet and minds his own business. Like a man who takes refuge under a small wall from a storm of dust or hail driven by the wind, and seeing other men filled with lawlessness, the philosopher is satisfied if he can somehow live his present life free from injustice and impious deeds, and depart from it with a beautiful hope, blameless and content.

REPUBLIC, supra note 1, at 494a, 496ce (trans. modified by the author).

122 Plato’s language is harsh, and pointed:

I do not think it has escaped your notice that when youths get their first taste of reasoned discourse [logos], they take it as a game and always use it to contradict. They imitate those who cross-examined [elenchthein] them and themselves cross-examine others, rejoicing like puppies to drag along and tear to bits in argument whoever is near them . . . . And when they have themselves cross-examined many people and been cross-examined by many, they fall vehemently and quickly into disbelieving what they believed before. As a result, they themselves and the whole of philosophy are discredited in the eyes of other men.

Id. at 539bc.

See generally C.D.C. REEVE, PHILOSOPHER-KINGS: THE ARGUMENT OF PLATO’S REPUBLIC (1988) (arguing that the Republic functions as a critique of Socrates and his methods, and as a preparatory study to the advancement of new, distinctively Platonic teachings). In the Apology, Socrates describes the “young men who follow me around” as the ones “with the most spare time, the sons of the wealthiest fathers,” who “take pleasure in listening to people being examined [elenchthein],” and who themselves often “copy me and try accordingly to examine other people.” See APOLLOGY, supra note 4, at 23cd. After admitting to this much (that is, to modeling the elenchus for the young, in public, and tacitly encouraging them to go forth and do the same), he then expressly denies that such activity corrupts the youth by adding that the spectacle of public elenchus is “not unpleasant” See id. at 24b, 33c (trans. modified by author).
the person who is the subject of the operation.”  

Socrates is recalled as a kind of “purifier of the soul,” whose “patient will receive no benefit from knowledge until he is subject to the elenchus, and thereby learns modesty.”  

However, Socrates can take the patient no further than purification, since Socrates did not teach positive doctrine. For Plato, Socrates remains a “negative” practitioner—a sophist, albeit of “noble lineage.”  

The Socrates of the Apology stands against the systematic Platonic impulses to find doctrinal homologies among metaphysics, politics, and psychology, and to structure them around the dichotomy between unity and plurality. This Socrates is ignorant of the deep nexus between unity and being, or between unity and the good, both so central to Platonic philosophy. His elenctic practice is simply the peculiar form his polypragmatics takes, vastly different from the synoptic master-science of Plato’s “dialectic.”  

The Apology’s Socrates is completely indiscriminate about with whom he talks, and Plato scolds him for this. Finally, and crucially, the Apology’s Socrates is not a principled anti-democrat, as is the Crito’s Socrates. This is true, if for no other reason, than that we find no trace in the Apology of the Crito’s anti-democratic systematics. Moreover, the character of the Apology’s Socrates is so obviously shaped and stamped by democratic influence, that he thrives in the milieu of a democratic culture. The Socrates of the Apology is not sheltered from life in democratic Athens as a result of “divine dispensation,” as Plato portrays him in the Republic, but is instead the quintessential democrat.

B. The Laws, and the Ancestral Constitution

I conclude this Part by addressing a potential problem for my thesis. The Crito is devoted to an emphatic defense of the obligation to obey the law. But Athenian law in this case, as Plato is surely aware, is democratic law. It follows then, that Socrates’s principled refusal to escape suggests a respect for democratic Athens that would belie what I have represented as Plato’s disdain for the city. The words of the personified Laws, as imagined by Socrates in the Crito, express a supra-paternal bond between Socrates and the Laws.  

Surely this is patriotism, and surely its object is Athens, a democracy.  

Any reading of the central argument of the Crito, then, must offer some account of who or what the

---

123 PLATO, SOPHIST 230c (Harold North Fowler trans., 1977).
124 Id. at 230cd.
125 Id. at 231d.
126 Compare REPUBLIC, supra note 1, at 531e–535a, with REEVE, supra note 122, at 84. Reeve says:

The dialectician emerges, not simply as the person who knits the wool provided by the mathematical sciences into a dialectically defensible, unified theory of everything, but as a master craftsman who knows how to use that theory to design, and in the person of the philosopher-king to actually construct, the best kind of polis.

REEVE, supra note 122, at 84.

127 See REPUBLIC, supra note 1, at 496c.
128 See Crito, supra note 10, at 50a–54d.
personified Laws represent. Are they the unified voice of the Assembly’s decrees, or of the popular courts’ decisions? Should we take the Laws as a personification of the principle of popular sovereignty? Two texts suggest strongly that these are precisely what Plato does not have in mind when he refers to the “Laws” in the Crito. First he apostrophizes his introduction of the Laws with the phrase, “the common part of the city.”130 The phrase recalls the distinction already aired in the Apology between “what belongs to the city” and the “city itself.”131 Socrates speaks of the ultimate basis of civic pride, urging a distinction between the pride kindled by the spectacle of wealth, empire and conquest, and the pride of a “virtuous citizenry” in its own elecically-tested virtue. But for Plato, the same distinction re-deployed in the Crito, suggests the metaphysics of appearance and reality—between what the city appears to be to the many, and what it is to the wise.

Plato’s metaphysical distinction is apparent in the Laws’ final warning to Socrates: “You now depart, if you depart, the victim of injustice at human hands, not at the hands of we who are the Laws.”132 From the standpoint of popular sovereignty, there is no difference between the hands of the laws and the hands of the humans who enact them. Therefore, the Laws cannot be the voice of popular sovereignty. In fact, an ideological program sharply critical of the ideology of popular sovereignty developed during the 490’s in Athens that drew a constitutional line between laws and popular decrees. This was the program of the “Ancestral Constitution.”133 Originating as a slogan during the failed oligarchic revolution in 411 B.C.E., it was an attempt by the oligarchic party to roll back what was perceived as a radical over-extension of popular sovereignty and to restore the Athenian constitution to its Cleisthenic foundations.134 This was a highly elastic concept, since what precisely constituted those longed-for foundations was a matter of marked dispute. In the Crito, they take the guise of enduring principles and institutions (call them the “Laws”), upon which Athens would be able to rebuild once the excrescence of radical democracy has been removed. So in the Crito, it is to these Laws, and not to the charlatans who have temporarily highjacked them, that Socrates is loyal.135

130 Crito, supra note 10, at 50a (trans. modified by author).
131 Apology, supra note 4, at 36c (trans. modified by author).
132 Crito, supra note 10, at 54c.
133 See Popular Sovereignty, supra note 11, at 337–411 for a comprehensive overview of the Ancestral Constitution movement.
134 Cleisthenes consolidated the institutional foundations of the Athenian democracy in the late sixth century. See id. at 15–28.
135 Around the turn of the fourth century, following its defeat in the Peloponnesian War and the dismantling of its Empire, Athens implemented constitutional reforms, which addressed some of the themes of the Ancestral Constitution movement. Spurred by the completion of a twelve-year effort to redact and codify the laws of Athens, the Assembly created a new constitutional institution (called the “nomothetai,” or the “Lawmakers”) with responsibility for reviewing all Assembly decrees, and distinguishing between those which would be incorporated into the body of permanent, binding law, and those which would remain decrees with little precedential value. While significant for their recognition of a distinction in principle between the popular will and the rule of law, and also for their tacit endorsement of the concept of “judicial” review, these reforms left the basic structure of the democracy very much intact, and thus cannot be seen, in any way, as an ultimate triumph for the oligarchs. Indeed, the nomothetai themselves were still chosen by lot, still reflected a broad cross-section of the Athenian citizenry, and, like jurors and most office-holders, were paid for their service. See Popular Sovereignty, supra note 11, at 405–20, 511–22; Raphael Sealey, The Athenian Republic:
IV. Socrates and the First Amendment: Subversive Advocacy in the Public Forum

In Parts II and III, I have attempted to excavate two paradigms for a critique of democratic politics. The first reveals a “Socratic” ethical critique premised on the idea that only within a thriving democracy can a critique of democracy ever be articulated, much less acted upon. The second illustrates a radical “Platonic” critique of democratic principles. From the standpoint of the Platonic critique, democracy is seen as so intrinsically corrupt that the best to be hoped for in a democratic society is containment of democracy’s pernicious effect on the pursuit of social welfare. In Part V, I take up the broad question of how these differently disposed critical paradigms have influenced the discourse of democracy in American constitutionalism. Expanding on my portrait of Socrates as the supreme practitioner of polypragmatics, this Part subjects the jurisprudence of subversive advocacy and the public forum to an elenchus.

A. Socrates Before the Court

My method is a thought-experiment posing this question: if Socrates’s conviction upon a writ of impiety were before the Supreme Court of the United States on direct review, could judicial standards

DEMOCRACY OR RULE OF LAW? 41–45 (1986); OBER, MASS AND ELITE, supra note 67, at 96–103.

