

SOCRATIC PERSPECTIVES ON AMERICAN CONSTITUTIONALISM

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*... 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

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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 sophistic art of "making the weaker argument appear stronger."⁴ Yet Socrates did not play the role of lawyer, deliberately avoiding both the courts and the legislature.⁵ 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."⁶ 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.⁷ Lawyers litigate, especially the "public lawyers" most likely to look to Socrates as a model. Socrates went to court only once, and in that case, he lost.⁸

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.⁹

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.¹⁰ 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.¹¹ 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). See also THOMAS C. BRICKHOUSE & NICHOLAS D. SMITH, SOCRATES ON TRIAL 2-9 (1989) (providing a useful overview of the literature on the subject) [hereinafter SOCRATES ON TRIAL]; James A. Coulter, *The Relation of the Apology of Socrates to Gorgias’ Defense of Palamedes and Plato’s Critique of Gorgianic Rhetoric*, 68 HARV. STUD. IN CLASSICAL PHILOLOGY 269 (1964) (comparing the *Apology* to the *Palamedes*); R.E. ALLEN, SOCRATES AND LEGAL OBLIGATION 33-36 (1980) (calling attention to revealing parallels between the Platonic document and other contemporary paradigms of the genre).

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?¹² 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,¹³ Socrates would have no recourse: his *elenctic*¹⁴ activities are too easily construed as extending beyond "abstract teaching" to posing a real and imminent threat of violence to American democracy.¹⁵

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*,¹⁶ 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

note 9, at 326b. Cf. REPUBLIC, *supra* note 1, at 473d. For a thorough account of the events, see MARTIN OSTWALD, FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW: LAW, SOCIETY AND POLITICS IN FIFTH-CENTURY ATHENS 12-96 (1986) [hereinafter POPULAR SOVEREIGNTY].

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).

¹³ See *Brandenburg v. Ohio*, 395 U.S. 444, 445-47 (1969).

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].

¹⁵ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

¹⁶ 438 U.S. 726 (1978).

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 POLYPRAGMATICS: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."

¹⁸ I.F. STONE, *THE TRIAL OF SOCRATES* (1988). Stone's book should be read alongside two older studies, ELLEN MEIKSINS WOOD & NEAL WOOD, *CLASS IDEOLOGY AND ANCIENT POLITICAL THEORY: SOCRATES, PLATO, AND ARISTOTLE IN SOCIAL CONTEXT* (1978), and G.E.M. DE ST. CROIX, *CLASS STRUGGLE IN THE ANCIENT GREEK WORLD: FROM THE ARCHAIC AGE TO THE ARAB CONQUESTS* (1981).

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.²² But Socrates’s criticism of Athens must be rightly apprehended, 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.”²³

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).²⁴ Indeed, Socrates insists on yoking his meritorious military service during the Peloponnesian War to his public *elenchus*²⁵ 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.²⁶ 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”).²⁷

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,”²⁸ Socrates declares: “I rouse you. I persuade you. I upbraid you. I never stop lighting upon each one of you everywhere, all day long.”²⁹

(arguing 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.³⁰ First, Socrates says, his manner of speaking is the commonplace style "of the Agora, by the bankers' tables."³¹ And second, he addresses and is open to dialogue with "anyone [he happens] to meet, young and old, citizen and stranger, . . . rich and poor . . ."³² 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.³³ 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.³⁴

Socrates's appropriation of the Achillean paradigm of excellence and virtue offers another example of his common touch.³⁵ For Socrates, excellence and virtue (what the Greeks called, *arete*) is *not* a matter of accumulating "as much wealth, reputation, and honor as possible," which is what it was for Achilles.³⁶ Rather, for Socrates *arete* is a condition of the soul, and more precisely, it is the sustained life-practice of *caring for* or *tending* the soul.³⁷ It follows that *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 *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 *arete*: *elenchus*. Socrates characterizes *elenchus* in moral terms. For Socrates, *elenchus* is the medium of the highest form of a human life, namely "*logos*-making about *arete*."³⁸ We

³⁰ *Id.* at 29d, 30a (trans. modified by author).

³¹ *Id.* at 17c (trans. modified by author).

³² *Id.* at 30a, 33b (trans. modified by author).

³³ *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).

³⁴ *See* PLATO, *SYMPOSIUM*, *supra* note 8, at 223d.

