

Legitimate Opposition, Ostracism, and the Law of Democracy in Ancient Athens

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Abstract

Traditionally, scholars have tied the emergence of legitimate opposition to the rise of political parties in the nineteenth century. Once governments acknowledged parties' and partisans' essential roles in representative government, they also established limits on legitimate opposition. Illegitimate opposition was now defined as the pursuit of unconstitutional, extreme or disloyal ideals. This essay upends the traditional understanding of legitimate opposition. Athenian democracy did not feature parties, but it did feature intense political competition. As I demonstrate, that competition was structured by a recognizable form of legitimate opposition. Focusing on the fifth century, I illustrate how Athens fostered contestation and where it drew the boundaries of opposition. Competitors were not sanctioned because of their ideals. Instead, Athenian institutions were anti-monopolistic, blocking individuals from wielding excessive power. Recognizing Athens' distinctive, party-less model of legitimate opposition should lead us to fundamentally reconsider the practice and the dominant approaches to regulating political competition today.

Key Words

Legitimate Opposition, Loyal Opposition, Parties, Competition, Ostracism, Athens, Campaign

Finance

In the fall of 1989 the comparative sociologist Barrington Moore gave a lecture in New York on the democratic prospects of the Soviet Union. A successful transition to representative government, he admitted, would require many moving parts and depend on many contingencies. But Moore suggested that the progress of any democratic project could be measured by a single criterion: did the regime and its people accept the legitimacy of political opposition. Recognizing the value of political rivalry requires a polity to strike a seemingly precarious balance: too little opposition and a regime will lapse into authoritarianism, too much and the result is frightful violence. A society's ability to achieve this balance, to allow effective opposition without countenancing anarchy, was simply: "[t]he key characteristic of liberal democracy" (Moore 1998, 83).

Today most countries hold elections. Many fewer tolerate a robust and effective opposition—polities that struggle with the practice range from members of the EU such as Hungary, to Latin American regimes like Venezuela, and, of course, to Moore's subject, Russia.

In the canonical American work on the topic, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840*, Richard Hofstadter contended that: "[t]he idea of a legitimate opposition...is an immensely sophisticated idea, and it was not an idea that the Fathers found fully developed and ready to hand when they began their enterprise in republican constitutionalism in 1788" (Hofstadter 1969, 42).¹ Faced with an empty intellectual cupboard, the Americans, and their counterparts in democratizing Britain, were forced, over the course of many years, to develop an entirely new political practice. The acceptance of ongoing popular political contestation was yoked, practically and intellectually, to the realization that political parties were not synonymous with factions, that partisanship was not synonymous with factionalism. Rather than posing an inherent threat to self-rule, parties were necessary to the effective functioning of representative government (Aldrich 1995). According to Hofstadter, this discovery triggered a complete reconsideration of the character of acceptable political competition.² No longer would the

test revolve around organization—i.e. whether members of a political movement had established a formal organization for contesting elections and passing legislation (a party). The test of unacceptability would now turn on a movement’s ideas or ends—its ideology.³ Groups deemed disloyal to the “constitutional consensus” or to the state itself were subject to penalties.

The conceptual and institutional revolution chronicled by Hofstadter helped fix the axis of modern debates about legitimate opposition. At one pole are those who call for restrictions on political actors that threaten democracy because they hold unattractive views—such as a preference for an illiberal or undemocratic regime (Waldron 1989; Quong 2004). At the other pole are those who are skeptical of content-based or ideological restrictions on democratic practice. Skeptics fear that power holders will overreach, silencing those with a claim to speak. By implication, ideological restrictions on participation diminish the moral authority of representative regimes, undermining majorities’ claim to create laws and policies that affect those who have been silenced (Scanlon 1972; Dworkin 2006, 2009). But the skeptical position is also open to a familiar criticism—it is too permissive, allowing intervention in the political process only after individuals have been harmed or after a regime has already been seriously weakened (Loewenstein 1937). Hofstadter claimed that the practice of legitimate opposition was established just over two centuries ago. But anyone familiar with academic and legal debates about political regulation will recognize that those discussions continue to turn on the wisdom of restricting competition on the basis of participants’ ideas.

In this essay, I pry apart the traditional understanding of legitimate opposition. I use the political practices of fifth-century, democratic Athens as a crowbar. Athens lacked political parties, but it was home to a vivid strain of democratic competition.⁴ Focusing on the institutional innovations of the fifth century, including ostracism and the rules governing its political system—its law of democracy, I show that the Athenians also distinguished, in practice, between acceptable and unacceptable forms of competition.⁵ Athenian institutions and practices raised the cost of wielding political power

deemed excessive and therefore a threat to democracy. In other words, the Athenians distinguished between legitimate and illegitimate forms of opposition. Accordingly, we ought to reconsider the traditional story about the development of legitimate opposition and rethink how that story has shaped our understanding of the practice.

The Athenian model of legitimate opposition constitutes a fundamental alternative to the two approaches that have long dominated the field. The Athenians did not silence critics of democracy. Nor were they passive, allowing those who threatened the regime to act first. Maintaining a lively space for democratic competition, the Athenians established a chain of reinforcing institutional measures that increased the cost of wielding outsized clout—whether or not one wielded clout improperly.

Many Athenian political practices would be ill fitted to modern societies and unacceptable to modern democrats. They were responses to the particular challenges Athenian democracy faced and to the background conditions, ideological, social and political, of that society. Yet political stability and concentrations of power are perennial problems for popular regimes. Today, unconsolidated democracies must decide whether religious parties or extremist groups pose a threat to the regime. In more stable polities, like the United States, the exaggerated influence of figures like Michael Bloomberg, David Koch, George Soros, and Sheldon Adelson, is a topic of increasing concern.⁶ These plutocrats are not beholden to political parties. And the political challenge they pose cannot be accounted for solely by considering the content of their ideas. As I show in the last two sections of this essay, acknowledging Athens' complex model of legitimate opposition may help us rethink the best ways to meet these challenges and help us resolve the devilish puzzle identified by Barrington Moore: how to garner the moral benefits of political competition without endangering the polity itself.

