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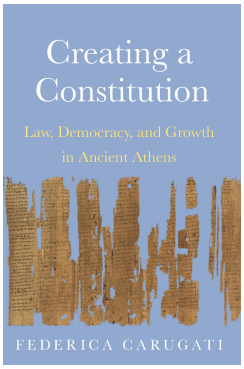
CREATING A CONSTITUTION: LAW, DEMOCRACY AND GROWTH IN ANCIENT ATHENS



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CREATING A CONSTITUTION: LAW, DEMOCRACY AND GROWTH IN ANCIENT ATHENS, by Federica Carugati. Princeton & Oxford: Princeton University Press, 2019. 248pp. Cloth $39.95. ISBN: 978-0-691-19563-6.

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In CREATING A CONSTITUTION: LAW, DEMOCRACY AND GROWTH IN ANCIENT ATHENS, Federica Carugati sets herself the dual tasks of contributing to an explanation of both Athens's economic (and military) recovery in the Fourth Century B.C.E., and of showing the relevance of ancient examples for contemporary political science, in particular the dynamics of constitutionalism and its role in state success. The volume succeeds at both of those tasks, and will prove to be an essential read for those who are concerned to understand the distinct institutional forms that constitutionalism and the rule of law can take while still serving their stability-promoting function. This monograph is an elegantly executed and quite substantial contribution to the literature of political science, law, and classics.

Some historical context is perhaps necessary for the reader who is less familiar with Athens. In the middle of the Fifth Century, Athens was a prosperous and powerful empire, with much of its local hegemony built on naval power, which it used, among other purposes, to extract tribute from its "allies" (client states). As is well-known, Athens's famous democracy was itself tied to this sea power, for the lower classes were the sailors. In this sense, Athens may stand as the first example of the thesis of a connection between military necessity and enfranchisement: a kind of ur-case for Therborn's (1977, 21-23) "national mobilization democracy."

However, toward the end of the Fifth Century, Athens went to war with Sparta, its major Greek competitor. Over the course of the war, the polis suffered several devastating defeats which brought its democracy down no less than twice. First, not long after a failed invasion of Syracuse (made infamous by Thucydides's dissection of the folly of the democracy in bringing it about)—and, not incidentally, after a collapse of the legal system as well (Gowder 2016, 102-3)—the democracy was replaced in 411 B.C.E. by a short-lived oligarchy known as "the Four Hundred." Athens bounced back from that meltdown fairly quickly, but finally suffered a total military defeat in 404 B.C.E. in which the Spartans occupied the city, tore down the Long Walls connecting Athens to its great port of Piraeus, and installed the infamously vicious and bloodthirsty Thirty Tyrants.

The Thirty were also quickly overthrown, but, in the interim, Athenian military power had been shattered, a vast proportion of the population had been killed (and much of the rest probably robbed by the Thirty), and a deep rift had been driven between the oligarchic and the democratic parties that posed the risk of poisoning Athens's politics. Yet, as Carugati recounts, Athens recovered to an astonishing degree over the next century. It did not, to be sure, return to the heights that it scaled during the time of its empire, but it rebuilt the economy, regained the capacity to protect its interests militarily, and managed to preserve the restored power of the democracy for decades thereafter. How?

The basic arc of Carugati's theoretical story can be presented simply, though to accommodate the

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shorter format of a review it will perhaps be clearer to present the argument in a different order than it appears in the book.

On her account, a key immediate driver of Athens's economic recovery (and hence indirectly of its military recovery as well, as war is rather expensive) was Piraeus, the great port of Athens which had been the center of its naval power as well as its trade wealth. But after the end of the war, Athens could not rebuild its empire, so the straightforward solution of exploiting the "allies" was no longer available. [*137] Instead, Athens needed to provide foreigners and others with an adequate incentive to trade in the port. Other sources of the economic recovery included an increase in exploitation of silver mines controlled by the city, and contributions to the public purse from elite citizens (the last of which itself must have depended on an overall economic and military recovery in order to facilitate continued elite acquisition and protection of their wealth).

