Abstract. Towards the end of the fifth century, the Athenians formally increased the political powers of their courts at the expense of those of the assembly. The significance of this move has been disputed, but it is agreed the aim was democratic self-restraint. This article questions that interpretation. There is no evidence the Athenians conceived judicial activity as a restraint on the démos. To the contrary, numerous sources cast the courts as the most demotic organ in the political system, and an examination of the respective compositions, procedures and functions of the assembly and courts finds several possible reasons why. The reconceptualisation of Athenian democracy this invites poses a considerable challenge to our understanding of democracy both ancient and modern.

Towards the end of the fifth century, the Athenians passed a series of reforms that formally increased the political powers of their courts at the expense of those of the assembly. Some thirty years ago these reforms occasioned considerable debate, one worth revisiting, not only for its intrinsic interest but because it suggests the limitations of an important assumption underlying many accounts of Athenian democracy.

The reforms in question were three. First, between 410 and 399, came the reexamination and reinscription of existing laws and the establishment of a public legal archive. Next, in 403/2, came a new distinction between a law (nomos) and a decree (psêphisma) and a new legislative procedure (nomothetia). In the latter half of the fifth century the assembly had enacted all legislation, but now the power to make law, i.e. permanent general rules, passed to a new body, the nomothetai (‘lawgivers’), several hundred judges who made their decision following what looked like a trial of the proposed law, with nominated speakers arguing for and against it. The assembly convened the nomothetai, but could itself only enact decrees, which were

---

1 Junior Fellow, Harvard Society of Fellows, 78 Mount Auburn Street, Cambridge MA 02138, USA. Email: cammack@fas.harvard.edu
2 I thank Stefan Dolgert, Bryan Garsten, Eugene Garver, David Grewal, Melissa Lane, Jane Mansbridge, Don Morrison, David Riesbeck, George Scialabba, Richard Tuck, John Tully, Harvey Yunis and several anonymous reviewers for comments and questions on this article. Translations are my own unless otherwise stated.
3 Andoc. 1 and Lysias 30 with Dow (1941); Dow (1961); Fingarette (1971); Boegehold (1972); Clinton (1982); Ostwald (1986) 369-72, 404-9, 414-20, 511-9; West (1989); Robertson (1990); Rhodes (1991); Sickinger (1999) 93-138; Carawan (2002); Canevaro and Harris (2012).
4 Dem 24.27, our only source, records 1001 nomothetai.
6 Dem. 24.20-36 with Harrison (1955); Rhodes (1972) 49-52; Laix (1973) 52-68; MacDowell (1975); Hansen (1985); Rhodes (1985); Piérart (2000); Rhodes (2003); Canevaro (2013).
policy decisions of a lower status than laws. No decree could trump a law, and if any conflicted, the decree would be abolished.7 Last came the graphê nomon mê epitêdeion theinai or ‘indictment for proposing an inexpedient law’. This procedure allowed the proposer of a law to be prosecuted for making a disadvantageous proposal, even one already approved. Conviction abolished the law, and if the case came within a year of the original vote the defendant was also liable to a penalty, including the death penalty.8 This charge paralleled one established at least twenty years earlier, the graphê paranomôn or ‘indictment for making an illegal proposal’, conviction under which led to recision of the enactment and a fine, or on the third offence loss of citizenship.9 Acquittal concerning an as yet unapproved proposal, however, had the effect of enacting it.10 Following the creation of the graphê nomon mê epitêdeion theinai, the graphê paranomôn was used only against decrees.11

According to some scholars, most prominently Hansen, these reforms marked a sea change in the character of Athenian democracy. While in the fifth century (at least before the invention of the graphê paranomôn) the courts had been unable to undo any decision made by the assembly, in the fourth century every assembly decision could be reversed by a court, though the opposite was not the case.12 Thus, Hansen argued, the fifth-century sovereignty of the assembly gave way to the fourth-century sovereignty (or ‘supremacy’) of the courts;13 the radical democracy of post-Periclean Athens was replaced by the more moderate (or at least ‘modified’) system of the age of Demosthenes.14 Similarly, Ostwald discerned a shift from ‘popular sovereignty’ in the fifth century to the ‘sovereignty of law’ in the fourth; Sealey, one from democracy to ‘republicanism and the rule of law’; and Eder claimed democracy only fully arrived when constitutional limitations on popular sovereignty were installed.15

Others disagreed, advancing two counter-arguments. The first was that the reforms’ effects were insignificant. According to Ober, Hansen and the rest had fallen into what Finley had called the ‘constitutional-law trap’, namely the

---

9 Andoc. 1.17 and 22 with Ostwald (1986) 125-9, 135-6; Hansen (1999) 205-12. Estimates of the introduction of this measure vary from 427-15 (e.g. Ober (1989) 95) to the late 460s (e.g. Hignett (1952) 210-13; Stockton (1990) 41-5).
10 Hansen (1989) 271-81; cf. Hansen (1985) 351 with nn.19, 20. It is not known if the dikastai in cases of graphê nomon mê epitêdeion theinai concerning unapproved proposals had a similar power to enact them.
belief that the outward form of institutions can tell us about political practice. As Hansen acknowledged, the new legislative procedures were seldom used. By the mid-1970s, only five fourth-century laws were known. The indictment for proposing an inexpedient law was also rare. By contrast, we have around five hundred decrees from this period, suggesting most political business was done in the assembly. Many felt the Athenians failed to observe the distinction between laws and decrees they had laid down; others that even when it was respected, the assembly retained the upper hand, since it convened the nomothetai and voted their pay. As for the new law-code, attempts to maintain its coherence apparently proved unsustainable.

The second counter-argument was yet more devastating. This was that even if the reforms had had much practical effect, they could not have wrought any great change in the character of Athenian democracy, because Athenian democracy could not be affected by institutional change of that sort. Most importantly, scholars stressed that judicial bodies were no less democratic than the assembly. Both represented (or were manifestations of) the dêmós, the people, so shifting tasks from one to the other hardly mattered. Like the assembly, judicial panels were composed entirely of ordinary citizens. They could thus be regarded as ‘committees’ of the assembly, enjoying ‘delegated’ powers, or even as the assembly itself ‘sitting in a judicial capacity’. Additionally, the language of ‘radical’ and ‘moderate’ democracy was criticised as anachronistic, more redolent of nineteenth-century party politics than anything authentically Athenian.