Section 2: Defining Legitimate Opposition

In this essay, I will assume that a polity features the practice of legitimate opposition when opponents of the political status quo can seek changes to the current government or policy via a regularized form of political competition. Using this definition, I will assess whether Athens featured the practice. By government, I do not mean the entire constitutional set-up, but the individuals who hold power within the regime at any given time. By regularized form of competition, I mean repeated, rule-based, non-violent, forms of political contestation. There are many justifiable ways of opposing power holders, of engaging in political contestation. Posting on Facebook, taking part in a public debate, voting and protesting in the streets are just a few examples. I will assume that the practice of “legitimate opposition” refers to a specific subset of oppositional activity: the pursuit of official power via a regularized process. By implication, though dissident activity in contemporary China may be legitimate, it is not evidence of the practice of legitimate opposition. Similarly, it is not difficult to imagine a regime that allows its citizens to speak freely, to dissent and even vote, without abiding real competition for influence.

My definition of legitimate opposition is minimalist.⁷ As Robert Dahl found when he studied the practice in the 1960s, polities take a confoundingly diverse set of approaches to fostering and managing political competition (Dahl 1966, xviii). Given that diversity, an overloaded definition of legitimate opposition would thwart productive comparison.⁸ We might decide, for example, that an official opposition is a necessary element of legitimate opposition. But many regimes featuring regular political competition, including the United States, do not boast official oppositions. I omit political parties or a fixed government from my definition. Societies lacking these institutions might feature regular forms of competition, forms of competition that can generate the kinds of benefits we associate with legitimate opposition. And those societies might feature forms of competition that

carry familiar disadvantages—e.g. the possibility that regulated rivalry will escape its boundaries and lead to violence or other maladies. In other words, these societies might face a familiar puzzle: how to gain the benefits of opposition while minimizing its costs. If that is plausible, then examining the regulatory strategies employed by those societies might prove intellectually valuable. Those potentially profitable inquiries, I believe, should not be avoided because of our preconceptions about legitimate opposition. Similarly, legitimate opposition is often associated with democracy, but I have not included democracy or its many cognate features (such as a broad franchise) in my definition of legitimate opposition. This allows me to avoid conflating the practices or arguing by definitional fiat. We can seriously consider whether some democracies, like Athens, may not have featured the practice. We can also consider whether non-democratic regimes do. Given the explosion of research on the often-competitive life of autocracies, I believe a minimal definition makes sense.⁹

What are the distinctive and regular benefits of legitimate opposition?¹⁰ First, it increases the costs of misrule. In regimes where the political field is dominated by a single group, that group may extract onerous rents from the populace. Under less industrious leadership, the group may simply fail to supply needed resources or policies (Hirschman 1970, 55). But in polities where opposition is accepted, those seeking power and influence will have an incentive to scrutinize current activities and call out evidence of misrule. A second advantage of legitimate opposition is that it allows those who disagree with a state's policies to bring their grievances into the political arena and win support for change. Legitimate opposition implies more than the freedom to speak freely or even to participate; it implies the ability to actively contest for power. Finally, creating space for opposition provides opponents information about the breadth of opposition to the status quo; it also draws attention to relevant policy alternatives.

Of course, political competition not only generates benefits, it carries costs as well. Two paradigmatic costs of opposition are the devaluation of consensus and the intensification of political antagonism. Contestants may also pursue power in ways that negatively impact or systematically distort the character of the regime. They might exploit illicit forms of advantage or unjustifiably keep others from joining the fray.¹¹ To limit these costs, most polities mark out unacceptable forms of contestation. Almost all regimes insist, rightly, that contestants adhere to the rules of the game. The ends of legitimate opposition would be difficult to attain if this were not the case.

Legal and institutional boundaries on political competition, like ostracism, will be critical to our evaluation of the Athenian case. Just as legal restrictions on citizenship offer insight into a community's self-understanding, political regulations provide special insight into a community's approach to political opposition (Smith 1999).

Section 3: An Ancient Model of Legitimate Opposition

It is generally allowed that the Athenian demos took power in 507 B.C. The transition to democracy was preceded by a long history of destabilizing, violent competition for power among aristocrats (Forsdyke 2005, 26). Accordingly, the demos could not take the durability of its new regime for granted; the failure of Athens' democracy was not a metaphorical possibility. And the array of institutional changes marking Athens' transition to democracy understandably reflected a concern that a sufficiently influential individual or well-organized group of citizens could compromise the people's regime. These reforms, often attributed to Kleisthenes, instantiated a peculiarly Athenian model of legitimate opposition. They enabled individuals to engage in valuable forms of political competition and they drew a line between legitimate and illegitimate forms of opposition. Perfect equality was not the aim or effect of these reforms. The Kleisthenic institutional innovations, for example, did not punish aristocrats by seizing their property or revoking their special standing (Ober 1989, 241).¹² Instead, Athens' new law of democracy raised the cost of translating aristocratic wealth and standing into political power. Anti-monopolistic in character, the reforms marked the illegitimacy of wielding political influence that was dangerously excessive and not based on the support of the demos—i.e. undemocratic.¹³

Consider the reorganization of Athens' most basic political units. Previously, the loci of political power had been the four tribes of Attica, bodies dominated by aristocratic kinship groups and families. The influence of these families sprang from their wealth, landownership, religious privilege and their ability to wield influence over a local domain (Ostwald 1988, 310). Leading families drew additional clout from sources that were external to the polis, including foreign regimes like Sparta. Perhaps most importantly, the dominant families' power over the tribes gave them a trump card over the rest of the polis' inhabitants: Athenian citizenship tracked membership in one of the four

tribes. Excluded from a tribe, one was no longer a citizen of the polis. In sum, as Martin Ostwald argues, prior to 507, “these families, by commanding a following and by concluding alliances with other prominent families and their retainers, will have competed only with one another to secure the highest offices of state, to which they alone as members of the highest census-class were eligible” (Ostwald 1988, 309).