Aristotle, writing sometime around the middle of the fourth century, treats the Athenian Constitution in its contemporary manifestation as the ultimate expression of the democratic form of political organization. See POLITICS, supra note 67, at 1274a7–11; ARISTOTLE, THE CONSTITUTION OF ATHENS § 41.2 at 113 (Kurt von Fritz & Ernst Kapp trans., 1974) [hereinafter ATHENIAN CONSTITUTION]. Demosthenes, writing around the same time as Aristotle, constructs “the Laws” in instructive contrast to Plato in the Crito. Notice how for Demosthenes, unlike for Plato, the principle of popular sovereignty co-exists harmoniously with the principle of the rule of law:

But what is the strength of the laws? For if one of you [the jurors] is wronged and cries out, will the laws come running up and offer aid? No; they are just inscribed letters, and they have no power to act independently. So what provides their power? You—but only if you support them and keep them masterful in support of he who is in need. Thus, the laws are authoritative through you, and you through the laws.

DEMOSTHENES, AGAINST MEIDIAS, IN ORATIONS, supra note 69, at 21.223–24.

In the 340’s, Demosthenes invoked the “ancestral constitution” in sponsoring a decree to return jurisdiction over certain crimes to the Areopagus—an ancient institution that, under the democracy, had seen its powers recede. However, as this excerpt suggests, it is unlikely that Demosthenes understood his action as an oligarchic atavism or a hearkening back to oligarchy.

136 For a discussion of the term polypragmatics, see supra notes 9–10 and accompanying text.

137 This term translates the Greek name for the cause of action employed by the three citizens who sponsored Socrates’s indictment: the graphe asebeias. See SOCRATES ON TRIAL, supra note 9, at 30–37. The graphe procedure is said by Aristotle to have been introduced by Solon. See ATHENIAN CONSTITUTION, supra note 135, § 9.1 at 77 (observing that the creation of this procedure was among his three “most democratic” reforms, alongside the epheisis procedure, permitting appeal from a magistrate’s decision to a jury court, and the banning of loans made upon security of the person). The graphe was distinguished from the older dike procedure by its “public” character—a graphe, though still initiated by individual citizens (and not a public prosecutor), was understood to be restricted to offenses in which the community, and not just the individual, had an interest. See TODD, supra note 39, at 110. How, precisely, impiety would have been seen to implicate communal interests is a complex question. Still, it seems clear that Athenians (who were not atheists) broadly shared the belief that the consequences of an impious act (whatever a jury might determine such a thing to be), would be suffered not just by the offender, but by the community as a whole. Id. at 310–11. See also RICHARD GARNER, LAW AND
and categories from the Court’s cases on free speech be applied to sustain a reversal?

Before turning to the cases, two parameters must be drawn. First, I will neither raise, nor treat as relevant issues raised under the religious liberty and the establishment clause of the First Amendment. Religion and politics were inextricably intertwined in classical Athens. Consequently, there is no way to translate American constitutionalism’s concerns about the state’s relationship to religion into the idioms of Athenian democratic ideology. In Socrates’s Athens, no issue was, or even could be, raised about the demos’ power to investigate, regulate, and ultimately control, the religious activities of Athenian citizens.

Socrates’s trial may be treated as having political issues at its heart. Therefore, I equate the term “impiety” to be synonymous with the term “subversion.” That is, I read Socrates’s indictment as a writ in subversion of the polis and demos, naming “corruption of the young” as an overt subversive act provable against him.

The second parameter discusses two peculiarities of the Athenian legal system already remarked on: the practice of leaving the operative terms of statutes undefined, and the absolute discretion of Athenian juries to decide both what those terms signified in a given case, and how they should be applied. In practice this placed Socrates’s conviction beyond review; an Athenian court’s decision was taken as delivering the “opinion of the polis” on the matter in question. My thought-experiment’s premise, by contrast, is judicial review of the conviction at trial. The experiment can only proceed, therefore, if a modern-day fact-law distinction is imposed. For this purpose, the “facts” of Socrates’s case are:


A more complicated question is whether and to what extent the demos exercised this power. See KONRAD LATTE, HEILIGES RECHT: UNTERSUCHUNGEN ZUR GESCHICHTE DER SAKRALEN RECHTSREFORMEN IN GRIECHENLAND (1920) (arguing that in Athens, the state served to secularize religion, and rarely intervened on religious pretexts to enforce official orthodoxies); TODD, supra note 39, at 309–10 (arguing that the interpenetration between religion and politics in classical Athens was not total, and noting that in Athens, “there was no distinctively religious authority structure which could set itself up against the authority of the state”).

I do not consider the other count in the actual charge—“failing to believe in the gods in whom the city believes” (APOLOGY, supra note 4, at 24b), and shall bracket the question of how much the corruption of the youth mentioned in the first count would have been attributable to Socrates’s alleged propagation of heterodox religious views. See SOCRATES ON TRIAL, supra note 9, at 118–28, 237–57 (discussing Socrates’s cross-examination of Meletus on the heresy charge, and the significance of Socrates’s daimonion to the substance of that charge).

Compare Athenian practice with, for example, Herndon v. Lowry, 301 U.S. 242, 261–63 (1937), which invalidated a state subversive advocacy statute because it did not “furnish a sufficiently ascertainable standard of guilt” and so “license[d] the jury to create its own standard in each case.”

See TODD, supra note 39, at 61.

I have not attempted to draw this line sharply, since vexing interpretive problems arise from the law-fact distinction. For discussion, see Pullman-Standard v. Swint, 456 U.S. 273, 284–89 (1982) (explaining the policy considerations supporting the rule of clear error, and discussing “mixed questions of law and fact”); Campbell v. Merit Systems Protection Board, 27 F.3d 1560, 1565–67 (Fed. Cir. 1994) (observing that in the “zone of logical overlap” occupied by mixed questions, the “knife of policy alone effects an artificial cleavage” between law and fact); United States v. McConney, 728
that Socrates, his denials notwithstanding, advocated and taught (or, engaged in activity that was reasonably taken by the jury as teaching) doctrines that a jury might reasonably have construed as inimical to the democracy;

that in 401 B.C.E., just two years before the trial, former associates of Critias and Charmides (both recently deceased members of the Thirty Tyrants), attempted to reinstate the tyranny;\textsuperscript{145}

that Socrates, having been closely associated with both Critias and Charmides, was reasonably found by the jury to have incited, inspired, or given intellectual and spiritual sustenance to the rebels of 401 B.C.E. by his teachings;

that the threat of an oligarchic coup has been, and remains, a clear and present danger to Athens (as events in 411 B.C.E., 403 B.C.E., and 401 B.C.E. amply attest).\textsuperscript{146}

Posturing Socrates’s appeal within these constraints highlights the fact that Socrates’s conviction presents a hard case. This is surprising considering the glorification of Socrates as western tradition’s first free speech martyr.\textsuperscript{147} Traditional Socratic martyrology portrays Socrates’s death sentence as the ineluctable consequence of his penchant for asking discomfiting questions. Socrates is the ultimate avatar of the street-corner dissident; he needles mainstream society from his marginal position, telling people what they do not want to hear, with such zeal that society is willing to silence him by force.\textsuperscript{148}

The problem with the interpretation of Socrates as martyr is that it de-politicizes Socrates’s trial by

---

\textsuperscript{144} These facts must be established at trial by proof of such quantity and quality as not to raise issues of weight or sufficiency of the evidence. \textit{See} Jackson v. Virginia, 443 U.S. 307 (1979) (setting forth the federal constitutional standard of legal sufficiency); Tibbs v. Florida, 457 U.S. 31 (1982) (discussing the distinction between review based on sufficiency and review based on weight of the evidence).

\textsuperscript{145} \textit{See} LYSIAS, \textit{Against Eratosthenes, in Orations} 12.52 (W.R.M. Lamb trans., 1930), and XENOPHON, \textit{supra} note 52, at 2.4.8.

\textsuperscript{146} For the presentation of these facts in a light most favorable to Socrates’s accusers, see \textit{Stone, Trial of Socrates, supra} note 18, at 140–56. For a less polemical assessment, see \textit{Richard Kraut, Socrates and the State, supra} note 129, at 194–244. Under the terms of the Amnesty of 403, most of these facts could not have been used against Socrates. Nevertheless, no judge was in a position to exclude such evidence if a prosecutor attempted to allude to or otherwise use it to prejudice a defendant in Socrates’s position. The evaluation of such an attempt would have been in the hands of the jurors.