The rebuilding of trade in Piraeus, however, depended critically on Athens remaining a democracy rather than an oligarchy; because Athenian lower-classes dominated the port and the navy, an oligarchy was unlikely to have been sustainable in conjunction with a revitalized port. Indeed, as Carugati describes, the Thirty recognized this incompatibility and vigorously endeavored to sabotage the port while they were in power (pp. 166-69). Democracy, in turn, required resolving Athenian political instability, and, in particular, required the creation of institutions that permitted the Athenian masses to credibly commit to refraining from expropriating wealthy elites or retaliating against them for their complicity in the crimes of the Thirty Tyrants.

Moreover, the full exploitation of the silver mines as well as providing adequate security to encourage foreigners to trade through Piraeus required Athens to enhance its ability to commit to fairness and legal stability in trade. Hence, the key driver of Athenian recovery was its ability to create credible legal institutions, which in turn permitted the democracy to remain in power while assuring both the wealthy oligarchs-in-waiting that they would be able to hold onto their wealth, and foreigners that they would be treated fairly in the economic sphere.

Yet the city's recent legal history would not have reassured either its wealthy citizens or foreign traders that it could refrain from succumbing from the temptation to expropriation. After all, this is the city that persecuted its young aristocrats in a hysteria surrounding the mutilation of the Herms and the profanation of the Eleusinian Mysteries just before the Four Hundred took over, and then again ran amok and extra-judicially executed the (victorious) generals of the battle of Arginusae just before the Thirty took over. And, as Lysias evocatively recounted in his twelfth oration, the Thirty plundered the metics. Moreover, the Thirty had run a notoriously blood-soaked reign, one that would have left many Athenians with strong motivations to seek revenge (legal or otherwise) and hence plunge the city into further instability. Athens would have had to do a lot of work to convince the various interest groups in play that a stable democracy operating under law was not only worth refraining from attempts to overthrow it, but even worth investing in.

Ultimately, Athens successfully achieved these feats through constitutional reform. It created legal institutions that maintained democratic political power and the capacity to innovate, while permitting checks on hasty or sectarian divergences from a traditional (or represented as traditional) legal framework—and hence supplying security to aristocratic elites. It also expanded legal access to foreigners, thus increasing the security of trade, while reserving political access for its own citizens.

The bulk of the volume comprises an extensive presentation of numerous forms of evidence to support this overall theoretical approach. Carugati details Athens's legal reforms, and provides a formal model suggesting that Athenian legal institutions following the reforms were capable of generating a secure legal landscape. She uses a comparative analysis of the institutional alternatives of Syracuse and Rome to draw out the connection between political stability and economic prosperity. She does as well as can be done given the limited evidence available to canvas the existing economic literature and trace the sources of Athenian public revenue. Finally, and perhaps most impressively, Carugati even delves into naval geography and meteorology in order to show that the success of Piraeus was not merely a consequence of its favorable location and physical features, but depended on institutional factors. The overall impact of this catalog of multidisciplinary evidence and argument is to render her theoretical account quite plausible. While she acknowledges that the historical evidence for such matters as the sources of [*138] Athenian revenue and the nature of the political conflicts that rocked Syracuse is sketchy, she is clear about

the nature and strength of the inferences she draws, and the overall approach is highly convincing.

Carugati also makes a strong case for the applicability of her insights on Athenian institutions to general problems in political science. One way to describe that case would be as a form of abstraction: by considering the strategic dynamics of a self-enforcing constitution in a social context distinct from the concrete institutional instantiations that characterize such phenomena in the modern world, we can learn about those dynamics without being confounded by the institutions that contingently, rather than necessarily, accompany it. As an example, Carugati gives the rule of law (pp. 174-75): by studying a state that achieved the core functionality of the rule of law (i.e., constraint of government power) without the superstructure of elite, independent, judges and the like that typically are used to implement the rule of law in the modern world, we can learn about the rule of law independent of its specific institutional implementation. This allows us to more confidently draw conclusions about the rule of law that are really about the rule of law, rather than about, e.g., the existence of an independent judiciary.

As another example: Mark Tushnet (2017) asks whether “illiberal constitutionalism”—which he defines essentially as a stable rule of law legal order (a weak rule of law order, in the sense of Gowder (2016)) which embeds a caste system in which some people have secure legal rights while remaining in subordinate legal status—is possible. Carugati’s analysis of Athens serves as a possibility case for just such an idea, for her demonstration that Athens managed to include metics in the economic sphere, and protect their legal rights without including them in the political sphere, demonstrates that some version of illiberal constitutionalism (although not perhaps identical to Tushnet’s version) is, at least in some social contexts, possible.