Under the Kleisthenic constitution that mode of competition was curtailed. In its place, a new basic building block of political life was established: the deme. Each of the 139 demes, territorial subdivisions of Attica, had their own cults, shrines, assemblies and political officers. Citizenship was now determined by membership within a deme. For the vast majority that status was made hereditary and membership in the deme could be extended by a vote of existing demesmen. Those who possessed the status gained a considerable measure of independence from their aristocratic betters. Beyond the deme, at a higher level, ten new tribes were established. The tribes were made up of three smaller units, trittyes, one each from the three main geographical regions of Attica. This remarkable bit of institutional engineering decreased the likelihood that the tribes would be dominated by citizens from any one locale or by the dominant families from that locale. Shifting away from the four attic tribes, the Athenians blocked an essential conduit for transmitting aristocratic status across the political system.

Critically, the demes and revamped tribes also served as the basis for representation within the new council—the *Boule*—a 500 member body that set the agenda for the people’s assembly. Each year the demes would nominate candidates to fill their pre-allotted seats on the council and a lottery would be used to select which of those candidates would serve in the *Boule*. Athens’ bonafides as a true democracy has been burnished by the egalitarian qualities of lotteries in comparison to election (Manin 1997). But replacing selection by kinship groups with random assignment had a more practical effect: it increased the costs of translating social standing and wealth into institutional

influence by disrupting the kinship-based mechanisms linking the powerful with their clients (Sinclair 1988, 18; Hansen 1991, 84)¹⁴.

Did these reforms foster a competition-less form of democracy, a form of democracy where people talk and deliberate, but do not contest for influence? No, the scholarly consensus is that a vibrant form of democratic rivalry marked Athenian life (Rhodes 1986, 135). Key decisions were made directly in the assembly and official positions were filled via lottery. But elites vied with each other to influence their fellow citizens as *rhetors*. They sought election as *strategoí* or generals. And those same elites exercised influence via *philoí*—groups organized along lines of friendship and personalistic influence (Connor 1971, 134; Rhodes 1986, 139; Strauss 1986, 17-31). The objects of that competition were power itself, of course, but also honor, influence over the polis' military engagements, and the distribution of fiscal responsibilities and wages.

As we would expect, Athenian modes of contestation plausibly increased the cost of engaging in corruption or misrule. Those who sought to gain or cement their positions as leaders of the Athenian polis predictably possessed incentives to uncover and expose the negligence or misconduct of their competitors. Thucydides, son of Melesias, famously wrangled with Perikles on questions of both military strategy and the cost of constructing the Parthenon. Thucydides charged Athens' most famous leader with having “squandered away the public money, and made havoc of the state revenues” (Plutarch, *Perikles* 14). In response to this charge, Perikles was compelled to justify his expenditures to the people.¹⁵ Forcing one's political opponent to explain and defend his approach to fiscal and military policy fits any defensible conception of legitimate opposition.¹⁶

The Athenian game of democracy, moreover, provided a forum for opponents of current policies to seek changes to the status quo and raise the profile of policy alternatives. We have substantial evidence that Athenian elites and the Athenians themselves could raise objections (Monoson 1994; Balot 2004; Saxonhouse 2006, esp. Chap 4).¹⁷ But beyond the ability to dissent,

Athenians could seek actual changes in policy. The Mytilene debate is the most celebrated example of this type of political action (Thucydides, *Peloponnesian War* 3.36-49). Thucydides, the historian, describes the aftermath of a rebellion against Athenian influence by the leaders of the city of Mytilene on Lesbos. The Athenians determined that they would not only punish Mytilene's leaders, but its people as well, killing the adult males and enslaving women and children. The next day a large number of Athenians reconsidered their decision. A second debate was held between those, like Kleon, who supported the initial decision, and those, like Diodotus, who opposed the policy. As reports of the speeches make clear, efforts to force the reconsideration of past decisions were familiar to the Athenians—Kleon criticizes the practice, while Diodotus, not surprisingly, defends it. Thucydides informs us that “[w]ith the two views expressed so evenly matched the Athenians continued to agonize over the decision and the final show of hands was very close, but Diodotus’ motion was carried” (*Peloponnesian War* 3.49.1). That the outcome of the famous Mytilene debate was not unanimous, or not described as such, befits a regime where opposition was lively, entrenched, and normal.

The Kleisthenic reforms altered the base elements of Athenian political life. A far-ranging combination of institutional innovations and adjustments, they constrained individuals’ ability to wield monopolistic power, but not their ability to express themselves. They also allowed opponents of the political status quo to seek changes to current policy via a regularized form of political competition. In other words, Athens featured a recognizable and distinctive system of legitimate opposition. That conclusion gains further credibility once we turn to another fifth-century institution: ostracism.