The conflict between the two sides seemingly ran deep. Yet agreement subsisted on one key point. Whatever the effects of the reforms, the aim was democratic self-restraint after years of mishaps, including the failed expedition to Sicily, the loss of allies, disaster at Arginusae and the execution of nine

---

20 It certainly broke down in 340-38, while many decrees were very wide ranging, and not all laws general (e.g. IG II² 222.41-6). Harrison (1955) 27; Ehrenberg (1969) 57; Rhodes (1972) 52; Laix (1973) 57-8; Ostwald (1986) 2; Sinclair (1988) 84.
24 Bonner (1927) 99; Gomme (1962) 188; Forrest (1966) 19.
25 Glotz (1921) 166; Hignett (1952) 233; Taylor (2001) 155.
generals, defeat by the Peloponnesians and perhaps most traumatic, two oligarchical takeovers, both formally legitimated by a vote of the assembly. The Athenians, it was said, sought a ‘brake’ to ‘slow down the machine’.28 ‘Our general impression’, wrote MacDowell, ‘is that after the turmoil of 403, the Athenians…wanted to make it difficult for themselves to introduce changes in the laws’.29 Above all, scholars suggested, they hoped to prevent ‘snap votes’30 and ‘hasty decisions’.31 Measures such as the graphê paranomôn allowed them a ‘pause for thought’32 and the ‘opportunity to reconsider a decision they had themselves taken’,33 thus counteracting ‘unthinking haste and passion’34 or ‘mass psychosis’35 in the assembly. In Ober’s words, the ‘errors’ made by the assembly during the war had ‘brought home to the Athenians the dangers of unrestrained exercise of the popular will’. They thus ‘enacted constitutional measures aimed at correcting the problem’.36

This picture reprises a widespread modern account of the relationship of courts to democratic legislatures. Just as the modern judicial review of legislation is conceived as a check on the potential excesses of untrammelled democracy, where untrammelled democracy is identified with the unrestrained rule of the legislature, so too is Athenian judicial activity conceived as a check on untrammelled democracy, where untrammelled democracy is identified with the unrestrained rule of the assembly.37 The division of labour in this schematisation is clear. The Athenian assembly represents the fully democratic ‘self’, judicial bodies ‘restraint’.

This conceptualisation is unsurprising. The assembly has long been considered the heart of Athenian democracy. It was the ‘key decision-making body in the Athenian state’,38 the ‘prime democratic body’,39 the ‘real sovereign of the city’,40 the ‘supreme power of the state’,41 ‘in a very real sense a sovereign body’,42 the ‘dynamo’43 or ‘crown’44 of the political system,

29 MacDowell (1975) 74.
34 Finley (1985) 72.
40 Fustel de Coulanges (1980 (1864)) 322.
42 Jones (1980 (1957)) 3.
43 Ferguson (1913) 51.
44 Finley (1985) 49-50.
the embodiment of ‘absolute democracy’. The assembly is not, of course, deemed the only significant democratic body in Athens: the council, courts and offices were also democratically constituted and played important roles. Yet though it has occasionally been suggested that another institution was more powerful than the assembly—the courts, as Hansen argued, or the council—none has been found more democratic. Indeed there seems good reason for that. The very word démós often meant ‘assembly’, at least in the sense of an agent. As such it seems absurd that any institution could have been more involved in the rule of the démós than the assembly itself.

Nonetheless, there is a real puzzle here. For there is no evidence that the Athenians regarded judicial activity as a restraint on the démós. To the contrary, numerous sources suggest the courts were conceived as the most demotic (démotikon) body in the political system, that is, the institution most reliably on the side of the démós, the collective common people, as opposed to the elite, and most integral to its rule.

A comprehensive review of the evidence is impractical, but the following items stand out. Aristotle regarded the courts as the demotic element in Solon’s political system, credited them with giving the démós political standing (ton de démon katastêsai) and cast them as the vehicle through which the démós achieved supreme power in the community overall. The Aristotelian Athênaiôn Politeia reported that of the three ‘most demotic’ (démotikôtata) reforms of Solon, the one ‘said particularly to have contributed to the power of the majority’ was ‘the right of appeal to the jury-court’, for ‘when the démós is master of the psêphos’—the ballot used in the courts, though not the assembly—‘it is the master of the political system’. The same author wrote that since 403 the démós had ‘continually increased the power of the majority’, a claim now dismissed as ‘mistaken’ but which could make sense if the transfers of power to judicial agents he mentions are

---

45 Glotz (1921) 162.
47 As in the enactment formula of many decrees, edoxe tê boulê kai tô démô, ‘it was decided by the council and assembly’. See Hansen (1974) 19-20; Rhodes and Osborne (2003) xvii-xix.
48 As in the enactment formula of many decrees, edoxe tê boulê kai tô démô, ‘it was decided by the council and assembly’. See Hansen (1974) 19-20; Rhodes and Osborne (2003) xvii-xix.
49 ‘Assembly’ in the sense of an event was conveyed by ekklêsia, ‘meeting’: Hansen (2010) 502-3, 507.
50 The Greek démotikos is often translated ‘democratic’, but ‘demotic’ and ‘democratic’ are distinct. Agents and actions may be demotic, that is, ‘in favour of (or in the interests of) the démós’ (Cartledge [2009] 49) without démokratia obtaining overall.
51 The same author wrote that since 403 the démós had ‘continually increased the power of the majority’, a claim now dismissed as ‘mistaken’ but which could make sense if the transfers of power to judicial agents he mentions are
understood as democratising moves. Lycurgus said the three main bulwarks of démokratia in Athens were the legal system, the vote of the judges, and the procedures by which wrongdoers were handed over to them; Aeschines described Athens’ judges as democracy’s ‘guards’; and Demosthenes claimed it was only the control of the laws by Athens’ judges that protected the dèmes from the depredations of the elite. Thucydides noted the Athenians’ ‘litigiousness’, and their passion for judging supplied the plot of Aristophanes’ Wasps (422) and a running joke elsewhere. Aristophanes also used judicial analogies to exemplify the power of ordinary citizens, as in ‘I’ll put a stop to your bellowing! You’re not on a jury now, you know!’ The Xenophontic Athênaiôn Politeia cited the organisation of the courts as a sine qua non of Athenian democracy. Finally, Plato’s depiction of rule by the dèmes is revealing. When he criticises the judgment of ‘the many’, the immediate context he has in mind is more often than not the courts.