\textsuperscript{147} \textit{See}, e.g., United States v. Weldon, 377 U.S. 95, 122 (1964) (Douglas, J., dissenting) (citing Socrates’s trial as exemplifying the tyranny of “legislative trials,” in which the “functions of prosecutor and judge” are combined, and defendant is “subject to the influence of partisanship, passion, and prejudice”); Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) (citing T.H. Huxley’s invocation of Socrates as an epitome of the “spirit of free inquiry” that is the fundamental ideal of the university); Marusis Liquors, Inc. v. Daley, 55 F.3d 258, 262 (4th Cir. 1995) (citing Socrates as a proof-case illustrating how in a direct democracy “rational ignorance is the order of the day,” and concluding on the basis of this example that “direct elections . . . are more prone to decision by passion or prejudice”).

\textsuperscript{148} \textit{See} Fiss, \textit{supra} note 12, at 349–50 (analyzing the “Free Speech Tradition” in terms of “protection of the street corner speaker”).
obscurring its dense political background. Viewed in historical context, we can conclude that jurors might have reasonably found: first, that Socrates held beliefs and advocated doctrines posing a subversive threat to the democracy, and second, that Socrates acted to advance those beliefs and doctrines. His relationship as teacher to Critias, the deceased leader (and most bloody-minded member of) the Thirty Tyrants arouses suspicion. The evidence of that relationship also permits the inference that Socrates gave succor and moral support to the Thirty’s remaining henchmen, whose aborted coup attempt in 401 B.C.E. occurred a mere two years before Socrates’s trial. Socrates also refused to desist from his former advocacy, insisting upon inculcating in a new generation the same pernicious ideas that had animated Critias a few years earlier. While this is only subtext in the trial itself, because of the studied vagueness of the indictment and its operative terms (both as enacted by the Assembly, and as interpreted and applied by the jury), it is readily inferable that Socrates’s prosecution and conviction was for subversive advocacy.

B. Two Appellate Theories

1. Subversive Advocacy

The first question on appeal is whether Socrates’s conviction can be upheld under the constitutional standard for distinguishing advocacy protected by the First Amendment from unprotected incitement of

---

149 See Moses I. Finley, Aspects of Antiquity: Discoveries and Controversies 60–73 (2d ed., 1977) (concluding that Socrates was indicted and convicted primarily because of his three accusers’ personal animosity toward him); Gregory Vlastos, The Historical Socrates and Athenian Democracy, 11 Pol. Theory 511 (1983) (concluding that politics played only a minor role in Socrates’s conviction).

150 There was also no other charge available to Socrates’s prosecutors. See Todd, supra note 39, at 102–09 (cataloging the forms of action in Athenian procedure). Socrates’s prosecutors, in proceeding with an action in impiety, evidently chose to indict Socrates on the charge that most closely approximated to what we would understand today as subversion.

The graphe paranomon—lying against anyone sponsoring an illegal decree in Assembly—carried connotations of subversion, but would have been inapposite in Socrates’s case. See id. at 157–60, 305–07. There was a law permitting an eisangelia, or impeachment proceeding, against any official committing “crimes against the state [demos] for which no written legislation exists.” See Popular Sovereignty, supra note 11, at 53. An eisangelia, normally directed against office–holders, may have been available in the fifth century against “any citizen who tried to overthrow the democracy”; but it seems that this cause of action did not survive the codification process completed in 403. Indeed, there are indications that the graphe asebeias was specifically created to supplant it. See Todd, supra note 39, at 114; Popular Sovereignty, supra note 11, at 53, 535–36. In 337-6, in response to fear of Macedonian plots, the Assembly enacted a decree, subsequently adopted as a law, expressly aimed against subversion of the democracy. The inscription of that law was decorated by a sculptural relief, depicting the goddess Demokratia crowning Demos, preserved today in the Agora Museum of Athens. See Martin Ostwald, The Athenian Legislation against Tyranny and Subversion, 86 Transactions of the Am. Philological Ass’n 103 (1955) (offering an account of the adoption of the Law against Tyranny). On the sculpture, see Peter John Rhodes, Athenian Democracy after 403 B.C., 75 Classical J. 305, 322 (1980).

151 So much would seem to have been beyond dispute to Aeschines, speaking in 345: “Did you put to death Socrates the Sophist, fellow citizens, because he was shown to have been the teacher of Critias, one of the thirty who put down the democracy . . .?” Aeschines, Against Timarchus, in Speeches of Aeschines, 5, 1.173 (Charles Darwin Adams trans., 1919) [hereinafter Against Timarchus]. Cf. Alexander Nehamas, Eristic, Antilogic, Sophistic, Dialectic: Plato’s Demarcation of Philosophy from Sophistry, 7 Hist. of Phil. Q. 3 (1990) (arguing that there is no clear distinction between Socratic and “sophistic” method as a matter of logic and technique in argument, and that such distinctions as may be drawn are moral and ideological in nature).
violent or illegal conduct, as articulated in *Brandenburg v. Ohio*.\textsuperscript{152} Under *Brandenburg*, advocacy may only be punished as subversion where it is clearly more than “mere abstract teaching.”\textsuperscript{153} Specifically, for speech to be constitutionally punishable as subversive, it must be both “directed to inciting or producing imminent lawless action,” \textit{and} “likely to incite or produce such action.”\textsuperscript{154}

On first blush, Socrates’s \textit{elenctic} activities seem protected under the *Brandenburg* standard. After all, in the iconography of free speech, Socrates stands for nothing if not for the ideal of moral autonomy realized through rational discourse and critical, interpersonal dialogue. While we are tempted to wonder how such speech could possibly \textit{not} be protected by the First Amendment, we must consider the substantive case against Socrates. The prosecutors sharply disputed Socrates’s contention that the limit of his activities was speech (whether \textit{elenctic} or didactic), and the jury finally credited the prosecutors’ case. To be sure, the Supreme Court has made clear that “it will not blindly accept a lower court’s determination that speech is punishable ‘incitement,’ and not protected, albeit spirited, advocacy.”\textsuperscript{155} But Socrates’s trial record\textsuperscript{156} shows that the jury did not embrace any such ritual incantation when it found that Socrates had subverted the democracy and corrupted the youth. Rather it found that what Socrates called “the life of a philosopher,”\textsuperscript{157} was more plausibly characterized as sustained collusion with a coterie of oligarchic politicians, with the paramount goal of overthrowing the democracy.

Socrates attempted to minimize this collusion at his trial, insisting that he had never sought out disciples and that the “sons of the wealthiest fathers” who predominated among his followers were simply spectators upon his eccentric “mission.”\textsuperscript{158} Socrates also denied, quite strenuously, being a “teacher” to


\textsuperscript{153} \textit{Id.} at 448 (\textit{citing} Noto v. United States, 367 U.S. 20, 297–98 (1961)).

\textsuperscript{154} \textit{Id.} at 447. For commentary, see Richards, \textit{supra} note 138, at 179–87 (1986) (emphasizing that *Brandenburg* implicitly endorses the test propounded by Justice Brandeis in his concurrence in Whitney v. California, requiring a showing that the advocacy in question is “not rebuttable in the normal course of normal dialogue”). \textit{See also} Sheldon Leader, \textit{Free Speech and the Advocacy of Illegal Action in Law and Political Theory}, 82 COLUM. L. REV. 412 (1982) (arguing on contractarian grounds that subversive advocacy is what free speech protects); Martin H. Redish, \textit{Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger}, 70 C AL. L. REV. 1159, 1166–77 (1982) (surveying the development of the doctrine, and concluding that it is not clear from *Brandenburg* that the convictions in prior cases would not be upheld in similar circumstances); Fred C. Zacharias, \textit{Flowcharting the First Amendment}, 72 CORNELL L. REV. 936, 966, n.159 (1987) (observing that, although *Brandenburg*’s clear and present danger test is not beyond judicial manipulation, it effectively limits the room for discretionary maneuvering).

\textsuperscript{155} Lawrence Tribe, \textit{American Constitutional Law} 849 n.58 (2d ed., 1988) (\textit{citing} National Association for the Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 926–27 (1982) (in which a civil judgment against the NAACP for damages arising from a boycott was set aside, despite findings that the leader of the boycott had used “highly charged political rhetoric” which had been followed by some violence—but not with sufficient proximity to convince the Court that allowing liability on that basis would not impermissibly chill the type of speech the First Amendment is designed to protect)).

\textsuperscript{156} \textit{See supra} notes 144–146 and accompanying text, which sets forth the facts constituting the thought-experiment’s trial record.

\textsuperscript{157} \textit{Apology}, \textit{supra} note 4, at 28e (trans. modified by author).

\textsuperscript{158} \textit{Id.} at 23c (trans. modified by author).
those young men, although in invoking a number of them (along with their relations) as witnesses against the charge that he had corrupted the youth, he tacitly acknowledged having given “advice.” But the jury did not accept this defense. To the contrary, it found that Socrates had held himself out as a teacher. Moreover, the jury found that his teaching was contemptuous of the democracy and that this teaching had incited many of his past “pupils” and “associates” to act in ways that endangered the democracy.