Section 4: Ostracism and the Limits of Legitimate Opposition

Athens' new democracy inherited a number of laws and practices aimed at safeguarding preceding regimes. One law penalized those who sought to establish a tyranny with outlawry—a punishment that allowed anyone to kill the convicted without fear of sanction (Ostwald 1955; Forsdyke 2005, 83). Another law allowed political trials for those suspected of treason, conspiracy against the regime, and the acceptance of bribes. And leading political figures, including Themistokles, Kimon and Perikles (who are discussed later in this paper)—were subjected to these trials. Each of these institutions illustrates the Athenian tendency to employ popular action, like an assembly trial, to enforce limits on political activities (Teegarden 2013). Yet these proto-democratic institutions are not evidence of the practice of legitimate opposition. Why is that? Because these institutions were not created to defang a regularized form of competition. Engaging in treason, accepting a bribe and seeking to establish a tyranny were beyond the pale even if one was not a contestant for influence.¹⁸ Political communities use rules of this sort to sustain themselves, no matter how power is distributed or the form political rivalry takes.

Among the most famous innovations of Athens' transition to democracy was ostracism—the temporary expulsion of a citizen from the polis.¹⁹ Ostracism was a critical mechanism for regulating and regularizing elite competition. Accordingly, it provides an especially revealing vantage to assess the character of Athenian opposition. Its use should strengthen our confidence in the particular character of the Athenian model of legitimate opposition. And it should diminish our confidence in Hofstadter's canonical account of the practice. Consistent with other Kleisthenic measures, ostracism was aimed at aristocrats and elites with excessive clout (Kagan 1961, 400).²⁰ As Aristotle observed in *The Politics*: democracies ostracized “those who seemed to predominate too much through their wealth, or the number of their friends, or through any other political influence”

(*Politics* 1284a15-25; On Athenian ostracism see: Aristotle, *Athenian Constitution* 22.6; Thucydides, *Peloponnesian War* 8.73.3).

How did ostracism work? Every year the assembly decided whether to hold an ostracism at all (Forsdyke 2005, 147). Citizens often voted with a specific candidate or candidates in mind (see the story of Kimon below). If a majority of the assembly voted to ostracize someone, the actual ostracism was held a short period later. Citizens had the ability, if they wished, to hide the content of their vote from others, making it more difficult for the powerful to monitor voters' choices (Missiou 2011, 53). And if 6000 votes or more were cast, the individual with the greatest number of votes had to leave the city for ten years.²¹

Aristotle reports that the first three citizens to be ostracized were tied closely to the tyrants who had recently ruled the city. The Athenians ostracized a fourth person, Xanthippos, the father of Perikles, because he “seemed to be too powerful” (*Athenian Constitution* 22.6). Aristotle's observation fits neatly with my account of Athenian opposition. But we cannot place too much weight on his analysis of these cases, since we know so little about those involved. To flesh out our understanding, I focus on three cases about which we possess more information: Themistokles, Kimon, and Thucydides, son of Melesias.

The ostracism of Themistokles, an architect of Greek victory at Salamis and of Athens' development into a sea power, indicates that the practice was not reserved for ideological opponents of self-rule. Themistokles was not a known critic of democracy. And though historians are always careful to highlight the anti-democratic biases of Aristotle and Plutarch, both authors identify Themistokles as a key player in the consolidation of the demos' power (*Athenian Constitution* 22.6; Plutarch, *Themistokles* 19.4).²² At the time of his ostracism in 470, Themistokles was locked in a contest with rivals, like Xanthippos, Aristeides and Kimon, over the course of Athenian foreign policy. He believed that Sparta constituted the primary challenge to Athens. They rated Persian

influence in Ionia a greater priority (Frost 1968, 186). Despite his democratic-leanings, Themistokles was not an average citizen. He was an aristocrat who masterminded several military triumphs. And during his time at the center of Athenian political life he also built a great fortune, one he famously deployed to extend his influence and reputation. Given these facts, the ostracism of Themistokles should reinforce our understanding of the Kleisthenic reforms. A leading political competitor, he possessed substantial sources of clout that were independent of the people.

The trajectories of two of Athens' most influential fifth-century leaders—Kimon and Perikles—also support the anti-monopolistic understanding of Athenian legitimate opposition.²³ Kimon and Perikles occupy central places in the polis' history. And their similarities extend beyond their exalted historical status. Both led troops into war. Both were leading politicians in the new Kleisthenic regime. Both hailed from aristocratic stock. But Kimon was ostracized, while Perikles was not. According to Aristotle and Plutarch, what chiefly distinguished the two figures were their wealth and the ability to channel that wealth into influence. "Kimon possessed a kingly fortune," Aristotle reported. "[He] maintained many of the members of his deme, for any member of the deme *Laciadae* who wished could come to him every day and receive adequate maintenance, and all his estates were unfenced so that anyone who wished could help himself to fruit." Kimon's beneficence extended to the city as whole. He played a key role in the building of Athens' long wall, ensuring the polis' access to the sea. Perikles' resources, by contrast, were "not adequate to match such liberality" (*Athenian Constitution* 27.3).

A political anachronism, Kimon used his extensive connections and exaggerated wealth to wield power without pandering to the people. He developed a famously close relationship with the Spartans. And he did not flinch from putting his fortune to work. As Gorgias observed: "Kimon made money to use it and used it to be honored" (Gorgias, VS 21 B20; Quoted in: Connor 1971, 20). In contrast, Perikles, as he rose to prominence, embraced the democratic cause. For example, he

joined the effort to weaken the *Areopagus*—a bastion of aristocratic power that tried major offenses and played an important procedural role in Athenian government.

Kimón was well known for his discomfort with the victory of democratic forces in Athens (Plutarch, *Kimón* 15). But Athens' democracy had numerous antagonists, relatively few of who suffered the penalty of ostracism (Ober 1998; Rhodes 2000). What distinguished Kimón from other Athenians, both democrats and non-democrats, were his wealth and his relationship with a rival city. His substantial public influence was not drawn from the well of the people's power.