³⁵ *See* *APOLOGY*, *supra* note 4, at 29e–30b (where Socrates characterizes the good life in terms of his *elenctic* mission). The Greek term *arete* spans a range of meanings that includes both the moral connotations of the English "virtue," and the more strictly instrumental connotations of "excellence." *See* GREEK-ENGLISH LEXICON, *supra* note 14, at 238.

³⁶ *See* *APOLOGY*, *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." *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. *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. *See* JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING*, 48–58 (1984) (discussing the ethical dimension of the Achean appeal to Achilles); EUBEN, *supra* note 21, at 218–26.

³⁷ *See* *APOLOGY*, *supra* note 4, at 30b. The Greek word, *psyche* translates to "soul," and *epimeleia psyches* means "caring for" or "tending the soul."

³⁸ *APOLOGY*, *supra* note 4, at 38a (trans. modified by author). Observe the complex interplay between the concepts of *logos*-making, *arete*, and *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

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).³⁹ 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."⁴⁰ 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 sophistic 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–480e (the *elenchus* of Polus, in which Plato offers systematic arguments in support of these Socratic principles); *CRITO*, *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 preferment 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).

⁴² See CHARLES DAVID CHANEL REEVE, SOCRATES IN THE APOLOGY: AN ESSAY ON PLATO'S APOLOGY OF SOCRATES, 155–60 (1989) [hereinafter REEVE, APOLOGY], and L.B. CARTER, THE QUIET ATHENIAN 185 (1986) (calling attention to the striking effects of Socrates's *catachresis*).

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).

⁴⁴ See Victor Ehrenberg, *Polypragmosune: A Study in Greek Politics*, 67 J. HELLENIC STUD. 46 (1947).

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 polloi*], 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, Callixenus 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 Callixenus’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 Callixenus’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 Callixenus’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 Callixenus 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 Callixenus 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.⁶⁶ 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.⁶⁷

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.⁶⁸

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.⁶⁹ 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 jurymen'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.”⁷⁰ 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.⁷¹

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.⁷²

III. SOCRATES IN THE *CRITO*: 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.⁷³ 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.⁷⁴ He begins by eliciting from Meletus the claim that “all Athenians” (save Socrates, of

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.⁷⁵ 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?”⁷⁶ Furthermore, is this not the case “both with horses and all other animals” (including humans)?⁷⁷

Meletus makes no response; he cannot. He is too inept to defend his crude parroting of democratic ideology.⁷⁸ 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.⁷⁹ Protagoras argued that this was possible, and that democracy therefore was sustainable.⁸⁰ 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 32c; 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.⁸¹ 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.⁸²

A. *Metaphysics and Politics in the Crito*

I begin with a close reading of the dialogue's pivotal moment.⁸³ 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?"⁸⁴ 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. See, e.g., James Stephens, *Socrates on the Rule of Law*, 2 HIST. OF PHIL. Q. 3 (1985) (arguing that Socrates starts from 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. WOZZLEY'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. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* 410–11 (1969) (discussing anti-democratic sentiments 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.⁸⁵ Socrates exploits an ambiguity between the claim that not every opinion is true, and the claim that the opinion of everyone cannot be true.⁸⁶ 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.⁸⁷ 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?"⁸⁸ He should value the opinion "of the one only," Crito responds pointedly.⁸⁹ "Then he ought to fear the blame and esteem the praise of that one, but not that of the many [*hoi polloi*]."⁹⁰ Socrates's objective is not to establish a merely logical point about the relative value of belief.⁹¹ Instead he seeks to establish a firm normative distinction between the agency of the many and that of "the one."⁹²

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,"⁹³ 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?"⁹⁴ 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."⁹⁵ The "one and the truth itself" of course, cannot be "the many."⁹⁶ 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

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),⁹⁷ 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 harm⁹⁸—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*.”⁹⁹

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.¹⁰⁰ 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.”¹⁰¹ In the *Symposium*, Pausanias describes the kind of *Eros* associated with “*Pandemos Aphrodite*” as one that “works at random.”¹⁰² 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.”¹⁰³ It follows that acolytes of *Pandemos Aphrodite* “answer to whatever comes their way, indifferent to whether it be good or bad.”¹⁰⁴ In this respect, the acolyte of “democratic” *eros* is no different from the

⁹⁷ See PROTGORAS, *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 tuchosi*—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 *tyche* 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 tuchosi* was already in place as one of the cornerstones of his thought. See *id.* at 34.

