A perception of decline appears in many classical Athenian texts. The exceptional valour of those who had died in past battles was ritually celebrated in public funeral orations; what “your ancestors” would have made of present preoccupations was bewailed; and the heroic Marathon generation, which had turned back two Persian invasions in the early fifth century BC, was a frequent source of both honour and self-reproach.2

It is not clear how seriously we should take these lamentations. Reverence for ancestors was entrenched in ancient Greek culture and similarly unflattering comparisons of current and past generations had appeared in much earlier texts.3 Equally, staunch pride in the achievements of contemporaries appears in some late classical evidence.4 Nonetheless, much twentieth-century scholarly writing on classical Athens suggested a narrative of fifth-century glory followed by fourth-century decline. The era of the Persian and Peloponnesian wars, taking in Aeschylus, Pericles and the building of the Parthenon, formed the centrepiece of historical accounts, while the years between Athens’ defeats by Sparta in 404 and by Macedon in 338 and (more comprehensively) in 322 were treated more summarily or not discussed at all.5

The incomparable Mogens Hansen has done more than anyone to refocus attention on fourth-century Athens (particularly 355-22), arguing convincingly not only that the democracy in the age of Demosthenes differed significantly from that of Pericles but also that the vastly richer philosophical, oratorical and epigraphical sources of the fourth century should make it the centre of gravity of histories of the period.6 Hansen’s monumental achievements leave all subsequent students of ancient Greek history with an unpayable debt. Yet in one respect he has—unnecessarily, I will suggest—continued to foster the decline narrative associated with the earlier historiographical tradition. At issue is the interpretation of a series of reforms passed towards the end of the fifth century, which had the effect of expanding the political powers of Athens’ judges (dikastai) at the direct expense of those of assemblygoers.7 Hansen, like many others before and after him, interpreted this as a move from the “radical” democracy of the fifth century to a more “moderate” (later “modified”) system in the fourth.8 And while numerous scholars have disputed Hansen’s view of the ultimate significance of the reforms, most nonetheless agree that the courts’ new powers were intended to limit what the Athenians could do to themselves politically and to that extent represented a constraint on democracy.9

This is exactly what a subject of a modern constitutional democracy would expect. The judiciary, in such systems, is indeed meant to limit what “the people” (or their representatives) can do to themselves. But it is not clear that the relationship between Athenian judges and assemblygoers should be understood in these terms. In particular, we cannot assume that late fifth-century Athenians regarded their courts as a less democratic forum than the assembly, since in both cases, among other things, decisions were made by ordinary citizens voting en masse.10 Indeed, I will argue that judicial panels may have been regarded as a significantly more reliable vehicle of the rule of the dêmos, conceived as the collective common people as distinct from
those who took leading political roles. From this perspective, far from moderating democracy, the reforms of the late fifth century seem designed to render it more extreme.

This chapter thus proposes a new interpretation of the era of Athenian legal reform, generated not from new evidence but by questioning the arguably anachronistic assumption that Athenian judicial bodies were a moderating force. This anachronism is worth excavating not only for historiographical reasons but because it helps to illuminate one of the limits of the modern idea and practice of democracy. Lacking democratic control of the administration of justice ourselves, it has proven difficult to appreciate fully its role in advancing and preserving democracy in the past. Ultimately this points towards what we may call the “decay” of democracy between ancient times and the present—that is, its fragmentation into distinct parts and the subsequent loss of one of those parts, perhaps even the most important. This is a subject of political as much as historiographical significance.

The late fifth-century legal reforms
Between 410 and about 399 BC, roughly halfway through the classical democratic period, the Athenians passed a series of reforms that, formally at least, significantly altered the balance of power between the assembly and judicial panels, arguably giving judicial panels the upper hand.

First, beginning in 410, paused in 404, and continuing in 403/2, the Athenians organized the revision and reinscription of their laws and established a new public legal archive, making it easier to bring cases to court and hence to secure convictions.

Next, in 403/2, a new distinction between a law (nomos) and a decree (psêphisma) was laid down, along with a new law-making procedure (nomothesia). In the latter half of the fifth century the assembly had enacted all legislation and policy without differentiating between them, but as of this date the power to make law, i.e. permanent general rules, was passed to a new body, the nomothetai or ‘lawmakers’, several hundred sworn judges who voted their decisions following what looked rather like a trial of the proposed law, with nominated speakers arguing for and against it. The assembly retained responsibility for convening the nomothetai but from this point on was empowered to approve only decrees, which were defined as policy decisions of an explicitly lower status than laws. No decree could trump a law, and if any were found to conflict, the decree was to be abolished.