Socrates claimed that his actions and words had always arisen from his pursuit of moral independence, and that over the years he had only appealed to his fellow-Athenians’ moral powers. Thus, he might argue on appeal that any threat he had ever posed was refutable by words, arguments, and ideas, and therefore cannot be judicially construed as subversive under the First Amendment. Socrates might invoke in his defense the basic value undergirding Brandenburg, namely the “dignity of the deliberative powers of persons” and the capacity inherent in those powers of “rejecting noxious and unsound doctrines” (a capacity which, once surrendered to the state, is fatally compromised). In short, even if his doctrines were noxious and unsound, they were so in a way that turned out to be a “blessing for the city.”

This is a strong argument, and would deserve careful consideration by an appellate court applying

---

159 See id. at 33ab.
160 Id. at 34d.
161 That is, as a sophist. Evidently the jurors were not persuaded by Socrates’s claim that he had never taken a fee for teaching. See id. at 19de, 31bc, 33ab.
162 An appellate court might draw attention to evidence in Socrates’s own testimony of this contempt. Consider, as an example, Socrates’s analogy between horse-breeding and a citizen’s education. There he made the point that only “one [expert] is able to improve [the youth], or very few, . . . whereas the many [hoi polloi] . . . corrupt them.” Apology, supra note 4, at 25b (trans. modified by author).
163 Socrates may have been heard by many jurors to admit to such incriminating associations in a remark following the second verdict (in favor of death): “There will be many to come who will subject you to the elenchus, whom until now I held back, although you did not notice. They will be more difficult to deal with as they will be younger, and you will resent them more.” Id. at 39cd (trans. modified by author). Stone observes that Socrates might have considered entering this claim earlier in the trial, as evidence that, far from inciting, he had actually attempted to prevent violent overthrow of the democracy. “Such a plea, however, would have required him to admit that he was indeed a teacher, and that he did inculcate antidemocratic views.” Stone, supra note 18, at 145. The jury’s resolution against Socrates of whether he was a teacher would make available to him the conflicting rhetorical frames of the cases balancing teachers’ rights and the State’s regulatory prerogatives in the area of public education. See National Gay Task Force v. Board of Education, 470 U.S. 903 (1985) (per curiam), aff’g by an equally divided Court 729 F.2d 1270 (10th Cir. 1984) (finding no constitutional problem with a statute permitting teachers to be fired for “public homosexual activity,” but striking down statute’s provision punishing “mere advocacy” of homosexuality as overbroad); Ambach v. Norwich, 441 U.S. 68, 78–79 (1979) (noting that “a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values,” and upholding on this basis a New York State regulation barring legal aliens from employment as public school teachers).
164 See Toleration, supra note 138, at 185. The most eloquent statement in the cases of this underlying value is Brandeis’s. See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (observing that “[t]hose who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative powers should prevail over the arbitrary”).
165 Apology, supra note 4, at 30a (trans. modified by author). Compare id. with id. at 36d (where Socrates proposes as a counter-penalty to the prosecutors’ request for death, free meals at the Prytaneum—reasoning that a true assessment of what he deserves requires rewarding some good for the goods he has bestowed upon Athens).
First Amendment principles. No doubt even if it were rejected, it would prove sufficiently moving to justify mitigation of the death sentence imposed at trial. But in the instant case, it would have to be rejected. Socrates’s characterization of his mission as merely the activity of principled rationality is countered by the record, which describes a litany of oligarchic brutality, ominously presided over, and seemingly inspired by Socratic sophistry. Against the vivid memories many jurors harbored of atrocities committed by the Thirty Tyrants, they had another display of that same sophistry, only this time in the form of an *apologia*. Even if they were stirred by the principles invoked therein, they might consider themselves bound under the applicable statute, which prohibited subversive advocacy, no matter how sincerely undertaken. If the jury respected the crucial distinction between advocacy and incitement to “imminent lawless action,” their verdict must be affirmed.  

If Socrates has no appellate recourse under *Brandenburg*, it might seem futile to seek it elsewhere within the First Amendment system. If Socrates concedes at the start that his speech was indeed subversive, his appeal would seem doomed.

2. *The Public Forum*

Subversive or not, Socrates’s activities were undertaken entirely in public. Of course, as we have seen, Socrates avoided the traditional public fora (the Assembly and the law courts). But, at the same time, he was perennially about in the city—in the non-traditional public fora that, collectively, may usefully be termed the “elenctic Agora.” In these other public places, he “practices philosophy,” by confronting and examining the politicians, poets, and the public workers, and by exhorting anyone he happens to meet, “young and old, citizen and stranger (but especially citizen), . . . the rich and the poor—


167 Might Socrates claim that the prosecutors’ showing of imminence was insufficient? Even if Socrates’s associations with the oligarchs were beyond dispute, there was no direct evidence offered of an imminent coup, just of past coups, and of the connections between the men who led those coups and Socratic teaching. *See* Hess v. Indiana, 414 U.S. 105, 107–09 (1973) (per curiam) (finding that defendant’s call to violence was directed to no one in particular, nor likely to produce imminent disorder); *cf.* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) (noting that the clear-and-present-danger “test requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood against the need for free and unfettered expression”). However, subversive advocacy is not the same crime as conspiracy. And, in view of recent history, it was reasonable for jurors to infer from the apparently close nexus in the past between Socratic teaching and oligarchic action, that such a nexus might still be in place. *But see* DAVID HUME, ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 39 (1777) (P.H. Nidditch ed., 1975) (arguing that “it is not reasoning which engages us to suppose the past resembling the future, and to expect similar effects from causes which are, to appearance, similar”).

168 *See* APOLOGY, supra note 4, at 17d, 31c.

169 The Agora was the central market of Athens, but not, at the same time a “traditional” public forum in the way that the lawcourts and the Assembly were. It was the city’s commercial, not political, hub. The “elenctic Agora,” therefore, is the non-traditional forum transformed by Socratic *elenchus* into a new kind of public forum altogether. Socrates points to the “elenctic Agora” early in the Apology by his reference to the “market place [Agora] by the banker’s tables,” where it is his custom to engage his fellow citizens, as he happens upon them. *See* APOLOGY, supra note 4, at 17c.

170 *Id.* at 29d.

171 *See* id. at 21ce.
anyone willing to answer [his] questions.**172

Twice in the Apology Socrates makes revealing allusions to the public dimension of his vocation. First, while denying ever having acted as a teacher to his young followers, he remarks that, throughout his life, in all his “public activities,” he has always been “the same man as [he is] in private life.”**173 He continues: “if anyone says that he . . . heard anything [from me] privately that the others did not hear, be assured that he is not telling the truth.”**174

Subsequently, after his conviction on the substantive charge, but before the vote on his sentence, he prefaces his counter-penalty proposal of free meals at the Prytaneum by observing that he has “deliberately not led a quiet life,” but has “neglected what occupies most people: wealth, household affairs, office, the political clubs and factions.”**175 The clubs to which Socrates refers, and which he singles out to disclaim, were the quintessential form of private association in fifth century Athens—and as such, they were universally regarded as the breeding grounds of oligarchic conspiracy. In a democracy, it was assumed, “only enemies of democracy needed secret organizations.”**176 By insisting that he had never associated with them, Socrates asserts his credentials as a public figure, who, unlike the oligarchs, can stand before the demos in good faith with a clear conscience.**177 Thus Socrates asserts an alternative theory under which to

172 Id. at 1.30a, 33b. Compare id. with Xenophon’s testimony:


173 Apology, supra note 4, at 33ab.

174 Id.

175 Id. at 36b (emphasis added). The proposal of a counter-penalty arises form a procedural rule that required the jury upon voting to convict to choose between the penalty demanded by the prosecution and a counter-penalty proposed by the defendant. Socrates’ prosecutors were seeking death. Exile was typically offered as the counter-penalty in capital cases, and in Socrates’s very close case, would almost surely have been seized upon by a jury looking to avoid imposing death. Socrates’s nomination of free meals at public expense, in a place ordinarily reserved for war heroes and Olympic athletes, is obviously provocative, but also perfectly consistent with Socrates’s self-assessment, as a “great blessing” to Athens. Id. at 30a. See Socrates on Trial, supra note 9, at 169–76 (surveying commentary on the counter-penalty passage of the Apology).

176 Gomme, supra note 45, 5:129. Although the families of the Athenian landed gentry no doubt maintained associations before the last quarter of the fifth century, it was only during this period that such associations became politically significant. See id; see also Burnet, supra note 55, at 233 (noting that such associations “were originally devised to secure the election to office of members of the oligarchical party and their acquittal when put on trial.”) The scandal over the destruction of the Hermes, in 415 B.C.E., just prior to the invasion of Sicily, marks their emergence as one of the driving forces of oligarchic politics. See Peloponnesian War, supra note 40, at 8.54–61; see also Popular Sovereignty, supra note 11, at 322–26, 355–58 (exploring whether the mutilation of the Herms was part of a conspiracy of like-minded aristocrats to overthrow Athenian democracy).