¹⁰¹ PROTGORAS, *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.”¹⁰⁵

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.”¹⁰⁶

In this pivotal passage of the *Crito*, Plato broaches one of the fundamental dichotomies of Greek ontology, between the “one” and the “many.”¹⁰⁷ Parmenides argued that what is real must be unitary; the realm of the illusory is the realm of change and plurality.¹⁰⁸ But the ethical-political purpose to which the distinction is applied in the *Crito* recalls Heraclitus.¹⁰⁹ The essence of wisdom for Heraclitus is that “all things are one,” an insight attainable through attention to “that which is common to all.”¹¹⁰ Heraclitus says, “I went in search of myself,”¹¹¹ and because of that investigation, becomes able to “distinguish each thing according to its nature, and say how it is.”¹¹² 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 tuche*.

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 there 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).

¹⁰⁸ Useful guidance to the literature on Parmenides, and generally on Presocratic philosophy, may be obtained from GEOFFREY S. KIRK ET AL., THE PRESOCRATIC PHILOSOPHERS 239–62 (1983) (providing an overview of Parmenides’s life and philosophy); ALEXANDER P.D. MOURELATOS, THE ROUTE OF PARMENIDES (1970) (analyzing Parmenides’s philosophy); Gwilym Ellis Lane Owen, *Eleatic Questions*, in LOGIC, SCIENCE, AND DIALECTIC: COLLECTED PAPERS IN GREEK PHILOSOPHY OF GWILYM ELLIS LANE OWEN 3–26 (Martha Nussbaum ed., 1986) (discussing the issues facing pre-Socratic philosophers); and Charles Kahn, *Being in Parmenides and Plato*, 43 RIVISTA DI STUDI ANTICHI 237 (1988).

¹⁰⁹ For general remarks on Plato as an interpreter of Heraclitus, see 1 PAUL FRIEDLANDER, PLATO: AN INTRODUCTION 25–26 (Hans Meyerhoff trans., 1969).

¹¹⁰ HERACLITUS, THE ART AND THOUGHT OF HERACLITUS, B2, B50, B114 (Charles Kahn trans., 1979) (providing valuable commentary). References are to the standard edition of the Presocratic fragments, H. DIELS & W. KRANZ, DIE FRAGMENTE DER VORSOKRATIKER (6th ed., 1951) [hereinafter FRAGMENTS].

¹¹¹ *Id.* at Heraclitus Fragment B101.

¹¹² *Id.* at Heraclitus Fragment B1.

that is, and the truth itself’ can be true.¹¹³

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

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 [*medeni*] among the [many] things of mine [*ton emon*], other than the *logos* that on reflection [*logizomenos*] seems best to me.¹¹⁵

It is striking to find here, in the distinction between the plural genitive form “my things” (*ton emon*—usually not translated), and the dative “no single thing” (*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,¹¹⁶ he seeks a unifying principle of action in the *logos*. The allusion now is to Parmenides, who summoned Greek philosophy to “judge by *logos*,”¹¹⁷ the “way of persuasion, which attends truth,”¹¹⁸ which “never was nor will be, since it is now, all together, one, continuous.”¹¹⁹ Reason by *logos*, Socrates says, and be persuaded by *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 *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

¹¹³ CRITO, *supra* note 10, at 47–48 (trans. modified by author).

¹¹⁴ See, e.g., REPUBLIC, *supra* note 1, at 443d.

Justice does not lie in a person’s external actions, but in the way he acts within himself, really concerned with himself and his inner parts. He does not allow each part of himself to perform the work of another, or the parts of his soul to meddle with [*polupragmono*] one another. He orders what are in the true sense of the word his own affairs well; he is master of himself, puts things in order, is his own friend, harmonizes the three parts [the wisdom-loving, honor-loving, and pleasure-loving] like the limiting notes of a musical scale, the high, the low, and the middle, and any others there may be between. He binds them all together, and himself from a plurality becomes a unity.

Id. (trans. modified by author).

¹¹⁵ CRITO, *supra* note 10, at 46b (trans. modified by author).

¹¹⁶ An account of a lost Socratic dialogue by Phaedo, the *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!” See 1 GABRIELE GANNANTONI, *SOCRATIS ET SOCRATICORUM RELIQUIAE* 62–63 (vol. 4, 1990). Compare *id.* with Nietzsche’s allusion to the *Zopyrus*, in *The Problem of Socrates*, in 3 FRIEDRICH NIETSCHE, *TWILIGHT OF THE IDOLS: HOW TO PHILOSOPHIZE WITH A HAMMER* 30 (R.J. Hollingdale trans., 1968) (characterizing Socrates as “a monster of the soul”).