Of particular interest is Carugati’s formal model in chapter 3. In essence, the model is used to argue that a litigant with preferences over honor (understood, roughly speaking, as a reputation for achieving legal and political victories) as well as over policy, would have an incentive under the *graphē paranomōn* system of challenging unconstitutional proposals to propose a limited amount of policy innovation, primarily in those cases where the median juror’s policy preferences are closer to the proposer’s ideal point than is the status quo.

While the model focuses specifically on *graphē paranomōn*, it also provides potential insights on the other trial-like procedures that bore on the leglative process, such as the innovations of *nomothetai* and *graphē mē no on me epitēdeion theinai*. It seems to me that the heart of her insight is really about sample variability; that is, to the extent that the preferences of those bodies were closer to that of the general public than those of the Assembly, they would have ameliorated the risk of radical and destabilizing acts of the Assembly. The volume doesn’t offer any evidence that the preferences of juries would systematically track the preferences of the general public better than the Assembly. However, the new procedures may have served the above-noted risk-reduction function if, as seems likely, the introduction of all these repeated opportunities for judicial-type bodies to consider the legality of acts of the Assembly came with a built-in conservative bias. By requiring a proposer to get through multiple stages of review in order to enact a potentially controversial policy, where each stage of review was conducted by a group of people whose preferences tracked the preferences of the public with some error, this multi-stage process would arguably reduce the opportunity for proposers to gamble on getting a sample that was more radical than the median. Even if they got a radical assembly, they might not get a radical jury. Hence, this would give proposers an incentive to plan the strategy of their proposals around the conservative end of the range of likely variation around the median.

Another potential account of the effects of the use of the jury to regulate unconstitutional proposals might focus on time-inconsistency. As Carugati points out (p. 36), the Assembly was subject to a problem of rash judgments and the [*139] tendency to ignore its own legal institutions prior to the constitutional reforms. Arguably, the diversion of more of the lawmaking process into formal institutions with trial-like procedures (particularly the *nomothetai*) may have tended to focus the argument and encourage a more deliberative process by juries relative to Assemblies. On such a story, perhaps the difference between the Assembly and the court is not that the latter represented the preferences of the median citizen better than the former, but that the latter represented the median citizen’s *long-term* preferences, while the former represented the median citizen’s *short-term* preferences.

An interesting—but, I fear, flawed—implication of the formal model is that lower-class citizens

would be more likely to make radical proposals that (under uncertainty about the median juror's preferences) would be more likely to lose at trial. The reason for this is that lower-class citizens are assumed to have weaker preferences over honor, and hence be less averse to the risk of losing a *graphē paranomōn* or a *graphē mē no on me epitēdeion theinai* at trial. However, Carugati can reach this conclusion only by ignoring the impact of the most significant disincentive to risking finding oneself at the receiving end of constitutional litigation: the massive financial penalty for losing, a financial penalty that, at its conventional level, only the rich could possibly have afforded to pay.

As Carugati acknowledges, there is a substantial portion of the prior literature which assumed, on the basis of the financial risks to losing cases (for either side), that elites were essentially the only significant players in such litigation. Carugati convincingly argues that such a claim would be overstated, in view of the inconsistent way in which the penalties for losing were applied (pp. 92-93). But it seems to me that, by assuming the financial penalties away altogether, her model over-corrects for the excessive attention on financial incentives in the existing literature. On her model, the utility function for a proposer is simply a function of honor (represented by votes at trial) and policy, such that a poorer citizen who is not concerned about honor is, *sub silentio*, assumed not to care about votes at trial at all—and hence not at all about the risk of losing, even if that also meant a risk of massive financial loss and, if the fine could not be paid, possible *atimia* (for example, the infamous fate of Aeschines as plaintiff when he dared to go up against Demosthenes in the Crown case, although as Carawan (2019, 115) suggests, perhaps Aeschines was actually subject to a special and unique penalty). And it is on the basis of that overcorrection that Carugati reaches the conclusion that lower-class voters would be more likely to make radical proposals. Hence, while her model succeeds at showing that it's too hasty to assume that radical proposals would have been brought exclusively, or predominantly, by the rich, it does not show that they would have been brought predominantly by the non-rich.