These points may be considered inconclusive. The philosophers are often deemed unreliable in relation to democracy, since they did not support it; the same may be said of the historians and Aristophanes. The orators are dismissed on other grounds. Since most extant speeches were written for trials, the suggestion that judges were especially democratically significant has been interpreted as flattery. But even an anti-democrat may provide an accurate glimpse of democracy, and flattery fails if it is wholly implausible. Moreover, as Hansen has pointed out, our extant assembly speeches, where one might expect flattery in equal measure, contain no equivalent claims. In the absence of any positive sign that judicial activity was seen as a restraint on the dèmes, these objections suggest special pleading.

Another interpretation is thus worth considering. In extending the political powers of the courts, the Athenians may have been seeking to extend democracy rather than to mitigate it. This account works better with the reading of the reforms as a response to recent events, particularly the coups. The accepted view implies that Athenian democrats, fresh from victory over their oligarchical opponents, blamed themselves for the conflict. But our

55 Lycurg. 1.3.
56 Aeschin. 3.7.
57 Dem. 21.222-5. Cf. Lycurg. 1.4 and 1.138; Dem. 7.7, 24.2, 24.37, 24.152 and 57.56; Aeschin. 1.4-5, 3.6 and 3.23; Din. 3.15.
58 Thuc. 1.77.
61 Ps. Xen. Ath. Pol. 3.2-9; cf. 1.16-18.
62 E.g. Pl. Tht. 173c; Grg. 452e, 454b, 454e, 455a; Rep. 553a-b, 565b-ε. See further my ‘Plato and Athenian Justice’, forthcoming.
sources suggest only anger toward the oligarchs. One sign of this is the 410 decree of Demophantus, which allowed anyone attempting to suppress democracy to be killed on sight.\textsuperscript{67} True, both coups had been legitimated by the assembly, but the publicly stated view was that the assembly had been forced by fear and deceit to vote against its wishes, not that it had itself erred.\textsuperscript{68} Indeed, anything else would have contradicted a key tenet of Athenian democratic ideology: that the dêmos was always right and any fault, when things went wrong, lay not with the voters but with the speakers who had misled them.\textsuperscript{69} This interpretation also allows that the same logic may have governed the graphê paranomôn and graphê nomon mê epitêdeion theinai. These measures look so similar it is hard to believe they were differently motivated, yet why the dêmos should have aimed at self-restraint in the 420s or earlier is unexplained. More likely both aimed at combatting the subversion of democracy by the elite—a possibility aired, but not pursued, in the scholarly literature.\textsuperscript{70}

Yet if this reading appeals, we must ask why judicial activity might have seemed a better vehicle of demotic rule. The question is particularly significant since Athenian democracy is often partly defined according to characteristics of the assembly, such as openness to all, equal rights to speak and to vote and popular power over policy. If the courts were deemed more democratic, then our account of what democracy meant in Athens must be revised.

The following survey of the compositions, procedures and functions of the assembly and courts makes an initial test of this revision. If key characteristics of the assembly can be interpreted as liabilities from the point of view of non-elite Athenians, while those of the courts appear more conducive to their rule, then both the reading of the reforms as demotic measures and the reconceptualisation of Athenian democracy that entails will seem worth pursuing.

Composition

The Athenian assembly was open to all male citizens over eighteen.\textsuperscript{71} This did not mean all could attend.\textsuperscript{72} Until the latter half of the fourth century, the assembly’s regular meeting-place on the Pnyx held between six and eight

\textsuperscript{67} Lycurg. 1.124-7; Andoc. 1.96. Cf. Thuc. 8.86.2.
\textsuperscript{68} See e.g. Andoc. 2.27; Aeschin. 2.176; Ps. Arist. Ath. Pol. 29.1, 34.3; Lysias 12.72-75 and 12.90. The only hint of a contrary view is Diod. 13.34 and 36 (on the 411 coup).
\textsuperscript{72} This is not always stated. E.g. Finley (1985) 19: the assembly was ‘an outdoor mass meeting of as many thousand citizens…as chose to attend on any given day’.
thousand people, a fifth of the citizen body. Judicial panels were smaller—a minimum of 201 in private cases and 501 in public ones—and entry tightly controlled. Every year six thousand citizens over thirty, chosen by lot from volunteers, took the judicial oath and were entered on the judicial roll. On court days, those willing to judge arrived at the gates before dawn, handed in their name-tags (pinakia) and waited to see if they were selected, again by lot. The process was complicated and periodically refined: by the late 330s it took nine separate lotteries to produce a fully staffed courtroom.

On the modern view, the sheer size of the assembly suggests it was more democratic. But that view assumes greater concern with the raw numbers of people attending than with who those people were, and there is no evidence the Athenians thought that way. In fact, one fourth-century writer posited that even in ostracisms, when every citizen could vote, 'those who have political associates and confederates have an advantage over the rest, because the judges are not appointed by lot as in courts of law'. What mattered was apparently less the size of the decision-making body than how it was constructed, and here the courts had two demotic advantages. First their social make-up, which seems to have tended more towards the poor than did that of the assembly, and second the difficulty of corrupting a judicial panel.