177 See Apology, supra note 4, at 30cd (Socrates declares that he cannot be harmed by Meletus or Anytus, “for I do not think it is permitted that a better man be harmed by a worse”). In concluding words of consolation to his supporters, Socrates discloses that he is sanguine about the prospects of death, since at no point on this fateful day has his divine sign opposed him. See id. at 40ab.
consider his appeal. For, if in fact all of Socrates’s teachings were propagated in public fora, then they were available at all times to public debate and scrutiny. If they were so available, then they are presumptively entitled to protection under the settled principle that within the public forum, state regulations of speech must be content-neutral, and imposed solely on grounds of time, place and manner.\footnote{See Cox v. New Hampshire, 312 U.S. 569, 576 (1941).}

The problem for his theory is that the Socratic public forum—the elenctic Agora—is not a traditional one. It is an innovation and invention, of a piece with polypragmatics itself. I have noted that in Athens, the traditional public fora were the Assembly and the law courts. Socrates therefore has no direct appeal to a case like \textit{Hague v. C.I.O.}, where three justices concurred in a plurality opinion that a permit requirement upon use of the streets, parks, and other public places—in effect, “mandatory” public fora—is void on its face.\footnote{See Hague v. C.I.O., 307 U.S. 496 (1939) (holding that “even a neutral prohibition of all communicative activity in these minimal public forums would violate free speech”). See \textit{Toleration}, supra 138, at 220. But see Perry Ed. Assn. v. Perry Local Educators’ Assn., 460 U.S. 37 (1983) (distinguishing among three types of property: “places which by long tradition or by government fiat have been devoted to assembly and debate,” where the “rights of the state to limit expressive activity are sharply circumscribed”; “public property which the state has opened for use by the public as a place for expressive activity,” where, “[a]lthough a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply to the traditional public forum”; and finally, “[p]ublic property which is not by tradition or designation a forum for public communication,” where the state may impose both time, place, and manner regulations, and also “reserve the forum for its intended purposes, communicative or otherwise,” subject to rational basis review).}

If Socrates wishes to use the public forum doctrine on appeal, he will have to first show that the “elenctic Agora” should be incorporated within a broader conception of a public forum. Only within that more broadly conceived public forum will a right of free speech, which was abridged by his prosecution and conviction, even come into view.\footnote{Public forum doctrine is built around some conception of the standard public forum—in the Athenian democracy, this was the Assembly; in the United States, it is the park or public square. The fact that Socrates practiced polypragmatics in what the United States Supreme Court would today regard as mandatory public fora is not what I wish to highlight for the purposes of this thought-experiment. I focus instead on an analogy between Socrates’s problematizing of the standard Athenian public forum, and cases that do the same to the conception of the American standard. As will become evident in the argument below, this problematizing raises very different questions in the two contexts.} Then Socrates can argue that a suitably re-conceived public forum doctrine provides a better paradigm for understanding what happened at his trial than do the subversive advocacy cases.

Socratic polypragmatics problematized the Athenian conception of free speech or \textit{isegoria},\footnote{Although often translated by the phrase “free speech,” the term \textit{isegoria} applies more precisely to the custom that had evolved over a century of development permitting all Athenian citizens the right to address the Assembly. See \textit{Ober}, supra note 67, at 72–78, for an overview of this development. Ober calls \textit{isegoria} the “most cherished Athenian freedom,” and it may justly be regarded as the one from which all the other rights and privileges of Athenian citizenship derived. See id. at 296.} by calling attention to its potentially stultifying effects on the development of moral character, or what Socrates termed “the best possible state of your soul.”\footnote{\textit{Apolo{gy}}, supra note 4, at 29e, 30b.} Athenians, Socrates urged, had allowed their sense of identity and purpose to become too intimately bound up with their public personae. In so doing, they had forsaken the cultivation of individuality (and of its voice, the moral conscience), in favor of the satisfactions...
of consensus (what the Athenians called *homonoia* or same-mindedness). The development of *isegoria* illustrates the point. In coming to think of “free speech” as something that could only be actualized in the Assembly, Athenians lost sight of the intimate connection between public reason and the capacity for self-criticism. Thus when Socrates severed his ties with an Assembly he believed insufficiently self-critical, his fellow Athenians mistook his *elenctic* prodding for subversion.

In truth, not all Athenians were deaf to the implications of Socrates’s interrogation of the ideal of *isegoria*. In the final two decades of the fifth century, a new Athenian coinage, *parrhesia*, begins to appear in the plays of Euripides. The word (a compound, meaning literally “everyone speaking”), is used by the playwright to refer to freedom of speech as a dimension of the lived experience of Athenian civil life. *Parrhesia*, as Euripides understands it, highlights the freedom of thought implicit in notions of “outspokenness” and “frankness,” in contrast to (and expansion of) the more rigidly conceived historical-political institution of *isegoria*.

Euripides used the new term *parrhesia* to name the domain where conscience and thought reside, apart from the older expressive-performative domain of *isegoria*. Socrates lived his life in this new domain, mapping, exploring, and pressing his fellow citizens to take heed of its potential. Sadly, burdened by fear and foreboding, they finally moved to silence him, rather than listen. Now, on appeal, Socrates asks the Supreme Court to recognize what the jury did not: that Socrates’s entire career was spent in a public forum, and that, impermissibly, he has been singled out for punishment based solely on the content of his

---

183 See Ober, supra note 67, at 297–99 (arguing that *homonoia* and *isegoria*, though ideological antitheses, were understood as complementary, especially in the fourth century). Ober notes: “That freedom was a good thing and worth defending and that consensus was a good thing and worth promoting were self-evident to the Athenians.” Id. at 299.


185 Any direct connection between the Socratic *elenchus* and Euripides’s treatment of *parrhesia* is entirely speculative. Still, there is a scholarly tradition that the *Medea* and *Hippolytus* were conceived in part as a refutation of the Socratic paradoxes that no one does wrong voluntarily, and that *akrasia* (the overpowering of reason by appetitive desire) is impossible. Thus, it is possible that the Socratic-Euripidean dialectic sounded in other registers. See James J. Walsh, *The Socratic Denial of Akrasia*, in *The Philosophy of Socrates: A Collection of Critical Essays* 235, 250–57 (Gregory Vlastos ed., 1971); Dodds, supra note 100, at 186–88, 199 n. 47; cf. 1 Diogenes Laertius, *Lives of Eminent Philosophers* 149 (R.D. Hicks trans., 1980) (recounting the tradition of the close relation between Socrates and Euripides).

186 See Greek-English Lexicon, supra note 14, at 836. The earliest occurrences of the term, which was certainly an Athenian invention, are in the plays of Euripides. Subsequently, the fourth century orators make frequent use of it. See Euripides, *Phoenician Women*, 387–91 (Oxford University Press, 1981) (illustrating this point):

Jocasta: So now I ask you what first I wish to know.

What is it to lose your country—a great suffering?

Polyneices: The greatest, even worse than people say.

Jocasta: What is its nature? What so hard?

Polyneices: One thing is worst: the exile has no *parrhesia*.

Jocasta: That is a slave’s lot: not to be able to speak one’s mind.

*Id.* (trans. modified by author). See also Euripides V 90 (David Grene & Richard Lattimore eds., Elizabeth Wyckoff trans., 1959). Contrast this with Plato’s discussion of free speech. See Republic, supra note 1, at 557b.
speech and advocacy within that forum. How may the Court respond?

The crux of a principled response lies in recognizing that the public forum problem cuts very differently across social existence in contemporary United States than it did in Socrates’s Athens. The American public forum problem is not the submergence of individuality in expressive politics; it is the disappearance of a public sphere accessible to the individual citizen. It follows that doctrine emerging from, and tailored to, citizen-state confrontations in public streets and squares risks extending only anachronistically-conceived protections, ultimately inadequate for the defense of the public forum principle brought to light by Socrates: namely, that the self-critical civic personality may be created by means of the elenctically examined life. Cases like Terminiello v. Chicago, Edwards v. South Carolina, Cox v. Louisiana (I), and Gregory v. Chicago enunciate important free speech principles. But if the salient fact of civic life in American society today is that very little of it transpires in the public thoroughfares that these cases are solicitous about, how much provocative and disputatious speech is really being protected?

The answer is troubling, and does not bode well for Socrates. As the traditional public fora have receded, or become idle, new ones have not emerged in their place (and to the extent that they have, few courts have recognized them as such). The result is the seeming paradox of an information age in which

187 See HANNAH ARENDT, THE HUMAN CONDITION 52–53 (1958) (“What makes mass society so difficult to bear is not the number of people involved, or at least not primarily, but the fact that the world between them has lost its power to gather them together, to relate and to separate them.”)