Also around 403/2, the indictment for proposing an inexpedient law (graphê nomon mê epitêdeion theinai) was invented. This procedure allowed the proposer of a law to be prosecuted for making a disadvantageous proposal, even if the laws in question had already been approved by the nomothetai. Conviction abolished the law, and if the case had been brought within a year of the original vote the defendant was also liable to a penalty, not excluding the death penalty. This charge paralleled one established at least twenty years earlier, the indictment for making an illegal proposal (graphê paranomôn), conviction under which led to rescission of the enactment and a fine, or on the third offence, loss of citizenship. Acquittal with respect to an as yet unapproved proposal, however, had the effect of enacting it. After the invention of the indictment against inexpedient laws, the indictment against illegal proposals was used only against decrees.

Accordingly, as Hansen emphasized, from the beginning of the fourth century, everything decided by the Athenian assembly could be ultimately reversed by a court, but nothing decided
by a court could ultimately be reversed by the assembly. This, he suggested, constituted a sea change in the character of Athenian democracy. The fifth-century sovereignty (later “supremacy”) of the assembly had given way to the fourth-century supremacy of the courts; the radical democracy of post-Periclean Athens had been replaced by the more moderate (later “modified”) system of the age of Demosthenes. Similarly, Martin Ostwald discerned a shift from “popular sovereignty” to the “sovereignty of law”; Raphael Sealey, from democracy to “republicanism and the rule of law”; and Walter Eder, from unlimited popular sovereignty to a constitutional system proper to a mature democracy. To these historians, it seemed clear that the raw power of the dēmos had been constrained, if not absolutely reduced.

Others disagreed, advancing two strong counter-arguments. The first was that whatever the Athenians’ intentions, the effects of the reforms had been insignificant. According to Josiah Ober, Hansen and the rest had fallen into what Moses Finley had called the “constitutional-law trap,” namely the belief that the outward form of institutions can tell us anything significant about political practice. As Hansen himself acknowledged, the new legislative procedures had seldom been used. By the mid-1970s, only five stone stelai bearing laws enacted by nomothetai had been discovered. The indictment for proposing an inexpedient law was likewise rare. By contrast, we have on stone over five hundred fourth-century decrees, suggesting that most political business had continued to be done by the assembly. Many historians felt the Athenians had 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 remained responsible for convening the nomothetai and voting their pay and judges proved unwilling to annul new decrees unless a formal violations of a prior law could be shown. As for the new law-code, attempts to maintain its coherence appeared to have proven unsustainable.

The second counter-argument was bolder still. This was that even if the reforms had a significant practical effect, they could not have wrought any great change in the character of Athenian democracy, because it was not the kind of thing that could be affected by institutional change of that sort. Most importantly, scholars argued that judicial bodies were no less democratic than the assembly. Both represented (or were manifestations of) the dēmos, so shifting tasks from one institution to the other hardly mattered. Like the assembly, judicial panels were composed entirely of ordinary citizens. As had often been suggested, 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 criticized as anachronistic, reflecting nineteenth-century political groupings more than anything authentically Athenian.

The dispute seemingly ran deep. Yet consensus subsisted on one key point. Whatever the ultimate effect of the reforms, scholars in both camps agreed that they represented an attempt at self-restraint after the trauma and instability of the last years of the fifth century. The catastrophic failure of the Athenian invasion of Sicily in 415-13, the loss of many important allies, naval disaster at Arginousai in 406 and the subsequent execution of nine of Athens’ ten generals, final defeat in the long-running war against the Peloponnesians and perhaps most traumatic, two oligarchical takeovers, one in 411 and one in 404, both actually legitimated by a vote of the assembly, had made the Athenians want to limit the damage they could do to themselves politically. They thus sought a “brake” to “slow down the machine.”

“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.” Above all, they hoped to prevent “snap votes” and “hasty decisions.” The new measures offered a “pause for thought” and the “opportunity to reconsider a decision they had themselves taken,” thus counteracting “unthinking haste and passion,” “rabid tendencies” or even “mass psychosis” 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.” Accordingly, they “enacted constitutional measures aimed at correcting the problem.”

This picture reprises a widespread modern interpretation of the relationship of judicial bodies 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 has Athenian judicial activity been conceived as a check on untrammelled democracy, where untrammelled democracy is identified with the unrestrained rule of the assembly. The division of labour in this schematization is clear. The Athenian assembly represents the fully democratic “self,” judicial bodies “restraint.”

This conceptualization reflects the enduring representation of the assembly as the heart of Athenian democracy. It was, it is said, the “key decision-making body in the Athenian state,” the “prime democratic body,” the “supreme power of the state,” “in a very real sense a sovereign body,” the “crown” of the political system, the embodiment of “absolute democracy.” The assembly has not, of course, been represented as the only significant democratic body in Athens. As is always emphasized, the council, courts and offices were also democratically constituted and played important political roles. Yet although it has occasionally been suggested that other institutions were more powerful than the assembly—the courts, as Hansen argued, or earlier historians the council—no one has suggested that another institution may have been more democratic, that is, more proximate to the démos and a better vehicle of its rule. Indeed there would seem to be a very good reason for that: the word démos itself often directly indicated the assembly. Thus it would seem highly paradoxical to suggest that any institution could have been more thoroughly implicated in the rule of the démos than the assembly itself.