¹¹⁷ FRAGMENTS, *supra* note 110, at Parmenides Fragment B7.

¹¹⁸ *Id.* at Parmenides Fragment B2.

¹¹⁹ *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”).¹²⁰ 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.¹²¹

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.¹²² 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. RUTENBER, *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 *APOLOGY*, *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.”¹²³ 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.”¹²⁴ 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.”¹²⁵

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.”¹²⁶ 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*,¹²⁷ 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.¹²⁸ Surely this is patriotism, and surely its object is Athens, a democracy.¹²⁹

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.

¹²⁹ See RICHARD KRAUT, SOCRATES AND THE STATE (1983) (offering a comprehensive assessment of the *Crito*’s significance for the problem of legal obligation.) See generally ALLEN, *supra* note 9.

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 *elenctically*-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,¹³⁶ 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 impiety¹³⁷ 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 religion¹³⁸ 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.¹³⁹

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.¹⁴⁰

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.¹⁴¹ 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.¹⁴² 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.¹⁴³ For this purpose, the "facts" of Socrates's case are:¹⁴⁴

SOCIETY IN CLASSICAL ATHENS 35–39 (1987) (discussing the relationship between religion and the state in Athens, and the influence of religious ideas and practices upon legal procedures).

¹³⁸ The relationship of state to religion is deeply embedded within the complex historiography of the religion clauses. See DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 104–28 (1986) (surveying the roots of the religion clauses in the political theory of Locke and Bayle).

¹³⁹ 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").

¹⁴⁰ 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).

¹⁴¹ 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 "licens[ed] the jury to create its own standard in each case."

¹⁴² See TODD, *supra* note 39, at 61.

¹⁴³ 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;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).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.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.¹⁴⁸

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

F.2d 1195, 1200–02 (9th Cir. 1984) (suggesting that the question of whether an appellate issue is essentially one of law or fact may be decided on the basis of “the concerns of judicial administration”).

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. 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).

¹⁴⁵ See *LYSIAS, Against Eratosthenes*, in *ORATIONS* 12.52 (W.R.M. Lamb trans., 1930), and *XENOPHON*, *supra* note 52, at 2.4.8.

¹⁴⁶ For the presentation of these facts in a light most favorable to Socrates's accusers, see *STONE, TRIAL OF SOCRATES*, *supra* note 18, at 140–56. For a less polemical assessment, see *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.

¹⁴⁷ 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); *Marusic 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”).

¹⁴⁸ See *Fiss*, *supra* note 12, at 349–50 (analyzing the “Free Speech Tradition” in terms of “protection of the street corner speaker”).

obscuring its dense political background.¹⁴⁹ 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,¹⁵⁰ 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.¹⁵¹

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 (cataloguing 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*.¹⁵² Under *Brandenburg*, advocacy may only be punished as subversion where it is clearly more than “mere abstract teaching.”¹⁵³ Specifically, for speech to be constitutionally punishable as subversive, it must be both “directed to inciting or producing imminent lawless action,” and “likely to incite or produce such action.”¹⁵⁴

On first blush, Socrates’s *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 *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 *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.”¹⁵⁵ But Socrates’s trial record¹⁵⁶ 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,”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.”¹⁵⁸ Socrates also denied, quite strenuously, being a “teacher” to

¹⁵² 395 U.S. 444 (1969) (per curiam), *overruling* *Whitney v. California*, 274 U.S. 357 (1927).

¹⁵³ *Id.* at 448 (citing *Noto v. United States*, 367 U.S. 20, 297–98 (1961)).

¹⁵⁴ *Id.* at 447. For commentary, see RICHARDS, *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”). See also Sheldon Leader, *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, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. 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, *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).

¹⁵⁵ LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 849 n.58 (2d ed., 1988) (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)).

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

¹⁵⁷ *APOLOGY*, *supra* note 4, at 28e (trans. modified by author).