Evidence on the composition of the assembly is scarce, but what little we have suggests some diversity. Plato’s Socrates asserts that a speaker might be ‘a blacksmith, shoemaker, merchant, sea-captain, rich, poor, of noble family or low-born’, Xenophon’s lists ‘fullers, shoemakers, builders, smiths, farmers, merchants, and profiteers’, while Theophrastus’ oligarch is ‘ashamed’ to find himself sitting next to a ‘scrawny, unwashed type’. To be

---

74 Hansen (1999) 90-4. This proportion was not unusual: see Robinson (2011) 229-30.
75 In the fifth century round numbers were used; the odd man appears by the 380s. Boegehold (1995) 34.
79 At least three different systems were used, becoming progressively more sophisticated. In Ar. Wasps (422), panels are formed at the beginning of the year, and judges know in advance which cases they will hear. Sortition at the gate existed by the time of Ar. Assemblywomen (c. 393); further changes appear by 340. See Boegehold (1995) 21-42; cf. Farrar (2010).
82 Pl. Prt. 319d.
83 Xen. Mem. 3.7.6.
sure, the platform was dominated by the upper echelons,85 and some groups, such as those who lived farthest from the city and wage-earners as opposed to peasants, may have found difficult to attend.86 But as far as we can tell, the assembly attracted a mix of mass and elite.87

The courts, however, seem to have attracted relatively more poorer citizens.88 The classic source is Aristophanes, particularly Wasps. The son of a judge hopes for figs, but his father can only afford knucklebones, and if the courts don’t sit that day there’ll be no lunch on the table.89 The origin of an association between judging and poverty is not hard to find: from the mid-fifth century judges were paid, while pay was not introduced for assemblygoers for another fifty years.90 The stipend was founded by Pericles with the explicit aim (so some said) of building his power base among the poor, and the Athênaion Politeia reports that ‘ordinary persons’ (tón tychontôn) ‘always thereafter took more care than the respectable to cast lots for the duty’.91 Aside from the boost to income, obviously worth more to a poor man than a rich one, payment may have dishonoured the office in the eyes of the elite.92 Certainly aristocratic young men such as Alcibiades or Glaucon did not dream of queuing up outside the courts at dawn, putting themselves at the mercy of the lot, but of shining as speakers in the assembly.93

The assembly was also considerably easier to stack and corrupt. An amusing case of stacking appears in Assemblywomen (c.393): Athens’ leading ladies simply turn up early, en masse, and are able to enact what they please.94 The scene is fantastic, of course, but interestingly not impossible. Indeed it may recall the 411 coup. That meeting was held at Colonos, outside the city walls and within striking distance of the Peloponnesian army encamped nearby, seemingly to make attendance as unattractive as possible for residents of the city or Piraeus (a democratic stronghold) or those who lacked their own shield and spear (the poorer two-thirds of the citizenry). Since many lower-class Athenians were away with the fleet, the number of democratic attendees

92 Arist. NE 1163b5-10. Cf. Arist. Pol. 1297a35-40 and 1300a1; Plut. Per. 11.4.
was limited, and the result the abolition of democracy.\footnote{Thuc. 8.67-9; Lysias 12.44, 75-6. Cf. Finley (1985) 53.} Manipulation also occurred at the vote on the Arginusae generals. According to Xenophon, the captains succeeded in pinning the blame on the generals at least partly because they recruited bereaved relatives (or those who claimed to be relatives) to turn up, begging for them to be punished.\footnote{Xen. \textit{Hell} 1.7.8; Hansen (1999) 284 with n.185.} Similarly, Thucydides’ Nicias accused Alcibiades of packing the assembly in the vote on Sicily,\footnote{Thuc. 6.13.1.} while Demosthenes claimed ‘three hundred to do the shouting’ were part of the entourage of any successful politician.\footnote{Dem. 20.118 and 18.217; Lycurg. 1.20, 1.79 and 1.146; Hyp. \textit{Eux}. 40; Theophr. \textit{Char}. 6.2, 13.11.}

The courts were more difficult to corrupt. One safeguard was the judicial oath, which included clauses against tyranny, oligarchy, the subversion of democracy and accepting bribes.\footnote{Hom. \textit{Il}. 3.107-10; Eur. \textit{Supp}. 230-7; Arist. \textit{NE} 1128b15-20; Hyp. 5, col. 21. Cf. Hansen (1974) 50.} Compliance surely varied,\footnote{Thuc. 6.28 and 8.65; Xen. \textit{Hell}. 2.3.23.} but oaths were at least solemnly regarded.\footnote{Ps. Arist. \textit{Ath. Pol}. 27.5; Diod. 13.64; Ps-Xen. 3.7. Cf. Boegehold (1995) 34.} Another factor was age: young men were perceived as unstable\footnote{Dow (1939) 31.} and potential supporters of oligarchy.\footnote{Aeschin. 3.1; Dem. 19.1, 19.332; Boegehold (1995) 14, 22, 33, 36-7.} Most significant was the difficulty of interfering with judges. In 409 an entire panel was successfully bribed, but the subsequent assignation of judges to courtrooms by lot made that impossible.\footnote{Eur. \textit{Supp}. 438, 441; Pl. \textit{Grg}. 461e; Dem. 15.18. Cf. Lewis (1971); Finley (1985) 19; Ober (1989) 79, 296; Miller (2001) 410-13; Sluiter and Rosen (2004); Balot (2006) 62.} The capacity to manipulate panels may not have fully disappeared: the \textit{pinakion}-sorter (himself randomly selected) could make the choice of given individuals slightly more or less probable,\footnote{Aeschin. 1.19-20, 28; cf. Dem. 22.30-33; Andoc. 1.73, Lysias 10.1.} and lobbying at the gates could not be stopped (though the buildings were later redesigned to minimise harassment).\footnote{Aeschin. 3.8, 3.208 and 3.233; Dem. 20.118 and 18.217; Lycurg. 1.20, 1.79 and 1.146; Hyp. \textit{Eux}. 40; Theophr. \textit{Char}. 6.2, 13.11.} But it remained far harder to shape judicial bodies than the assembly, and the ongoing refinement of these processes suggests it was a priority.