However, there are more insights which might be gleaned, in future research, from combining Carugati's point that honor counts more heavily as a litigation incentive for elites, with the point from the prior literature that ability to pay could provide a hard constraint on the ability to risk (or to bring) *graphē paranomōn* cases. For example, it may be that there is a kind of inverted U-shaped curve of socioeconomic status and willingness to participate in *graphē paranomōn* litigation, where the maximum of the latter is reached at some point where citizens are wealthy enough to be able to afford the financial risk but not wealthy or prominent enough to be a player in the (ultra-elite?) game of honor-driven litigation. (If I may descend into pure speculation for a moment: if that's the socioeconomic sweet point for being able to make the most aggressive use of the constitutional reforms, this may feature in a potential explanation of the success of the amnesty for those who supported the Thirty, as it may have given the wealthy cavalrymen, who were arguably the greatest beneficiaries of amnesty, a particular incentive and ability to make use of the judicial system.)

For another example, to what extent was the honor to be gained by *graphē paranomōn* litigation on the plaintiff side dependent on the status of the defendant? Carugati's conclusion that lower-class proposers might have more [*140] leeway to make more radical proposals could perhaps be rescued if we consider the role of honor not from the standpoint of the degree to which the proposer is afraid of being made a defendant and losing, but from the standpoint of the degree to which plaintiffs who might bring a graphē paranomōn not just for policy purposes but also in order to win victories over their rivals might have less incentive to bring such suits against lower-class defendants. (Would Aeschines have even bothered to bring his ill-fated crown suit if he didn't have a shot at humiliating a rival of the stature of Demosthenes?)

It might also be possible to use the tension between honor and money incentives to shed further light on Carugati's theme of partial inclusion and the metics. If metics were subject to different honor incentives than citizens, that difference could potentially feature in an explanation of the timing and difference in extent to which metics were extended access to the litigation process.

I must confess to one small further reservation about this volume (although not remotely sufficient to undermine the contribution it makes to the literature): the account could perhaps use some more clarity regarding the interaction between ideological or cultural explanations of Athens's success and strategic explanations. In particular, Carugati recounts in chapter 2 the growth of the idea of the *patrios politeia* (the ancestral constitution) as a concept to which both sides in Athens's

class/political struggle appealed to lend legitimacy to their legal reforms, as well as the changes in the practical extension of the concept until it became identified with what Carugati calls “legality” under the fourth-century democracy. But it is not quite clear how exactly that fits into the broader account of the self-enforcing constitution which the book offers.

Perhaps, for example, the label “patrios politeia” served to identify a common core of legal ideas that could serve as a focal point for efforts to coordinate to enforce the new constitution. At one point, Carugati interestingly hints that the concept may have played a focal point role not so much in the enforcement of the new legal order, but in the selection of which particular institutions would go into it (p. 62., “On the consensus on patrios politeia qua Solonian legality, the Athenians built a new, self-enforcing democratic constitution.”) At another point, Carugati suggests that appeals to Solon functioned as a kind of consensus outer-limit of permissible legal innovation in challenges to unconstitutional proposals under the reformed legal order (pp. 104-107).

Alternatively, perhaps appealing to the ancestral constitution served as a signal of commitment to the fourth-century legal system and hence as a useful way for democrats to communicate a willingness to surrender the aspiration toward “radical democracy” or revenge and in favor of constitutionalism at all. At any rate, some additional clarity on the precise mechanism for the ancestral constitution’s role in stability would be helpful; appeals to the concept of “legitimacy” standing alone do not quite get us to a full theoretical account.

Notwithstanding the handful of worries I have just articulated, the overall argument of the volume is entirely compelling. It seems quite plausible, on Carugati’s account, that the constitutional reforms of the Fourth Century were instrumental in permitting Athens to find a new model of economic growth and public finance that fueled its postwar recovery. And CREATING A CONSTITUTION stands both as an important example of the use of ancient cases to develop modern institutional understanding, on the one hand, and, on the other, an important update of the literature on Athenian constitutional reforms (such as Ostwald’s (1986) magisterial account) to make use of the insights of contemporary social science. Political science, law, and classics all owe Carugati thanks for the contributions of this volume.

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