Nonetheless, it is possible that although Athenian judicial panels were certainly distinct from the démos conceived as the assembly—a point surely underlined by the fact that the Athenians wished to transfer power from one institution to the other at all—judicial panels were regarded as a better vehicle of the démos’s will when démos is conceived more broadly as the collective common people. Some such formulation, at any rate, must seem attractive, because there is otherwise a real puzzle here. For there is no evidence that the Athenians regarded judicial activity as a restraint on the démos. To the contrary, our sources suggest that the courts were regarded as the most demotic (démotikon) element in the political system, that is the institution most reliably on the démos’s side and historically—as it turns out—most integral to its rule.

A comprehensive review of the evidence is impractical, but the following items stand out. Aristotle, in the Politics, identified Athens’ courts as the “demotic element” in Solon’s political system in the early sixth century (as compared to the “aristocratic” elected offices and “oligarchic” Areopagos council) and cast them as the vehicle through which the démos had achieved supreme power in the community overall. Similarly, the Aristotelian Constitution of
The Athenians argued that of the three reforms of Solon said to have most advanced the power of the dêmos, the most important was the right of appeal to a popular court, because “when the dêmos is master of the vote”—that is, the psêphos, the voting-ballot used in the courts but not in the assembly—“it is master of the political system.” The same author asserted that since 403 the Athenian dêmos had been “continually increasing the power of the majority,” a claim today judged “mistaken,” but which may make some sense if the transfers of power to judicial agents mentioned subsequently can be understood as democratizing moves.

The democratic significance of judicial activity also loomed large in fourth century rhetoric. Lycurgus said that 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 judges as democracy’s “guards”; and Demosthenes argued that it was only the control of the laws by Athens’ judges that protected the dêmos from the depredations of the elite. Another orator complained about certain phrases which had “passed into your common speech,” such as “in the law-courts lies your salvation” and “it is the ballot box that must save the state”—the ballot box, that is, used exclusively in the courts. A couple of generations earlier, Thucydides had portrayed Athenians as exceptionally litigious, while the passion for judging, especially of the relatively poor, supplied the plot of Aristophanes’ Wasps (422) and formed a running joke in numerous other plays. 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 Constitution of the Athenians attributed to Xenophon also devoted considerable space to the courts and concluded that their construction could not be altered without materially weakening the dêmos’s control of the political system. Finally, our most striking witness to the democratic significance of the classical Athenian courts is Plato. It is very suggestive that throughout his work, when the judgment and capacities of “the many” (hoi politoi) are attacked, the institutional context is more often than not the courts.

Some of these points may seem inconclusive. The philosophers are often considered unreliable on the topic of 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 the vast majority of 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, extant assembly speeches, where one might expect to find flattery in equal measure, contain no equivalent claims.

In the absence of any positive sign that judicial activity was perceived at the time as a restraint on the dêmos, we may consider another interpretation. In transferring significant political power from the assembly to judges at the end of the fifth century, the Athenians sought not to limit the authority of the dêmos, broadly conceived, but to augment and entrench it. They hoped to render their system of government neither less nor equally democratic, but more so, because judicial panels were both more impervious to domination by the political elite and played a greater role in disciplining them.

This interpretation makes especially good sense if the reforms are understood as a response to the traumas of the late fifth century, particularly the two coups. The conventional interpretation implies that Athenian democrats, fresh from victory over their oligarchical
opponents, actually blamed *themselves* for their previous loss of power.\textsuperscript{72} But our sources do not support that. Rather, Athenian voters seem to have been straightforwardly angry with the conspirators. That is the message of the decree of Demophonatos, passed in 410 after the first coup had been put down, which directed that any individual who attempted to suppress democracy might in future be killed on sight.\textsuperscript{73} It is also implied by the claim, found in several sources, that the assembly, in legitimating the coups, had been forced by fear and deceit to vote against its wishes, not that it had itself erred.\textsuperscript{74} Anything else, in fact, would have contradicted a core tenet of Athenian democratic ideology: that the *dêmos* was always right and any fault, when things went wrong, lay not with voters but with the speakers who had misled them.\textsuperscript{75} This interpretation also makes better sense of the indictments against illegal proposals and disadvantageous laws. It is hard to believe that these measures had different goals, yet why the *dêmos* should have been aiming at self-restraint in the 420s or earlier is unclear.\textsuperscript{76} More likely both aimed at combatting the subversion of democracy by the elite.\textsuperscript{77}