\textit{Procedures}

Almost all male citizens had the right to address the assembly (\textit{iségoria}).\footnote{Aeschin. 1.19-20, 28; cf. Dem. 22.30-33; Andoc. 1.73, Lysias 10.1.} Those convicted of certain moral offences, such as neglect of parents, cowardice or prostitution, were excluded, as were state debtors\footnote{Aeschin. 1.19-20, 28; cf. Dem. 22.30-33; Andoc. 1.73, Lysias 10.1.} and anyone who had stayed in the city under the Four Hundred, though that rule may have
been dropped from the post-403 code.\footnote{Aeschin. 1.75.} Speakers could also say largely what they pleased (\textit{parrhēsia}),\footnote{Pl. Rep. 557b; Ps-Xen. \textit{Ath. Pol.} 1.12. \textit{Cf.} Radin (1927); Miller (2001): 413-17; Saxonhouse (2006); Landauer (2012).} though slander about ‘unspeakable things’ was prohibited,\footnote{Lysias 10; At. \textit{B}irds\ 287-89, 1473-81. \textit{Cf.} Radin (1927) 226-8; Carey (1994) 174.} along with, apparently, speaking more than once per meeting on the same topic,\footnote{Though \textit{cf.} Thuc. 6.19.2.} speaking off-topic or on several topics at once, and heckling or shouting down other speakers (heckling from the audience was allowed).\footnote{Aeschin. 1.35; \textit{cf.} Dem. 24.13. On heckling, see Pl. \textit{Laws} 876a9-b6; Din. 1.41; Hyp. 1, fr. 2; Dem. Ex. 4, with Bers (1985); Tacon (2001); Villacèque (2012).} The courts’ rules were stricter. Any citizen could bring a public suit, and speakers could argue whatever they wished, though they might later be charged with false witness.\footnote{Dem. 24.23. \textit{Cf.} Hyp. 1.10 and 4.11} But all speakers—litigants, witnesses and any co-pleaders—had to be specified in advance;\footnote{Ar. \textit{Ach.} 692; At. \textit{Wasps} 857. \textit{Cf.} Boegehold (1995) 27; Allen (1996).} strict time limits applied;\footnote{Bonner (1927) 77; Bers (1985); Boegehold (1995) 26; Tacon (2001).} and cases were not discussed. Once the speeches were over, voting began. As in the assembly, heckling was acceptable;\footnote{Arist. \textit{Pol.} 1268b5-10. Judges could also not discuss cases with anyone else, since trials started and ended on the same day. See MacDowell (1978) 249-50; Rhodes (1992) 719; Todd (1993) 132; Hansen (1999) 187. \textit{Pace} Worthington (1989); Worthington (2003).} brief exchanges were also possible on the way to the voting urns. But there was no formal opportunity for judges to influence each others’ views, and this was deliberate. According to Aristotle most legislators prohibited discussion (\textit{koinologountes}) among judges.\footnote{\textit{Cf.} Isoc. 12.10; Plut. Dem. 6-8; Plut. \textit{A}lc. 10.2. N.B. also Hyp. 1.10, 1,19, 4.11.} 

Did limits on speech benefit the \textit{dêmos}? Arguably, yes. Though most citizens had the right to address the assembly, given limitations of time, temperament, and rhetorical ability, very few actually did.\footnote{Hansen (1989) 93-125; Ober (1989): 107-8. On the term ‘politician’, see Hansen (1989) 1-23; Ober (1989) 106 with n.6 (whose view I share). Hansen suggests many others occasionally made proposals, perhaps 700-1400 in 355-22: \textit{cf.} Ober (1989) 109; Rhodes (1995) 159-60; Osborne (2010) 5-7. But Hansen’s \textit{rhētores} include those who put their name to proposals but did not speak in favour of them (97), and occasional speakers by definition will not have challenged the dominance of regular ones. \textit{Cf.} Aeschin. 3.125; Dem. 22.36; Ps. Arist. \textit{Ath. Pol.} 29.1; Ober (1989) 104-18. See also my ‘Not Talking but Thinking: Democratic Deliberation in Ancient Greece’, forthcoming.} Consequently, a great deal of influence over decisions was concentrated among very few men. Hansen put the number of recognised \textit{rhētores}, ‘speakers’ or ‘politicians’, at ten to twenty at any one time; others go slightly higher, but the implication is the same.\footnote{Eur. \textit{Med.} 580-5; Eur. \textit{Supp.} 410; Ar. \textit{Ach.} 376, 625-37; Thuc. 7.8; Dem. 5.12, 9.64 and 22.30-33; Aeschin. 3.170 and 3.220.} Though equal in theory, speech norms in the assembly were highly unequal in practice. The \textit{dêmos}’s problem was thus how to make use of speakers without being ruled or abused by them, no easy task.\footnote{Eur. \textit{Med.} 580-5; Eur. \textit{Supp.} 410; Ar. \textit{Ach.} 376, 625-37; Thuc. 7.8; Dem. 5.12, 9.64 and 22.30-33; Aeschin. 3.170 and 3.220.} Thucydides
counted Pericles’s rhetorical gifts as a major factor in the outbreak of war,\textsuperscript{122} while Cleon’s almost provoked genocide in Mytilene.\textsuperscript{123} Alcibiades helped to restart the war by deceiving the assembly,\textsuperscript{124} and the main speaker in favour of executing the Arginusae generals turned out to have been bribed.\textsuperscript{125} Most alarming, nearly everyone involved in the coups was a trusted politician. The leading conspirators in 411 (with the single exception of Antiphon) had been considered committed democrats,\textsuperscript{126} while the Thirty were originally voted the task of producing new laws.\textsuperscript{127} The courts could not resolve the inequality between speakers and listeners altogether, but restrictions on speech may have ameliorated it.

The right to vote was a real equality, though the issue of disproportionate influence also arose. In the assembly, all could vote by raising a hand, and a simple majority decided every question.\textsuperscript{128} Occasionally, as in citizenship grants, the assembly voted by secret ballot, but there was apparently no desire to extend this.\textsuperscript{129} Court cases, however, were always decided by secret ballot, and the process was repeatedly refined.\textsuperscript{130} In the mid-fifth century, urns for the prosecutor and defendant were placed side by side with a funnel concealing the openings. A century later, judges had two ballots, one pierced (for the prosecutor) and one unpierced (for the defendant). The vote went into a bronze urn, the discard into a wooden one, and provided the discs were held between thumb and forefinger it was impossible to tell which was which.\textsuperscript{131}