Perikles not only outlasted Kimón, he also outlasted Kimón's successor, Thucydides, son of Melesias, who was ostracized as well. Unlike his relation-by-marriage Kimón, Thucydides, son of Melesias remains something of a mystery and his legacy is debated (Raubitschek 1960; Frost 1964; Andrewes 1978; Krentz 1984). Nonetheless, three elements of his life are relatively well established. First, he was a prominent figure in Athens (Plato, *Meno* 94d). Second, he was a rival of Perikles, leading many of those who had supported Kimón. Finally, he was an organizational innovator. Thucydides was known for his ability to get Perikles' opponents to act in unison. The best-known example of his talent for political mobilization was the grouping of his supporters in the assembly (a practice that was later outlawed in the *Boule*) (Plutarch, *Perikles* 11; Strauss 1987, 28-31; Rhodes 1986). Kimón used his wealth and familial connections to exercise outsized power. Thucydides' proto-organization was used to advance the same ends and also cut against the grain of Kleisthenes' democratic reforms. Scholars have quarreled over many parts of Thucydides' story. Accordingly, placing too much too much weight on this single case would be a mistake. But considered against the background of the Kleisthenic constitution, Thucydides' ostracism is not surprising.

What of Perikles? Rid of his rivals, Perikles famously dominated the heights of Athenian political life, exercising unrivaled influence over the polis. Of course, Perikles' father, Xanthippos, was ostracized. And Perikles was a candidate for ostracism, surely perceived by some to be a threat to

the regime. But he was never successfully removed from the city. What kept ostracism at bay? As Josiah Ober emphasizes, though Perikles' wielded significant power and was subject to energetic criticism, he did not pursue independence from the people. His clout rested on his ability to persuade the demos and on his capacity to advance Athenian interests (Connor 1971,120; Ober 1989, 90).

We might also ask: did each Athenian always vote with the aim of hobbling those with oppressive power? Were ostracisms uncontaminated by the pursuit of political advantage or personal distaste? It seems implausible. Inscriptions on the *ostraka* suggest that voters were moved by a variety of motives (Forsdyke, 155). A well-known story, for example, concerns Aristeides, whose propensity for upright action earned him the informal title "The Just." In the moments before a final ostracism vote was to occur, an illiterate citizen asked Aristeides for a favor, without realizing he was speaking with Aristeides. The man asked to have a name inscribed on his *ostrakon* (ballot). As the story goes, the name the citizen asked to have written was Aristeides, The Just. When Aristeides enquired what wrong he had committed, the man is said to have responded "None whatever...I don't even know the fellow, but I am tired of hearing him everywhere called "The Just" (Plutarch, *Aristeides* 7.1-6). Historians do not credit the story, but it attests nonetheless to the reality that ostracism could be used to banish those who did not possess destabilizing forms of undemocratic power.²⁴ And given the intense political rivalry shaping Athenian political life it would be naïve to assume that ostracism would not be a cite of contestation.

Still, I do not think these important reservations should alter our conclusion. Laws and institutions are not always used consistently. In the United States, if a prosecutor seeks an indictment on the basis of weak evidence, as she has the power to do, we would not be justified in concluding that prosecutors are afforded discretion in the name of prosecuting the innocent. And the Athenians deployed a range of institutional measures to limit the possibility of misuse. Ostracism

required multiple votes over an extended period of time. Citizens possessed time and space to reconsider their decision. Each voter cast a secret *ostrakon*. And a large quorum was required to successfully ostracize someone—increasing the difficulty of gaming the system. Of course these measures were not foolproof—misuse remains a possibility whenever individuals are allowed to exercise their judgment. Assessing the aim or force of ostracism, I have placed it in the context of contemporary reforms. Despite the possibility misuse, it seems sensible to treat ostracism as one part of a comprehensive institutional effort to reign in those who wielded undemocratic power and to ensure the integrity of Athens' regularized system of political competition.

In modern polities, when states limit competition, we assume, almost axiomatically, that their actions indicate official disapproval of the views or the actions of the affected (Brettschneider, 2010). States' capacity to chill debate is a familiar source of anxiety, an anxiety spurred by ideological approaches to legitimate opposition. A remarkable feature of ostracism and of the Athenian approach to opposition, more generally, is that these institutions did not constitute an ideological moat, keeping Athens free from malevolent ideas. What supports this conclusion? Known opponents of the demos' rule were allowed to play a large role in Athenian political life and they did so. And supporters of the ostracized were not punished. Meanwhile, known supporters of the demos were ostracized. Finally, though it is counter-intuitive, ostracism was not a mark of disloyalty or illegality. The status of the ostracized reflects this fact. They remained citizens and they retained their property. As full members of Athenian society the ostracized, including Megakles, Xanthippos, Aristides and Kimon, could, and were, called back to the city if a new, greater threat to the demos emerged (Forsdyke 152, Plutarch *Kimon*, 17). "The framers of ostracism were neither fools nor incompetents," Robert Connor has observed. Athens' institutions reflected, "a recognition that was most to be feared was not ideas or policies but men" (Connor 1971, 74). Taken together, it is apparent that the institutions and practices of fifth-century Athens constitute a critical alternative to

the standard ideological approach to legitimate opposition, an alternative that turned on men's status and on their ability to wield undemocratic influence.

Section 6: Why Ancient Opposition Matters: The Ideological Approach to Legitimate Opposition

The modern architects of representative government eventually came to recognize that parties were a permanent feature of political life. Yet they feared that partisans motivated by irrational passions or narrow self-interest would paralyze and demolish constitutional government. In fifth-century Athens, the perceived threat to self-government arose from those whose political influence did not depend on the demos. We must, of course, acknowledge the gulf separating the ancient and modern political scenes. Modern politics is waged by large organizations, whether political parties or even militaries, and the variety of issues a government must address is vast. Governance is a veritable profession, distinguished from other discrete careers. And Athenian political life was given shape by a complex popular morality, a popular morality that differs significantly from our own (Dover 1974). But the ancient and modern approaches to opposition are connected by the idea that political competition is valuable and should be encouraged despite the fact that certain forms of rivalry might threaten self-rule. If persuasive, this conclusion should alter our basic conceptions of the practice. In this section and the next, I illustrate how acknowledging the Athenians' status-based model of legitimate opposition can alter our view of two contemporary debates: whether political parties should be banned because of their member's views and how to renew the American campaign finance system.