188 337 U.S. 1 (1949).


192 See, e.g., Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (holding that it is a “function of free speech under our system of government . . . to invite dispute”); Edwards v. South Carolina, 372 U.S. 229, 232–33 (1963) (holding that authorities may not suppress speech in the (traditional) public fora for fear of imminent spectator violence, if the risk of that violence can be curbed by reasonable police measures). This case reversed protestors’ breach of the peace convictions where police had been given warning of the protest, and had sufficient resources to prevent violence. See also Gregory v. Chicago, 394 U.S. 111 (1969) (reversing convictions for conducting a disorderly march, despite evidence that spectators were growing increasingly unmanageable); Cox v. Louisiana (I), 379 U.S. 536, 550 (1965) (reversing convictions of protestors who had been across street from courthouse, separated by 75–80 armed police from a crowd of 100–300 “muttering” spectators). Cf. Collin v. Smith, 447 F.Supp. 676 (N.D. Ill. 1978), aff’d 578 F.2d 1197 (7th Cir.), (relying on Terminiello in striking down an ordinance prohibiting public demonstrations that “incite violence, hatred, abuse or hostility”).

193 The role that the Internet will play as a new kind of public forum remains to be seen. Nevertheless, by its openness and interactivity, it shows the potential to transform the relationship of people to the means of communication. See Christopher Anderson, The Accidental Superhighway, THE ECONOMIST, July 1, 1995, at 5, 7, 18 (noting that the “seeds of the Internet Revolution” lie in the Internet’s “creative anarchy” and “audacious uselessness,” but cautioning that as the Internet network approaches the carrying capacity of the telephone voice network, the two could “split in two, leaving a high-priced, orderly business network and a cheap, chaotic consumer network, with minimal interconnection between them,” and with massive profits redounding to the cable TV and telephone companies as a result). For a judicial celebration of the Internet’s “democratizing” potential, see A.C.L.U. v. Reno, 929 F.Supp. 824, 881 (E.D. Pa. 1996) (calling the Internet the “most participatory marketplace of mass speech that this country—and indeed the world—has yet seen,” and concluding that it “deserves the broadest possible protection from government-imposed, content-based regulation”). See also Reno v. A.C.L.U., 521 U.S. 844, 870 (1997) (noting that the Internet permits “any person with a phone line [to]
collective deliberation is increasingly constrained.\textsuperscript{194} Analogously in fifth century Athens, as free speech in the Assembly expanded, deep disagreement became harder to air, resulting in the rise of oligarchic associations, and the relegation of speech to the private sphere.\textsuperscript{195}

A solution to the contemporary paradox must begin with an acknowledgement that public debate about the collective good no longer takes place primarily in public squares and town halls.\textsuperscript{196} It must also be noted that most of the nation’s access to information, knowledge, and artistic display is controlled by a small number of corporations, with vested institutional interests in extending and consolidating their influence, power, and wealth.\textsuperscript{197} With these premises in place, it would surely be easier to find public fora, which have been suppressed by a convergence of unprincipled categorization by the Court, and Congressional support for corporate domination of the “telecommunications sector.”\textsuperscript{198}

\begin{itemize}
\item become a town crier with a voice that resonates farther than it could from any soapbox,” and agreeing with the district court below that “our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium”). For a more pessimistic assessment of the Internet’s likely impact on First Amendment rights, see LAWRENCE LESSIG, CODE, AND OTHER LAWS OF CYBERSPACE (2000).
\item For a related paradox, see RICHARD SENNETT, THE FALL OF PUBLIC MAN: ON THE SOCIAL PSYCHOLOGY OF CAPITALISM 283 (1978) (“The mass media infinitely heighten knowledge people have of what transpires in the society, [while] they infinitely inhibit the capacity of people to convert that knowledge into political action.”)
\item See supra note 176 and accompanying text on the rise of the political clubs in fifth century Athens, and their ties to the oligarchic reaction.
\item But see Ray Oldenburg, THE GREAT GOOD PLACE: CAFÉS, COFFEE SHOPS, COMMUNITY CENTERS, BEAUTY PARLORS, GENERAL STORES, BARS, HANGOUTS AND HOW THEY GET YOU THROUGH THE DAY (1989) (emphasizing the vital importance of these “third places”—the social mean between large, structured organizations on the one hand, and nuclear families on the other—to the vitality of neighborhoods, and to the “promotion of decency” above wealth, glamour, aggression, and even intelligence). Cf. SARA M. EVANS & HARRY C. BOYTE, FREE SPACES: THE SOURCES OF DEMOCRATIC CHANGE IN AMERICA 17 (1986) (arguing the need for “free spaces . . . . settings between private lives and large-scale institutions where ordinary citizens can act with dignity, independence, and vision”).
\item See Peter Hart, AOL-Time Warner: Dawn of a Golden Age, or a Blow to Media Diversity?, FAIR MEDIA ADVISORY, January, 13, 2000 (noting Time-Warner CEO Gerald Levin’s comment regarding whether the new entity’s cable lines would remain “open” to competitors in the same way phone lines traditionally have been: “We’re going to take the open access issue out of Washington, and out of city hall and put it into the marketplace, into the commercial arrangements that should occur to provide the kind of access for as much content as possible.”); Robert W. McChesney, The Global Struggle for Democratic Communication, MONTHLY REVIEW, July 1996, at 1, 3 (predicting that the “eventual mature global media market should be dominated by five to eight firms with another one or two dozen quite large firms filling regional or niche markets”); Mark Crispin Miller, Free the Media, THE NATION, June 3, 1996, at 9 (documenting the dominance of six giant corporations over television news divisions, entertainment companies, and publishers). See generally ED HERMAN & ROBERT W. MCCHESENY, THE GLOBAL MEDIA: THE MISSIONARIES OF GLOBAL CAPITALISM (1998) (surveying the factors that have led to the corporate dominance of global media, and the global media’s impact on the public sphere).
\item See Neil Hickey, The Law That Made the Giants Grow So Big: The Telecommunications Act at Year One, COLUM. JOURNALISM REV., January 11, 1997, at 23, 24 (noting that the 1996 Telecommunications Act dismantled almost all the ownership limitations designed to prevent monopolization and observing that the Act triggered a “torrent of mergers, consolidations, buyouts, partnerships, and joint ventures that has changed the face of Big Media in America”); See also HERBERT SCHILLER, INFORMATION INEQUALITY: THE DEEPENING SOCIAL CRISIS IN AMERICA (1996) (arguing that corporate control over the means of communication and over access to information has far-reaching effects on primary institutions of American democracy); THE POLITICAL ECONOMY OF INFORMATION (Vincent Mosco & Janet Wasko eds., 1988) (a collection of articles discussing various aspects, problems and possible solutions of living in an “information society”).
\end{itemize}
The Court’s decision in Federal Communications Commission v. Pacifica Foundation\(^{199}\) epitomizes the problem of unprincipled categorization. From the standpoint of a polypragmatic concern with the crisis of the public forum, the deepest flaw in the plurality holding of the case was not its flirtation with the “lower value speech” approach, but its “privacy invasion” rationale. The Court held that the “intrusive” nature of radio and television justified speech restrictions on them, and accordingly upheld the FCC’s authority to regulate radio broadcasts it finds “indecent but not obscene.”\(^{200}\)

This rationale falters because it fails to recognize radio and television as public fora, relying instead upon an unreflective conception of what constitutes a public forum, and where the bounds of privacy delineate that forum. The failure is analogous to the failure of Socrates’s fellow-citizens’ to recognize his mission as a new form of democratic politics. They had become convinced that politics is only safe within the glare of Assembly debate and, if practiced anywhere beyond those confines, is tantamount to oligarchic conspiracy. Thus, the citizens of Athens assumed the worst about Socratic polypragmatics. They saw it as an attempt to forge a third place between the Assembly and the private clubs, where politics could be practiced as a kind of therapy for the soul. Likewise, the Supreme Court draws its analysis of the public forum from an anemic and anachronistic concept of public life as something existing only on the public thoroughfares or in large institutional contexts. It cannot conceive of a public forum that lies between Speaker’s Corner and the independent press: a non-commercial public broadcasting media sector, dedicated to the public good, rather than corporate profit. Such media, made accessible to people who now function only as passive consumers, might become tools for the actualization of collective political projects. Just as Socrates awakened in many of his fellows a sense of the benefits resulting from the cultivation of individuality and moral personality through rational discourse, so the judiciary, having discerned broadcast media’s robust potential for revivifying the public forum, might reawaken public debate about the perils of unchecked corporate hegemony over the means of communication.\(^{201}\)

---

In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 248–51 (1974), the Supreme Court considered, but rejected, arguments that the domination of public debate by a few wealthy voices might justify governmental action to protect rights of access and participation, concluding, in effect, that access “is not mandated by the Constitution and like many other virtues it cannot be legislated.” *Id.* at 256.