The advantages of voting by hand are obvious. Thousands of people could quickly and easily participate in all decisions (perhaps an average of nine or ten per meeting).\textsuperscript{132} One disadvantage was inaccuracy: when votes were close, as in those on the Mytilenaeans, it could be hard to see who had a majority.\textsuperscript{133} Darkness could also delay decisions, providing an opportunity for canvassing and conspiracy in the interim, as in the case of the generals.\textsuperscript{134} Most fatal, public voting made citizens vulnerable to reprisals. Especially during crises, fear of voting the ‘wrong’ way could encourage abstention or voting against one’s wishes.\textsuperscript{135}

\begin{itemize}
\item Thuc. 1.29.1-5, 1.30.2, 1.31.1, 1.127, 1.145, 2.59, and 2.65; Ar. Peace 603-80; Plut. Per. 8.4 and 15.4.
\item Thuc. 3.49.
\item Thuc. 5.43-5; Plut. Alc. 14; Diod. 13.69.
\item Xen. Hell. 1.7.8.
\item Thuc. 8.68; Lysias 13.9-10. Ant. fr. B1; Andoc. 1.36.
\item Ps. Arist. Ath. Pol. 34-5.
\item Dem. 59.90.
\item How the \emph{nomothetai} voted is unknown. See Piéart (2000); Rhodes (2003).
\item Staveley (1972) 96-7; Boegehold (1995) 28, 36.
\item Thuc. 3.49.
\item Xen. Hell. 1.7.7.
\item Sealey (1956) 240-2; Staveley (1972) 83. If citizens sat by tribes, this tendency will have been exacerbated: Staveley (1972) 81; Stanton and Bicknell (1987) 76-7. Pace Hansen (1983) 83-102; Hansen (1982); Thompson (1982).
\end{itemize}
Political observers since Plato have worried that such conditions promote the ‘tyranny of the majority’. Take Thucydides’ description of the vote on Sicily: the elderly were sanguine, the young enthusiastic, and the great multitude excited by the prospect of profit and dominion, so those who opposed the war ‘held their peace, fearing a contrary vote would seem disloyal to the state’. Yet cases of a few being cowed by the majority are rarer than the reverse. Again according to Thucydides, one factor in the success of the Four Hundred was the murder of several leading democrats, leaving many too ‘terrified’ to vote for democracy. Similarly, Lysias found the démos in 404 ‘terrified’ by the oligarchs’ show of strength and ‘compelled to dissolve the democracy through a show of hands’. The Thirty also used public voting in the council, where they tried potential opponents (strikingly, they avoided the courts). Councillors were told to deposit their ballots on a table in front of the new rulers. As Lysias asked: ‘What possible chance of escape had any of them?’

As Thucydides saw, fear of reprisals could trigger a vicious circle. This was the democrats’ problem in 411: since all were reluctant to move against the oligarchs, each overestimated the extent of the conspiracy, which sealed the conspirators’ success. Even in the regime’s last days, those who wished for démokratia did not dare state it openly but instead discreetly advocated rule by the ‘Five Thousand’. Such skittishness could be a problem for elites, but it was more devastating to the démos. Elites by definition enjoy various advantages: wealth, leisure, weaponry, personal status, useful friends. The only advantage possessed by non-elites is their numerosness, and if fear renders coordination impossible even that is lost. Demotic rule is thus supported by a secret ballot. As Demosthenes argued, this alone ensured that ‘every one of the citizens, being absolutely free from interference, may form his own judgment’. The ensuing lack of accountability prompted some anxiety: reminders that nothing was hidden from the gods, and that fellow-citizens might ask how each had voted, were commonplace. Yet judges’ freedom in this respect was also compared favourably with the constraints on assemblygoers. ‘Nobody today is compelling you to vote against your

139 Lysias 13.33-7 trans. Lamb. Cf. Xen. Hell. 2.49. For cases outside Athens, see Thuc. 4.74, 3.70-1 and 6.51.
140 Thuc. 8.66. Cf. Andoc. 2.8.
141 Thuc. 5.92.
144 Lycurg. 1.146; Lysias 12.100; Aeschin. 3.246.
judgment’, Lysias observed at the trial of Eratosthenes, charged for his actions under the Thirty.145 Secrecy enabled all judges to vote as they wished.

Functions
The assembly decided state policy: war, peace, foreign affairs, defence, public finance, expenditures, imports and exports, and until 403/2 legislation.146 It also conferred honours, elected generals and some other officials, held regular votes of confidence, launched impeachments and until at least 361 occasionally judged them.147 The courts decided intra-citizen disputes, including the scrutinies (dokimasiai) and audits (euthynai) of officeholders.148 In Aristotle’s analysis, assemblygoers decided to sympheron, what was expedient, a judgment about things to come. Judges decided to dikaion, what was just, a judgment about things past.149 Could the latter have seemed more essential to the démos’s rule?

It is possible. For one thing, the Greeks traditionally took deciding what is just to be the supreme political task. When the maker of Achilles’ shield in the Iliad wished to decorate it with ‘typical scenes of Greek public life’, as Bonner noted, he chose ‘not an executive council in session or an assembly legislating, but a group of elders administering justice’.150 Similarly, the first task of princes in Hesiod’s Works and Days was to dispense justice, Herodotus attributed Deioces’ rise to power wholly to his standing as a judge, Aeschylus tied political stability to judicial activity, Aristotle called dikê, ‘the decision of what is just’, ‘the backbone (taxis) of the political community’, and Cleanthes defined polis as ‘a habitation where people seek refuge for the purposes of the administration of justice’.151 For another, the history of Athenian democracy includes many nods to judicial power. Ephialtes used the courts to break the power of the Areopagus,152 while the only item on the agenda at Colonus in 411 was the suspension of the graphê paranomôn and impeachment; the oligarchs in 404 followed suit.153

Why might the courts have seemed especially democratically significant? A possible answer is their role in disciplining politicians and office-holders, the most self-evidently ‘political’ of the uses to which they

145 Lysias 12.91. Cf. Hyp. 2.5.
148 Hansen (1999) 179-80, 218–24; Bauman (1990); Todd (1993) 154-63. They also had other minor responsibilities such as overseeing state auctions.
151 Hes. WD 225-9; Hdt. 1.96-7; Aesch. Eum. 433-5, 484, 490-565, 681-710; Arist. Pol. 1253b25, trans. mine; Stob. Flor. 2.7.iii (Wachsmuth 208).
were put.\textsuperscript{154} In the early fifth century, the only means of calling the powerful to account was impeachment (\textit{eisangelia}),\textsuperscript{155} typically on grounds such as treason, bribe-taking, or attempting to overthrow the \textit{dēmos}.\textsuperscript{156} Opinions differ on whether such cases were originally judged by the \textit{dēmos} or by the Areopagus,\textsuperscript{157} but by the mid-fifth century, following a push from Ephialtes in 462/1, accountability had been regularised and popularised. As well as impeachments, all officeholders were now subject to an incoming \textit{dokimasia} and annual \textit{euthyna} decided by paid judicial panels.\textsuperscript{158} Hansen argues that the small number of prosecutions known to have resulted from these procedures—just fifteen out of over a thousand \textit{euthynai} a year in the fourth century—suggests they were relatively unimportant, but the inference does not follow, for we cannot tell what actions were avoided out of consciousness of an impending audit.\textsuperscript{159} More interesting, later reforms revealed the same logic at work. The \textit{graphê paranomôn} and \textit{graphê nomon mê epitêdeion theinai} brought \textit{rhêtores} under the control of the courts; the new law-code and legal archive made it easier to prosecute them; and \textit{nomothesia} reduced the advantage held by gifted speakers and organisers in the assembly by transferring decision power to an arguably more demotic organ.