The ancient Athenians sought to reduce the influence of those whose undemocratic power might have posed a threat to their regime. A diverse group of contemporary democracies, ranging from Germany, to Israel, to India, to Turkey, have used political organizations' ideological

commitments, not their organization or power, as a justification for restricting their participation and even banning them (Kirshner 2014). More recently, the success of Islamist parties in Turkey and Tunisia and the growth of far-right wing parties in Hungary, Greece and France have fanned debates over the steps democracies should take to defend themselves.²⁵ These examples illustrate that the institutional revolution chronicled by Hofstadter retains its power over us—specifically its shift from organization to ideas as a standard of political legitimacy. That ideological standard also finds scholarly support. The distinguished political theorist Nancy Rosenblum, perhaps the leading voice on the ethics of partisanship, has claimed governments are justified in banning parties that “that do not accept their status as parts but claim to be the sole legitimate representative of the nation” (Rosenblum 2007).

At a minimum, the Athenian model illustrates that we cannot assume the ideological approach is the only or the best way of understanding the boundaries of democratic rivalry. Moreover, the Athenian model was not an ideal hatched in an academic’s office; it was a genuine, working response to the challenge posed by those wielding undemocratic power. And once we acknowledge Athenian opposition, we ought to carefully assess the coherence of more familiar, ideological approaches to competition (just as the Athenians’ use of lotteries has caused modern political theorists to reconsider the practice of election (Manin 1997).

Can ideological approaches to legitimate opposition withstand critical assessment? Limitations of space block full consideration of this complex question, but will I offer two reasons to doubt ideological approaches would pass the test. First, a successful defense would require us to identify a persuasive normative basis for the ideological approach. And plausible candidates are weaker than they might appear (Kirshner 2014). For example, consider whether groups who reject key elements of a constitutional consensus should be banned because pursuing that end is immoral (assuming, for arguments’ sake, that it is). In itself, pursuing an immoral end is not a sufficient reason to exclude a

political party or sanction its members. The democratic process treats the most pressing political questions facing a community, whether to go to war or provide healthcare to citizens, for instance. These questions have an intrinsically moral character. Accordingly, participants will regard each other as pursuing immoral ends. And if individuals were not allowed to pursue ends that others believed, perhaps correctly, to be immoral or unfair via the political process, the right to participate would be radically delimited, tapered down to questions of no import. Participation could no longer advance basic moral interests, like autonomy and equal respect, which justify it in the first place (Waldron 1981). By implication, merely embracing and pursuing immoral ends is not a warrant for denying someone's right to play a part in the political process. This is one example. But it illustrates the possibility that an ideological approach to legitimate opposition is a normative dead-end.

Assessing ideological tests of opposition would also require us to consider whether parties or groups with particular ideologies actually pose a special threat to their regimes. As I noted above, the recent revolutions and counter-revolutions in the Middle East have instigated new arguments about Islamist parties and democracy.²⁶ These debates have been loud and heated. But the actual evidence that Islamist parties or religious parties, more generally, present a distinctive and regular threat to their regimes is not especially firm (Kalyvas 2000; Henderson and Kuncoro 2011; Meyersson 2014). Without evidence of that sort, we have even less reason to credit ideological approaches to legitimate opposition.

These necessarily incomplete arguments do not mean that democracies should become stoic or impassive in the face of legitimate threats to their integrity. The Athenian model, I believe, demonstrates that effective systems of political regulation can be designed with an eye toward the harm caused by both inaction and action. Nor is the Athenian approach necessarily the right one for modern regimes. My claim is more limited: the existence of an ancient model for regulating political rivalry should cause us to reevaluate our understanding of the practice and it should keep us from

accepting, without persuasive evidence or argument, the claim that particular groups pose a danger to a regime simply because of their beliefs.

Section 7: Why Ancient Opposition Matters: Silver Bullets versus Systems of Regulation

Can contemporary political reformers, in the United States for example, take encouragement from Athens' system for managing opposition? Since the mid-1980s, American inequality has increased dramatically and political outcomes arguably reflect the preferences of a narrow economic elite (Gilens 2012; Saez and Zucman 2014). Influential political reformers and academics, like Lawrence Lessig, contend that reforming campaign finance is a silver bullet, the best strategy for reshaping the political system and for making progress on a host of additional issues (Ackerman and Ayres 2002; Lessig 2011). And reformers have repeatedly sought to increase the cost of converting economic power into political influence. In 2002, the United States Congress passed the Bipartisan Campaign Reform Act (BCRA), making it more difficult to spend money on political campaigns outside limits already established by federal campaign finance law. The law restricted the ability of corporate entities, like unions and businesses, to fund political advertisements. It also sought to block outside organizations from acting in the stead of more highly-regulated campaign organizations.

The United States Supreme Court has overturned key elements of the BRCA because it violates the Court's free speech doctrine. Since the 1970s, the Court has distinguished contributions made directly to campaigns and parties, which are subject to significant limitation, from independent expenditures, which are treated as expressive and therefore subject only to regulations that meet the highest justificatory standards. The Court has held that the federal government has a compelling interest in reducing direct forms of corruption, where individuals give money to candidates in

exchange for favors. This focus on direct corruption, however, has not stanching the ability of individuals to convert wealth into political influence. Federal and state governments, the Court has held, do not have an especially weighty reason to make that conversion more difficult. In effect, the Court remains wedded to an ideological model of legitimate opposition, one in which the chief danger to the system is not individuals wielding undemocratic power, but political officials silencing views they reject. Any but the most finely tailored efforts to limit the influence of the powerful are, from the Court's perspective, potentially chilling and democratically suspect.²⁷ The Athenian approach to political opposition illustrates the democratic pedigree of alternatives to narrowly ideological approaches to legitimate opposition. And political reformers and critics of the Court's rulings may take sustenance from that fact.