\(^{200}\) *Id.* at 750-51. *But see* Sable Communications, Inc. v. F.C.C., 492 U.S. 115 at 128 (1989) (limiting *Pacifica*’s reach in this area, and unanimously striking down Congressional attempt to criminalize phone-sex services); Consolidated Edison Co. of New York, Inc. v. Public Service Commission, 447 U.S. 530 (1980) (striking down an order by a state agency prohibiting Consolidated Edison from including inserts in monthly bills stating its position on nuclear energy, and declining to find the intrusiveness of the insert sufficient to uphold a content-based restriction). *See also* Frederick Schauer, *Categories and the First Amendment*, 34 Vand. L. Rev. 265 (1981) (arguing that *Pacifica* taken together with *Young v. American Mini Theatres*, sets up a vague and indeterminate subcategory for offensive speech).

Socrates could hope for little relief from appellate theories tailored to the cases of the U.S. Supreme Court. There was too much reasonable evidence that he had engaged in subversive advocacy, even under the Brandenburg rule. And the conceptual stretch he would have to exact from the public forum cases suggests that only a particularly bold and imaginative Court would be receptive to his appeal on that ground.\(^\text{202}\)

I turn in conclusion to some broader questions raised by the contemporary state of the Supreme Court’s public forum jurisprudence. In the following Part, I focus on two dimensions of the problem: first, the historical origins of currently prevailing concepts of the public forum in Locke’s assimilation of the commons to “waste,” and second, the deep connection between the Lockean model of the public forum and American constitutionalism’s ambivalence about democracy. I then return once more to Socrates, whose own ambivalent relationship to democratic ideology makes him, I suggest, an apt figure through whom to reflect on contemporary predicaments.

V. Socrates in the (Negative) Public Forum: The Enclosure of Democracy

A. The Public Forum as “Waste”

I begin with a speculative hypothesis about the historic origins of the public forum doctrine around which the cases have congealed.\(^\text{203}\) I propose that the public forum in those cases is originally prefigured in John Locke’s assimilation of the commons to “waste.”\(^\text{204}\) That is, the public forum, particularly in its guise as the “marketplace of ideas”\(^\text{205}\) begins in the imagination of American constitutionalism as unexploited

---

\(^{202}\) There is little chance of such vision emerging on the Court as it is presently constituted. See Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 662 (1994) (characterizing the public interest at stake in cable broadcasting within the narrow bounds of “promoting fair competition in the market for television programming,” instead of recognizing the medium as a public forum).


\(^{204}\) John Locke, Two Treatises of Government (Second Treatise § 42) 315 (Peter Laslett ed., 3d ed. 1698) [hereinafter, Locke, II]. Compare id. with id. § 37:

[Therefor he, that incloses Land and has a greater plenty of the conveniencys of life from ten acres, than he could have from an hundred left to Nature, may truly be said, to give ninety acres to Mankind. For his labour now supplys him with provisions out of ten acres, which were but the product of an hundred lying in common.]

Id.

surplus and open space, where rights of speech and conscience could be acquired and appropriated by all, simply by the claiming. In the Lockean figuration, this claiming amounts to an act of enclosure, not of land, but of individuality. Thus, free speech is to the public forum as free labor is to the commons: a taking of property, conceived in both instances as an assertion and confirmation of personhood.

Locke viewed the rights of labor as similar to those of conscience and speech, namely, as moments in the appropriation of personhood and individuality. The rights of labor are particularly conditioned on there being "enough, and as good left in common for others." By contrast, "[t]he contemporary understanding of the commons . . . is largely built upon a Malthusian predicate of scarcity." In the Malthusian model, the commons becomes waste as an inexorable consequence of the activity of rational utility maximizers. Since no individual owns the commons, each exploits it without heed to the costs (since no individual sustains those costs). The grim inference is drawn by Garrett Hardin: "Ruin is the destination toward which all men rush, pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all."

While Locke viewed the commons as the political analogue to the "empty Cabinet" of a mind yet

---

206 See Locke, II, supra note 204, § 27:

[E]very Man has a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatevsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property.

Id. (emphasis in original).

207 Id. § 27. It should be noted that there were alternative conceptions of the commons available to Locke, though he was probably unaware of them:

So likewise all the commons and waste lands, which are called commons because the poor was to have part therein; but this is withheld from the commoners, either by lords of manors requiring quit rents and overseeing the poor so narrowly that none dares build him a house upon this common land, or plant thereupon without his leave, but must pay him rent, fines and heriots and homage, as unto a conqueror; or else the benefit of this common land is taken away from the younger brethren by rich landlords and freeholders, who overstock the commons with sheep and cattle, so that the poor in many places are not able to keep a cow unless they steal grass for her.


208 Frow, supra note 203, at 99.


[N]ot only when the presumption of individual utility maximizing behavior is inappropriate, but also as soon as the sharp dichotomy between internal and external disappears, as occurs within ecosystems as well as in societies in which what we now rather patronizingly call respect for nature is internalized in customary usages, religious beliefs, taboos, and the like.

Id. at 154.
untouched by the world of ideas, the Malthusian scenario analogizes the same space to cancer. What was to the seventeenth century imagination a horizon of exuberant possibility becomes, to the contemporary mind, a locus of pure dread.

As the commons goes, so goes the public forum—at least, within the scheme of the hypothesis I am proposing. As a result, the public forum, like all common spaces within modern society, comes to be perceived as subject to the effects of chaotic exploitation, like the original commons.

Lockean liberalism remains the prevailing political ideology, now tempered and augmented by neoclassical economic theory, and it has a solution to Hardin’s tragic fable: the privatization (i.e., the enclosure) of the commons. In the enclosure model, public spaces upon being made private become vested interests, supposedly to be managed by rational agents in the interests of optimal efficiency. In the United States, this solution has been applied fairly assiduously to the means of communication. The apparent result is a public sphere more expansive than ever, buoyed by euphoric discourse about new technology. Of course it is also a public sphere managed by private corporations, and thus a public sphere increasingly infertile as a medium for democratic praxis.

Thus, the real result of this shift towards private corporations is a banalizing homogenization of public debate, brought about by its thorough commodification. In turn, the process of this


211 See E.P. THOMPSON, CUSTOMS IN COMMON 107 (1993) (noting the parallel between Hardin’s argument and those proffered by the propagandists of enclosure in the seventeenth and eighteenth centuries, whose arguments in turn all derived from Locke’s, and criticizing Hardin for obscuring the historical fact that the actual users of commons “developed a rich variety of institutions and community sanctions which . . . effected restraints and stints upon use”); cf Carole Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. REV. 711, 742–67 (1986) (criticizing Hardin’s model, and arguing that “[c]ustom is the method through which an otherwise unorganized public can order its affairs authoritatively,” and that “customary rights [unlike individual rights] vest property rights in groups that are indefinite and informal, yet nevertheless capable of self-management”).

212 This solution was first tentatively applied with the passage of the Communications Act of 1934, and then triumphantly with the Telecommunications Act of 1996. See Hickey, supra note 198, at 23 (noting that the 1996 Telecommunications Act dismantled almost all the ownership limitations designed to prevent monopolization and observing that the Act triggered a “torrent of mergers, consolidations, buyouts, partnerships, and joint ventures that has changed the face of Big Media in America”).

213 See Julian Stallabrass, Empowering Technology: The Exploration of Cyberspace, NEW LEFT REV., May-June 1995, at 3 (critically surveying this discourse).

214 This is one of Jurgen Habermas’s great themes. For a useful introductory overview of his thinking on the problem, see generally JURGEN HABERMAS, FURTHER REFLECTION ON THE PUBLIC SPHERE 442, 444 (Craig Calhoun ed., 1992) (calling for a “democratic dam against the colonizing encroachment” of bureaucratic knowledge on the public sphere) (emphasis original); JURGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (Thomas Burger trans., 1989) (emphasizing the liberatory implications of the liberal-capitalist conception of the public sphere, but decrying the decline of the democratic function of the public sphere in the twentieth century).