The scale of judicial action against political leaders in Athens has been regarded with dismay. Hansen called the number of politicians targeted by \textit{eisangelia} ‘a serious defect in the system’; others agree.\textsuperscript{160} Two readings are suggested: either the Athenians persecuted many honest men, or they were incapable of selecting honest leaders; neither looks good.\textsuperscript{161} Yet once-honest men may become lax, and a low tolerance for dubious behaviour may be appropriate in politics. Moreover, if chicanery seems rife in Athens, one may wonder how much escapes notice under less robust systems of detection. In


\textsuperscript{155} Hansen (1975). Private citizens or metic could be impeached (as in relation to the profanation of the mysteries and mutilations of the herms in 415), but cases typically involved office-holders (19 cases), politicians without formal office (17 cases) and generals (19, 17 and 39 cases respectively): Hansen (1975) 58-65.

\textsuperscript{156} Hyp. 3.7-8; Hansen (1975) 12-20 and cat. nos. 2 and 6. Cf. Bonner and Smith (1930) 294-309; Rhodes (1972) 162-4; Rhodes (1979) 106-8; Sealey (1981) 129.

\textsuperscript{157} Rhodes (1972) 199-211; Sealey (1981) 131; Jones (1987); and Wallace (1989) 76 favour the Areopagus. Against this view see Rhodes (1979); Hansen (1980); Carawan (1985); Carawan (1987) 190-1.


\textsuperscript{161} Hansen (1975) 11; Knox (1985) 144.
any case, the courts’ capacity to discipline politicians adequately justifies their significance, as illustrated by Aristophanes’ *Knights*. In response to the knights’ charge that he is too easily manipulated, Demos replies: ‘there’s purpose in this foolishness of mine. I relish my daily pap, and I pick one thieving political leader to fatten; I raise him up, and when he’s full, I swat him down.’ As the knights (who accept Demos’s claim) observe, politicians are ‘raised’ in the assembly; and as Demos explains, they are ‘forced to regurgitate whatever they’ve got from me’ in the courts, using the funnel that concealed judges’ votes as a ‘probe’. The assembly and courts are thus interdependent: demotic rule requires both. But the courts have *final* significance. The ‘fattening’ process to which Demos refers would be self-undermining without a way of recovering the goods, and to that extent the entire system depends on the *dèmos’s* judicial function.

**Conclusion**

The debate occasioned by the late fifth-century Athenian legal reforms has lain dormant for some time. But the major premise on which it stood holds firm. The assembly is still regarded as the leading vehicle of democracy in Athens, the courts a restraining factor, yet this view may be questioned. The characteristic features of the assembly—openness to all, open speaking, open voting, and the choice of leaders and policies—may have seemed less valuable to demotic rule than those of the courts—random selection, better representation of the poor, limits on speech, a secret ballot, and the power of judgment over leaders and their actions. This suggests the reforms may have been intended to boost democracy rather than to limit it, and that, in turn, constitutes a serious challenge to our conceptualisations of democracy both ancient and modern, for demotic judicial activity figures prominently in neither.

This reinterpretation prompts numerous questions, some of which may be treated briefly here. Why, if the organisation of the courts was so helpful to the *dèmos*, was it never imitated in the assembly? Why, in the later fourth century, did the Athenians even go in the opposite direction and expand the assembly? Quite possibly a single body modelled as the courts may have seemed sufficient. Indeed, Athens’ political leaders may have enjoyed more leeway in the assembly precisely because it was so easy to remove them from their positions via the courts. The Athenians could then have the best of both worlds: greater participation, more options and speedier decision-making early on, with the certainty of demotic rule as a backstop. As for expansion, the larger the group, the more difficult corruption and organisation: in this respect, expansion offered a sound demotic alternative to random sortition.

---

164 See n.71 above.
Another concern is that the courts were merely a venue for intra-elite rivalry: reputation, not legality, was the issue at stake.\textsuperscript{165} That there is something to this is suggested by the fact that most of our cases of graphê paranomôn involve the award of honours.\textsuperscript{166} Yet there were safeguards against frivolous suits, chiefly a fine for prosecutors who failed to obtain a fifth of the votes. More important, such cases did not necessarily constitute an abuse of the system. So long as the dêmos remained in the seat of judgment, inviting its advisors to prosecute each other was arguably an efficient way to manage its affairs, since dubious behaviour would the more likely be discovered. There may be an analogy here with antidosis, through which Athens’ richest men challenged other wealthy citizens to an exchange of properties if they felt they had been asked to bear an unfair share of public burdens. In both cases, the elite kept tabs on each other, and the dêmos, which judged the matter, reaped the rewards.\textsuperscript{167} Hypereides commented: ‘Orators are like snakes, in that all snakes are hateful, though some of them, the adders, are harmful to men, while others, the brown snakes, eat the adders.’\textsuperscript{168} Athenian democracy may be interpreted as an object lesson in managing one’s snake population, to the benefit of ordinary citizens.