On the other hand, the Kleisthenic solution to the problem of undemocratic power was not a silver bullet; it was an elaborate and overlapping system of regulation. Ostracism is the most striking and perhaps the best-known part of that system. And it is comforting to believe that a single institutional change could neutralize undemocratic sources of influence. But that belief is likely mistaken. And we should resist the urge to examine an innovation like ostracism on its own. Political processes impact key areas of our social and economic lives. Meeting an obstacle along one path to political influence, elites will search for alternative routes. The Athenians, it seems, were aware of this truism, establishing an array of institutions to alleviate the threat posed by undemocratic concentrations of power—e.g. laws concerning citizenship, the restructuring of the demes and trittyes, the use of lotteries to select office holders and, of course, ostracism itself. These far-ranging reforms altered the character of Athenian political competition. Just as critically they placed responsibility for maintaining that system in new hands—i.e. the people's. In doing so, they increased the likelihood that the changes made to the system would be enforced.

The scope of the Athenians' project may actually lend weight to the arguments advanced by certain campaign finance reform skeptics. Prominent constitutional and election law scholars Pamela Karlan and Samuel Issacharoff, for example, have repeatedly drawn attention to the limits of silver-bullet approaches. "If money has the outcome-determining effects on the electoral process that reformers have identified," Karlan and Issacharoff argue, "then moneyed political interests will continue trying to use money to influence outcomes whatever the regulatory regime" (Issacharoff and Karlan 1999, 1709). Efforts to restrict the flow of funds to campaigns and parties, they predict, will have unintended consequences, diverting money to organizations even less accountable than parties and candidates. Moreover, they argue that reforms must reflect the environment in which campaign finance is embedded. By environment, they mean the social and economic characteristics of the society as well as its institutional ecosystem—e.g. the role of the Supreme Court, the dominance of first-past-the-post representation, territorial districting, the two-party system and political control over reapportionment. Shifting a single lever within this unwieldy institutional contraption is unlikely to achieve the desired outcome. And actually altering the American approach to legitimate opposition, on this view, would require a more thoroughgoing effort.

The Kleisthenic reforms were the product of a political transition, a revolution. And it would be reasonable to wonder whether reforms of this kind can be produced by non-revolutionary political movements. I think they can. The passage of the 1965 Voting Rights Act is one such case. It fundamentally altered America's system of political competition, invigorating efforts to disassemble discriminatory voting practices and triggering a massive partisan realignment. Like the Kleisthenic reforms, the Voting Rights Act radically shifted responsibility for ensuring the integrity of political competition. Previously, electoral regulation had largely been the province of states and localities. The Voting Rights Act gave the federal government, either via the courts or the Department of Justice, the right to strike down proposed changes to election practices that were discriminatory in

purpose or effect. The federal government also gained the ability to monitor elections in certain areas of the country. The Voting Rights Act was not a silver bullet. It was a systematic attempt to change how elections were held in the United States (Kousser 1999). And it was not the product of revolution. Still, one might insist that even the passage of the Voting Rights Act required a large and committed coalition. That reality, I think, actually underlines the Athenians' achievement. If we accept that the Athenians domesticated elite rivalry, while reaping the benefits of legitimate opposition, then we ought acknowledge the scope of their ambition.

Conclusion

In the seventh book of Herodotos' great work, *The Histories*, he describes an encounter between the Persian king, Xerxes, and his counselor Mardonius. While other members of Xerxes' court were afraid to contradict the king, Mardonius outlined the benefits of disagreements: "My lord, when no opposing opinions are presented, it is impossible to choose the better, but one must accept what is proposed. When such opposites are stated, it is as with gold, the purity of which one cannot judge in itself, but only if you rub it alongside other gold on the touchstone and see the difference" (Herodotos, *The History* 7.10.1) Quoted in: (Anastaplo 2003). Through Mardonius, Herodotos outlines one of benefits of political rivalry—that it brings novel alternatives to the fore, improving the decision-making process. But Mardonius' analogy also captures the benefit of allowing ourselves to reinvestigate the origins of legitimate opposition. By comparing it with its ancient predecessor, we gain a better sense of the work performed by the modern practice.

The Athenians did not participate in organized political parties, but they did draw a line between acceptable and unacceptable forms of political contestation. Allowing aristocrats to wield undemocratic forms of power might have threatened constitutive elements of the regime. But not to

allow competition would have been a form of self-mutilation, compromising the capacity of the demos to rule itself. The Athenians identified an equilibrium between those two poles and worked to maintain it. That balance is the distinguishing mark of legitimate opposition.

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Biographical Statement

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¹ Robert Dahl also considered the practice of legitimate opposition to be “wholly modern” (Dahl 1966, xi). See also: (Lowell 1909, 437).

² On the development of the modern conception of legitimate opposition, see: (Robbins 1958; Foord 1964; Mansfield 1965; Skinner 1974; Aldrich and Grant 1993; Leonard 2002; Engel 2011; Selinger 2012).

³ See: (Dicey 2009, 150-6; Fontana 2009; Gerken 2014, 1964).