215 See TOLERATION, supra note 138, at 224 (contrasting the judiciary’s toleration for this homogenization in radio and television programming, with its insistence that “traditional” public fora must be kept open to a wide and diverse range of views, even those the majority might judge offensive and deviant); cf. Cohen v. California, 403 U.S. 15, 25–26 (1971) (emphasizing that Cohen was in a “public building”). The court concluded:
commodification, the enclosure of the public forum, is given statutory structure by a legislature enthralled to the champions of privatization. This structure is then approved by a judiciary incapable of seeing the process as anything other than natural (or alternatively, by a judiciary transfixed by Hardin’s fable, where the privatization of the public forum emerges as a rational response to the looming “tragedy of the commons”216). Habermas observes that in the formative days of the bourgeois public sphere, “you had to pay for books, theater, concerts, and museums, but not for the conversation about what you had read, heard, and seen and what you might completely absorb only through this conversation.”217 Today, Haberman concludes, “the conversation itself is administered” as a commodity by corporate purveyors, through monopolized mass media.218

B. Socrates Among the Demos

It should be clear that the Malthusian concept of the public forum imposes sharp constraints upon any theory of democracy. Joseph A. Schumpeter has offered one of the most influential modern variants of this minimalist theory, which is now the template for thinking about the possibilities of democracy in modern mass society. Schumpeter conceives of democracy as an “institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”219 Schumpeter, a Cold War agnostic, was seeking a neutral conception of democracy, freed from the kinds of normative commitments—e.g., to the sovereignty of the popular will, or to the principle of equality—from which it had been historically inextricable.220

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.

Id. at 25–26.

216 See, e.g., Hendler v. United States, 952 F.2d 1364, 1375 (Fed. Cir. 1991) (citing Hardin, and reviewing relevant issues raised by government takings of private land). The Court notes:

The notion of exclusive ownership as a property right is fundamental to our theory of social organization. In addition to its central role in protecting the individual’s right to be let alone, the importance of exclusive ownership—the ability to exclude freeriders—is now understood as essential to economic development, and to the avoidance of the wasting of resources found under common property systems.

Id.

217 HABERMAS, STRUCTURAL TRANSFORMATION, supra note 214, at 164.

218 Id.

219 JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269 (1942).

Within the constraints of Schumpeterian democratic theory, the role of the vast majority is reduced to deciding “by which elite group of experts they wish to be ruled.”\textsuperscript{221} In such a society, there is little need for a robust, participatory public forum, in which questions of politics and culture are broadly debated and discussed. Indeed, for the Schumpeterian democrat, the “musings” of the “private citizen” are quite superfluous to the management of “national affairs.” Such a citizen “is a member of an unworkable committee[:] the committee of the whole nation.”\textsuperscript{222} Incapable by its nature of rational decision-making, this committee does not need the means and resources for collective mutual consultation within a public forum.\textsuperscript{223}

It is one of the signal ironies of American constitutionalism that, from origins so professedly skeptical of Platonic political theory, it should have evolved to a condition of almost unassailed consensus on one of the founding principles of Platonic politics: the intrinsic inviability of participatory democracy. Of course, an unexamined ambivalence towards Platonism had already been internalized by the Founders—or at least, by Madison.\textsuperscript{224} But arguably, that ambivalence had not yet precipitated into the suffocating dogmatism it has become.\textsuperscript{225}

As Plato knew very well, Socrates was capable of exerting a solvent effect on opinions that had lain too long dormant. Thus, it is worth considering how he might have cast a problematic shadow across the current judicial conception of the public forum, as situated within the broader context of “democratic elitism.”\textsuperscript{226} I argued in Part IV that Socrates can reasonably be seen as a “criminal” subversive.\textsuperscript{227} But, nevertheless, under a more broadly conceived model of the public forum, his “subversive” activities might be better understood as a new kind of politics, not easily assimilated into the conspiratorial politics of the oligarchs who looked to Socrates for inspiration. However, the public forum cases demonstrate little latitude

\textsuperscript{221} David S. Allen, The Creation of an (In)active Public Sphere, in FREEING THE FIRST AMENDMENT, supra note 205, at 99.

\textsuperscript{222} S\textsuperscript{H}UMPETER, supra note 219, at 261.

\textsuperscript{223} See also Noam Chomsky’s analysis of the political thought of Walter Lippmann, writing a generation before Schumpeter, but anticipating many of Schumpeter’s themes. In Lippmann’s view, the role of the general public in a modern democracy, as distinguished from that of the elite, meritocratically trained class of leaders, should be restricted to occasionally “aligning itself as the partisan of someone in a position to act executively.” NOAM CHOMSKY, DETERRING DEMOCRACY 367–68 (2d ed. 1992), citing THE ESSENTIAL LIPPMANN: A POLITICAL PHILOSOPHY FOR LIBERAL DEMOCRACY (Clinton Rossiter & James Lare eds., 1982).

\textsuperscript{224} See supra note 64 and accompanying text.

\textsuperscript{225} Madison defined “democracy” as “a Society, consisting of a small number of citizens, who assemble and administer the Government in person.” It was this severely conceived political form that he then condemned as excessively, and unrestrainedly, majoritarian. THE FEDERALIST No. 10 (James Madison). From this, it would seem hazardous to infer his anticipatory endorsement of the elitist, instrumentalist, minimalist conception of democracy that has become the dominant paradigm.

\textsuperscript{226} See CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 3 (1970).

\textsuperscript{227} Indeed, his conviction for that offense looks a good deal more reasonable than the convictions sustained on similar offenses at issue in Dennis v. United States, 341 U.S. 494 (1951)—inasmuch as the United States was merely convulsed by fears of constitutional overthrow, whereas Athens had suffered the actual event twice (in 411 B.C.E. and 404 B.C.E.), and an additional attempt to provoke it (in 401 B.C.E.) in the previous 12 years.
for such broad new conceptions of principle.

I have attempted to sketch out an account of why this might be: deep nerves of theory and history, sealed within a dense integument of institutional interests, make for a doctrinal consolidation that will not give way easily. In the face of discourse so impervious, I offer another thought-experiment. Suppose this time that Socrates had never been a notorious public figure, or the defendant in a high-profile case. Instead of seeking appellate review of a criminal conviction, where he would still have (at least momentarily) a receptive audience for his elenctic mission-work, he is cast adrift in mass society. Now, the Government is not interested in prosecuting him for subversive advocacy; the Government neither knows nor cares who he is. And neither AOL-Time Warner, nor Capital Cities, nor Westinghouse, nor Turner Broadcasting, nor even Rupert Murdoch wants to sign him to a talk-show contract.

Since he despises riches, and is inured to the privations of poverty, he ends up in New York City’s Washington Square, as vital a public forum as he is able to find. And there he passes his days—questioning, examining, testing, anyone he happens to meet. Eventually, after a number of incidents (although never entailing more than a night or two in the city jail), the regular beat-cops learn to leave him alone, since although he is a prodigious drinker, he never seems drunk. (Still, he is unquestionably strange; and a couple of them have noticed that he has an uncanny ability to make a person feel quite uncomfortable, if that person makes the mistake of getting drawn into conversation with him.)

People come and go. He is popular with students; among a handful, he is venerated. The professors, however, ignore him. He goes freely with the young, and with the mothers of children. He is something of a legend among New York’s homeless—for his capacity to drink, and laugh, and endure the cold, and construct improvised shelter, but above all, for his capacity to sustain enthralling conversation. Still, he always disclaims the role of leader. And, anytime an impulse gets loose among his fellow denizens on the margins of the great plutocracy to do something, to change the conditions of their lives, old Socrates slips away, muttering that he is not a leader, not a teacher, and will have nothing to do with “politics.”

So this time, Socrates dies quietly one night, in rough quarters too often reassembled after evictions by police newly zealous about the “quality of life.” He had actually attempted to engage a number of city

228 The model for the Socrates of my parable is the image of Eros in the speech of Diotima:

[H]e is always poor, and he’s far from being delicate and beautiful (as the many think he is); instead, he is tough and shriveled and shoeless and homeless, always lying on the dirt without a bed, sleeping at gates and in roadsides under the sky, having his mother’s nature [Penia, the “goddess” of Poverty], always living with Need. But on his father’s side [Poros, the “god” of Resourcefulness] he is a schemer after the beautiful and the good; he is brave, impetuous, and intense, an awesome hunter, always weaving snares, resourceful in his pursuit of intelligence, a lover of wisdom through all his life, a genius with enchantments, potions, and clever pleadings.

SYMPOSIUM, supra note 8, at 203cd. Compare id. with MARTHA NUSBAUM, THE FRAGILITY OF GOODNESS 184 (1986) (observing that Socrates is put before us in the Symposium “as an example of a man in the process of making himself self-sufficient,” who, as we look upon him, makes us feel “both awestruck and queasy, timidly homesick for ourselves.”)

229 See SYMPOSIUM, supra note 8, at 214a, 220a (describing Socrates’s capacity for alcohol).

230 See id. at 220ab (describing Socrates’s tolerance for harsh weather).

231 See John Tierney, The Holy Terror, N.Y. TIMES, Dec. 3, 1995, § 6, 60 (discussing Rudolph Guiliani’s mayoral campaign,
officials in conversation about this concept, but he had made little headway.

There is no obituary in the *New York Times*. 