¹⁵⁸ *Id.* at 23c (trans. modified by author).

those young men,¹⁵⁹ 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.”¹⁶⁰ But the jury did not accept this defense. To the contrary, it found that Socrates had held himself out as a teacher.¹⁶¹ Moreover, the jury found that his teaching was contemptuous of the democracy¹⁶² and that this teaching had incited many of his past “pupils” and “associates” to act in ways that endangered the democracy.¹⁶³

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).¹⁶⁴ 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.”¹⁶⁵

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’d 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. Norwick*, 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 forces 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,"¹⁶⁶ their verdict must be affirmed.¹⁶⁷

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).¹⁶⁸ 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*."¹⁶⁹ In these other public places, he "practices philosophy,"¹⁷⁰ by confronting and examining the politicians, poets, and the public workers,¹⁷¹ and by exhorting anyone he happens to meet, "young and old, citizen and stranger (but especially citizen), . . . the rich and the poor—

¹⁶⁶ *Brandenburg v. Ohio* 395 U.S. 444, 447 (1969).

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:

Socrates was always in the public eye. Early in the morning he used to make his way to the covered walks and the gymnasia, and when the agora became busy he was there in full view; and he always spent the rest of the day where he expected to find the most company. He talked most of the time, and anyone who liked could listen.

MEMORABILIA I.1.10, at 70 (Hugh Tredennick & Robin Waterfield trans., 1990).

¹⁷³ APOLOGY, *supra* note 4, at 33ab.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 36b (emphasis added). The proposal of a counter-penalty arises from 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.¹⁷⁸

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 *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.¹⁷⁹ 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.¹⁸⁰ 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 *isegoria*,¹⁸¹ 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.”¹⁸² 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

¹⁷⁸ See *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

¹⁷⁹ 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 *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).

¹⁸⁰ 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.

¹⁸¹ Although often translated by the phrase “free speech,” the term *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 *OBER*, *supra* note 67, at 72–78, for an overview of this development. Ober calls *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.

¹⁸² *APOLOGY*, *supra* note 4, at 29e, 30b.

of consensus (what the Athenians called *homonoia* or same-mindedness).¹⁸³ 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,¹⁸⁴ 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.¹⁸⁵ 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*.¹⁸⁶

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.

¹⁸⁴ The Assembly had become, Socrates concluded, a place where anyone who genuinely opposed the crowd had to fear for his life. See APOLOGY, *supra* note 4, at 31de; see also RUSSEL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860 (1963); WILLIAM LEE MILLER, ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS (1996) (describing the repression of free speech about slavery in ante-bellum America).

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 <i>parrhesia</i> .
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.¹⁸⁷ 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*,¹⁸⁸ *Edwards v. South Carolina*,¹⁸⁹ *Cox v. Louisiana (I)*,¹⁹⁰ and *Gregory v. Chicago*,¹⁹¹ enunciate important free speech principles.¹⁹² 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).¹⁹³ 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).

¹⁸⁹ 372 U.S. 229 (1963).

¹⁹⁰ 379 U.S. 536 (1965).

¹⁹¹ 394 U.S. 111 (1969).

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.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.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.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.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."¹⁹⁸

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).

¹⁹⁴ 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.")

¹⁹⁵ 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.

¹⁹⁶ 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").

¹⁹⁷ 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. MCCHESENEY, *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).

¹⁹⁸ 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").

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.

¹⁹⁹ *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978).

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).

²⁰¹ *See* Robert McChesney, *Public Broadcasting in the Age of Communications Revolution*, *MONTHLY REV.*, Dec. 1995, at 1 (discussing political and historical views of corporate control of the media, and the attack on public broadcasting); *see also* Eric Alterman, *PBS on the Run: Public Broadcasting Service*, *THE NATION*, Feb. 24, 1997 (discussing the attack by political conservatives on the Public Broadcasting Network). Justice Brennan, dissenting in *Pacifica*, surely discerned this potential in observing that "the responsibility and the right to weed worthless and offensive communications from the public airways" resides "in a public free to choose those communications worthy of its attention . . ." *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 722 (1978). *Cf.* *CBS, Inc. v. Democratic Nat'l. Comm.*, 412 U.S. 94, 193 (1973) (Brennan, J., dissenting) (arguing that the fairness doctrine is insufficient by itself to guarantee robust public debate, urging a broader right of access to the broadcast media, and concluding: "[F]reedom of speech does not exist in the abstract. On

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.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.²⁰³ I propose that the public forum in those cases is originally prefigured in John Locke's assimilation of the commons to "waste."²⁰⁴ That is, the public forum, particularly in its guise as the "marketplace of ideas"²⁰⁵ begins in the imagination of American constitutionalism as unexploited

the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency." (*emphasis added*). See also OWEN M. FISS, *THE IRONY OF FREE SPEECH* 50–78 (1996) (arguing that the Supreme Court has gradually assimilated the idea of free press into the idea of free enterprise in decisions declining to enforce the Fairness Doctrine, and invalidating state right-of-reply statutes).