Finally, why, if the dêmos’s judicial role was so important, has it not figured more prominently in accounts of Athenian democracy?\textsuperscript{169} One factor may be lack of evidence: the Aristotelian Athênaïôn Politeia, our most instructive source, was discovered only in 1891, when the priority of the assembly was already assumed.\textsuperscript{170} The fact that modern democratisation has occurred exclusively through the democratisation of legislatures also surely plays a part, as does the influence of the American constitutional model, in which the restraining aspect of courts is paramount.\textsuperscript{171} Yet these points only push the key question further back. Why does judicial activity play such a small role in the modern idea of democracy? A possible answer is a widespread feeling that unlike law- and policy-making, legal disputes normally admit of a correct answer, the discovery of which requires knowledge and training and thus cannot be left to any chance comer.\textsuperscript{172} If so, another connection to classical Athens bears scrutiny. The first extant writer to suggest that meritorious adjudication was in principle beyond the power of ordinary citizens was Plato, and there is reason to think this constituted a

\textsuperscript{165} MacDowell (1978) 51; Cawkwell (1988) 3; Hansen (1999) 211.
\textsuperscript{166} Hansen (1999) 211.
\textsuperscript{167} Christ (1990).
\textsuperscript{169} Grote (1861) 5:381 gave the dêmos’s judicial powers a large role, describing them as ‘the consummation of the Athenian democracy’. Cf. Bonner (1927) 73-4; Hignett (1952) 220-1; Ehrenberg (1969) 73; Harrison (1971) 43; Ostwald (1986) 50; Allen (2000); Lanni (2006) 15. However, none pursue the implications for our conceptualisation of democracy itself.
\textsuperscript{170} See e.g. Mill (1846); Turner (1981); Urbinati (2002).
\textsuperscript{171} See e.g. Hirschl (2004).
\textsuperscript{172} See e.g. Mirhady (2006) 302.
deliberate attack on Athenian *dēmokratia*. Our evidence suggests that Plato would find the modern practice of democratising the creation of law while outsourcing its interpretation and application to small bodies of experts perfectly acceptable. An Athenian democrat would no doubt fear this invited the oligarchical capture of the entire political system, whether the citizenry realised it or not. What to make of that is our final question.

Bibliography


——. *World of Prometheus* (Princeton 2000)


J. Bleicken, *Die athenische Demokratie* (Paderborn 1986)

——. *The Lawcourts at Athens* (Princeton 1995)

R. Bonner, *Lawyers and Litigants in Ancient Athens* (Chicago 1927)
——. *Aspects of Athenian Democracy* (Berkeley 1933)

R. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle* (Chicago 1930)


M. Canevaro, ‘Nomothesia in Classical Athens: What Sources Should We Believe?’ *CQ* 63 (2013) 139-60


P. Cartledge, *Ancient Greek Political Thought in Practice* (Cambridge 2009)


M. Christ, ‘Liturgy Avoidance and Antidosis in Classical Athens,’ *TAPA* 120 (1990) 147-69
——. *The Litigious Athenian* (Baltimore 1998)

S. Dow, ‘Aristotle, the Klêroteria, and the Courts’, *HSCP* 1 (1939) 1-34
W. Ferguson, *Greek Imperialism* (New York 1913)
M. Finley, *Politics in the Ancient World* (Cambridge 1983)
——. *Democracy Ancient and Modern* (New Brunswick 1985)
W. Forrest, ‘Themistokles and Argos’, *CQ* 10 (1960) 221-41
——. *The Emergence of Greek Democracy* (New York 1966)
N. Fustel de Coulanges, *The Ancient City* (Baltimore 1980 [1864])
G. Glotz, *The Greek City* (London 1921)
L. Hall, ‘Ephialtes, the Areopagus and the Thirty’, *CQ* 40 (1990) 319-28
M. Hansen, *The Sovereignty of the People’s Court in Athens in the Fourth Century B.C. and the Public Action against Unconstitutional Proposals* (Odense 1974)
——. *Eisangelia: The Sovereignty of the People’s Court in Athens in the Fourth Century B.C. and the Impeachment of Generals and Politicians* (Odense 1975)
—. *Athenian Democracy in the Age of Demosthenes* (Norman 1999)
—. *Democracy and the Rule of Law in Classical Athens* (Cambridge 2006)
U. Kahrstedt, ‘Untersuchungen zu athenischen Behörden II. Die Nomotheten und die Legislative in Athen’, *Klio* 31 (1938) 1-25
—. *The Composition of Aristotle’s Athenaión Politeia* (New York 1992)
—. *Law and Justice in the Courts of Classical Athens* (Cambridge 2006)


J.D. Lewis, ‘Isegoria at Athens: When Did It Begin?’ *Historia* 20 (1971) 129-140


—. *The Law in Classical Athens* (Cornell 1978)


J. Miller, ‘Democratic Characterizations of Democracy,’ *History of Political Thought* 22 (2001) 400-17


—. *The Athenian Revolution* (Princeton 1996)


—. *Athens and Athenian Democracy* (Cambridge 2010)


M. Piéart, ‘Qui étaient les nomothètes à Athènes à l'époque de Démosthène?’, in E. Lévy (ed) *La Codification des lois dans l’antiquité* (Paris 2000) 229-56


—. ‘Eisangelia in Athens’, *JHS* 99 (1979) 103-14
—. ‘Athenian Democracy after 403 BC’, *CJ* 75 (1980) 305-23
—. ‘Nomothesia in Fourth Century Athens’, *CQ* 35 (1985) 55-60
—. ‘Political Activity in Classical Athens’, *JHS* 106 (1986) 132-44


E. Robinson, *Democracy Beyond Athens* (Cambridge 2011)


A. Saxonhouse, *Free Speech and Democracy in Ancient Athens* (Cambridge 2006)


R. Sealey, ‘The Entry of Pericles into History’, *Hermes* 84 (1956) 234-47
—. ‘Ephialtes’, *CP* 59 (1964) 11-22
—. *The Athenian Republic* (University Park 1987)


E. Staveley, *Greek and Roman Voting and Elections* (Ithaca 1972)

S. Todd, ‘The Use and Abuse of the Attic Orators’, G&R 37 (1990a) 150-78
——. ‘Lady Chatterley’s Lover and the Attic Orators’, JHS 110 (1990b) 146-73
——. The Shape of Athenian Law (Oxford 1993)
N. Urbinati, Mill on Democracy: From the Athenian Polis to Representative Government (Chicago 2002)
H. Wade-Gery, Essays on Greek History (Oxford 1958)
D. Whitehead, The Demes of Attica 508/7-c.250 BC (Princeton 1986)
H. Wolff, ‘Normenkontrolle’ und Gesetzesbegriff in der attischen Demokratie (Heidelberg 1970)