⁴ By political parties, I mean organized and relatively stable political associations formed to pursue political power. These are the organizations the American founders famously feared. Previous generations of scholars variously treated Athens’ classes, informal groupings, and social associations, such as the *heiratai*, as parties (Whibley 1889). Contemporary scholars reject the view that these informal or not primarily political associations bear a strong resemblance to modern parties. That conclusion is well founded and I accept it in this essay. For further analysis of this question and of the character of political competition in Athens, see (Connor 1971 5-9; Strauss 1986, 15-31; Hansen 1991, 277-287; Cartledge 2000).

⁵ The law of democracy is the term used by some legal scholars to refer to the legal and regulatory edifice that gives shape to democratic practice (Issacharoff et al. 2002). See also: (Lowenstein et al. 1995).

⁶ See: (Lessig 2011) and (Fishkin and Forbath 2014).

⁷ On the advantages of minimalist definitions of political institutions, see: (Przeworski 1999; Przeworski et. al. 2000).

⁸ In her recent essay on the American approach to loyal opposition, Heather Gerken also promotes a non-traditional, non-ideological conception of the practice, one centered on federalism. See (Gerken 2014).

⁹ Imagine a country that severely and unjustifiably limited the franchise to such a degree that it could not be considered a democracy. That polity might still feature forms of regulated rivalry and might develop a system for regulating that competition. The early American republic might actually be an example of such a regime. On the institutions of non-democratic regimes see: Magaloni 2006; Gandhi 2008; Gandhi and Lust-Okar 2009; Schedler 2009; Malesky et al. 2012; Simpser 2013.

¹⁰ Ian Shapiro describes some of the benefits of opposition in his work (Shapiro 1999, 39-40).

¹¹ I am grateful to the one of reviewers of this essay for requesting clarification about the costs of political competition.

¹² To be sure, under the democracy, the well off faced special political and fiscal responsibilities, like liturgies. But carrying out these special responsibilities actually increased their status and influence among their fellow citizens. See: (Rhodes 2000, 469-471).

¹³ To my knowledge, Aristotle is actually the first author to employ the term: monopoly (Aristotle, *Politics* 1259a15-35). See also: (De Roover 1951).

¹⁴ Ober makes the same point when he discusses the use of a lottery to select archons and other magistrates: (Ober 1989, 76).

¹⁵ Even Antony Andrewes, who is skeptical of Plutarch's interpretation, admits that this element of Plutarch's account is plausible. See: (Raubitschek 1960; Andrewes 1978).

¹⁶ As noted earlier, Thucydides, son of Melesias, was ostracized. But it appears that the ostracism occurred well after Thucydides forced Perikles to defend his spending. (Raubitschek 1960, 94-5; Strauss 1987, 27).

¹⁷ This conclusion is additionally supported by Demosthenes' repeated efforts to change his fellow citizens' minds concerning the threat posed by Phillip of Macedonia see: Demosthenes' *Olynthiacs*.

¹⁸ In theory, one could bring actions against political actors (as opposed to military figures) if they misled the people. Based on the evidence for the fifth century, it appears this was rarely or never undertaken and rules of this sort did not limit political practice in the city (Hansen 1974).

¹⁹ There is considerable debate about the date when ostracism was introduced. The main line of scholars now agree that ostracism was introduced at the same time as the other Kleisthenic reforms (Kagan 1961; Ostwald 1988; De Ste. Croix 2004, 182; Forsdyke 2005, 282-283; Missiou 2011, 36).

²⁰ There is an extensive debate about the intended use of ostracism. See: (Ostwald 1988; Hansen 1991; Ober 1989 74; De Ste. Croix 2004; Forsdyke 2005; Ober 2008, 160-1). The author of an illuminating recent monograph about ostracism, Sarah Forsdyke, offers an important alternative to the interpretation I defend. She contends that the practice was largely symbolic, a pantomime institution, epitomizing the people's power and reason (Forsdyke 2005, Chap. 4). A full treatment of Forsdyke's thought-provoking book cannot be provided within the limited space of this essay. But it is worth noting that Forsdyke's interpretation is finely balanced on two *a priori* claims (Forsdyke 2005, 149). The first claim is that the infrequency of ostracisms illustrates their intentionally

symbolic character (no ostracisms were held after 415, though votes whether to ostracize someone continued to take place). Forsdyke's second claim is that the expulsion of a single actor could not have protected the regime from a substantial threat. Despite the persuasiveness of much Forsdyke's analysis, I believe these deductive arguments cannot sustain the argumentative weight placed on them.

²¹ There is a disagreement concerning the figure 6000—some believe 6000 votes were needed in total, in order to reach a kind of quorum, others contend that to be ostracized required 6000 votes for a particular person. Most scholars now tend to favor the former interpretation over the latter.

²² On the biases of Aristotle and Plutarch see: (Ober 1989, 50; Hansen 1991, 15).

²³ My account of this rivalry is primarily drawn from Aristotle's account in the Athenian Constitution and Plutarch's essays on Kimon and Perikles.

²⁴ On the historical support for this tale, see: (Forsdyke 2005, 148).

²⁵ The public debate on these issues has been vigorous. See, for example: (Mandaville 2013; Mueller 2013; Hamid 2014; Higgins 2014)

²⁶ See, for example, the entire July 2008 issue of the *Journal of Democracy*.

²⁷ The literature on the Supreme Court's campaign finance jurisprudence is predictably immense. Good reviews include: (Kagan 1996; Sullivan 1997; Hasen 2011). At one point, the Court ruled that the state had a strong interest in ensuring that the political process was not overly distorted by the political capacities of large organizations, like corporations and unions (see: *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652 (1990)). That view echoes the Athenian approach to legitimate opposition. But the anti-distortion principle has now been set aside by the Court (*Citizens United v. Federal Election Commission* 558 [U.S. 310](#) (2010)) and it was never as potent as political reformers had hoped (Hasen 2010).