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).

²⁰³ See generally John Frow, *Information as Gift and Commodity*, *NEW LEFT REV.*, Sept.–Oct. 1996, at 89 (discussing the role of the public forum on the global exchange of information in the modern era).

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:

[T]herefor 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 suppyls him with provisions out of ten acres, which were but the product of an hundred lying in common.

Id.

²⁰⁵ See Thomas Streeter, *Free Speech, Language, and the Rule of Law*, in *FREEDOM OF EXPRESSION: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION* 31 (David S. Allen & Robert Jensen eds., 1995) (discussing the problematics of this hoary metaphor) [hereinafter *FREEDOM OF EXPRESSION*]; BENJAMIN GINSBURG, *THE CAPTIVE PUBLIC* 86–89 (1986)

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.²⁰⁶

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.”²⁰⁷ By contrast, “[t]he contemporary understanding of the commons . . . is largely built upon a Malthusian predicate of scarcity.”²⁰⁸ 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.”²⁰⁹

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

(arguing that the “marketplace of ideas” is dominated by wealthy and powerful individuals). For a striking instance of the metaphor in action, see *Memphis Dev. Found. v. Factors, Etc., Inc.*, 616 F.2d 956, 960 (6th Cir. 1980), *cert. denied* 449 U.S. 953 (1980) (defining the public domain *as* free access to the market).

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. Whatsoever 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.

GERRARD WINSTANLEY, *THE LAW OF FREEDOM AND OTHER WRITINGS* 340 (1652) (Christopher Hill ed., 1973).

²⁰⁸ Frow, *supra* note 203, at 99.

²⁰⁹ Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). *But see* DAVID HARVEY, *JUSTICE, NATURE, AND THE GEOGRAPHY OF DIFFERENCE* 154 (1996). Harvey argues that Hardin’s parable breaks down:

[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,²¹⁰ the Malthusian scenario analogizes the same space to cancer. What was to the seventeenth century imagination a horizon of exuberant possibility becomes, to the cotemporary 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 neo-classical economic theory, and it has a solution to Hardin's tragic fable: the privatization (i.e., the enclosure) of the commons.²¹¹ 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.²¹² The apparent result is a public sphere more expansive than ever, buoyed by euphoric discourse about new technology.²¹³ 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.²¹⁴

Thus, the real result of this shift towards private corporations is a banalizing homogenization of public debate,²¹⁵ brought about by its thorough commodification. In turn, the process of this

²¹⁰ See JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING Bk. I, ch. 2, '15, 55 (P.H. Nidditch ed., 1975) (1700) [hereinafter ESSAY].

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).

²²⁰ See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 255–57 (1992) (situating Schumpeter within the context of the professionalization of post-war social and political thought). Compare *id.* with ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) (articulating the “interest group pluralist” variation on Schumpeter’s minimalist theory). See also John Bellamy Foster, MONTHLY REV., Sept. 1997, at 51 (reviewing WILLIAM I. ROBINSON, PROMOTING POLYARCHY: GLOBALIZATION, U.S. INTERVENTION AND HEGEMONY) (discussing links between Dahl’s theory of democracy as “polyarchy,” Schumpeter, and Samuel Huntington’s “crisis of democracy”

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.”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.”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.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.²²⁴ But arguably, that ambivalence had not yet precipitated into the suffocating dogmatism it has become.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.”²²⁶ I argued in Part IV that Socrates *can* reasonably be seen as a “criminal” subversive.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

thesis).

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

²²² SCHUMPETER, *supra* note 219, at 261.

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, *DETECTING DEMOCRACY* 367–68 (2d ed. 1992), *citing* *THE ESSENTIAL LIPPMANN: A POLITICAL PHILOSOPHY FOR LIBERAL DEMOCRACY* (Clinton Rossiter & James Lare eds., 1982).

²²⁴ *See supra* note 64 and accompanying text.

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.

²²⁶ *See* CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 3 (1970).

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,²²⁸ 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,²²⁹ and laugh, and endure the cold,²³⁰ 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.”²³¹ 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 NUSSBAUM, 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*.

and the prominence therein of a commitment to intensifying prosecution of “quality of life crimes”).