Yet why exactly should late fifth-century Athenians have supposed that transferring political power from the assembly to sworn judges would tighten the *dêmos’s* grip on power? A comparison of the composition, procedures, and functions of the assembly and courts around the turn of the century suggests several possible answers. Taken together, it seems plausible that although (as the author of the *Constitution of the Athenians* asserted) the fourth-century Athenian *dêmos* ruled through both *psephismata* and *dikastêria*, that is decrees and courts, in the immediate aftermath of the coups the courts will surely have been regarded as the more demotic partner, especially following certain procedural refinements established around 409 BC.\textsuperscript{78}

*The assembly and judicial panels compared*

The Athenian assembly, as is well known, was open to all adult male citizens.\textsuperscript{79} This did not mean that all could attend.\textsuperscript{80} Until the 330s, when it was greatly expanded, the assembly’s usual meeting-place on the Pnyx held between six and eight thousand people, only about a fifth of the citizen population.\textsuperscript{81} But there were no other limitations on entry. Those who wanted to take part simply had to arrive at dawn and find themselves a seat.

Judicial panels were significantly smaller. A minimum of 500 citizens heard public cases (which included all political ones), while private cases were heard by at least 200, though larger panels were common.\textsuperscript{82} Most important, entry was tightly controlled. Those wanting to judge first had to get on the judicial roll, which comprised some six thousand people chosen annually by lot from volunteers over the age of thirty.\textsuperscript{83} Those selected swore the judicial oath and received an official nametag (*pinakion*). For most of the fifth century, judges seem to have been assigned to a particular court for the entire year, but in or just after 409 they began to be allotted to a different court each day and to a specific seat within the court.\textsuperscript{84} Whoever wished to serve henceforth had to turn up outside the courts at dawn, hand in his nametag and wait to see if he were chosen, again by lot.\textsuperscript{85} After this the selection and case-assignation process became ever more sophisticated, until by the late 330s it involved nine rounds of sortition.\textsuperscript{86}

One might assume that the greater size of the assembly automatically made it more democratic, but it is not clear that the Athenians thought that way. One anonymous, likely early fourth-century writer remarked that even in ostracisms, when all citizens were entitled to 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." On this view, the size of the decision-making body was less important than its construction, and here two points demand attention.

One is the social make-up of the two bodies. As far as we can tell from the little evidence available, the assembly attracted a relatively broad mix of rich and poor. Xenophon’s Socrates mentions “fullers, shoemakers, builders, smiths, farmers, merchants, and profiteers”; Plato’s suggests that a speaker might be “a blacksmith, shoemaker, merchant, sea-captain, rich, poor, of noble family or low-born”; and Theophrastus, a couple of generations later, sketched an oligarch “ashamed” to find himself sitting next to a “scrawny, unwashed type.” Closer to our period, Aristophanes’ Dikaiopolis, in Acharnians (425), is a farmer living in the city for the duration of the war, while Demos, in Knights (424), is represented as a grumpy, half-deaf old countryman. By contrast, the courts were consistently represented as attracting a greater proportion of poorer citizens. The poverty of judges is a running joke in Aristophanes, particularly Wasps, where the chorus-leader is depicted as unable to provide anything other than knucklebones as a toy for his son and claims the family will be unable to eat if he cannot judge. No doubt Aristophanes exaggerates for comic effect, but there is a good reason to think that this was a caricature rather than a simple fiction. This was the provision of payment for judging, instituted by Pericles in the mid fifth century, we are told specifically in order to strengthen his popular power base against that of his wealthy rival Cimon. The stipend was not huge: two obols initially, increased to three by Cleon in 425. But the Aristotelian Constitution of the Athenians suggests that it had the expected effect. Some people, at least, said that the “deterioration” of the courts heralded from this time, since “ordinary persons always thereafter took more care than the respectable to cast lots for the duty.” Payment for attending the assembly was eventually introduced as well, but the intervening fifty years was more than long enough for the perception that the courts were comparatively dominated by the lower classes to become entrenched. The other notable feature of the courts’ composition was the difficulty of stacking or otherwise corrupting judicial panels. Though the assembly’s openness may, on first consideration, seem to be democracy-enhancing, it may not have been regarded as an unmixed blessing by the least powerful. For one thing, it was possible to manipulate the outcome of votes by arriving earlier than one’s opponents and with more supporters in tow. An extreme form of such manipulation was one factor in the success of the 411 coup: the meeting had been moved to small location outside town, near the Spartan military camp, thus discouraging anyone without his own shield and spear (i.e. the poorer part of the population) from attending. In addition, many poorer citizens were away with the fleet, and the result was the abolition of democracy. Another example is the vote on the Arginousae fiasco, when (according to Xenophon) the ships’ captains succeeded in pinning the blame on the generals at least in part because they recruited bereaved relatives, or those who claimed to be relatives, to turn up, begging for retribution. Similarly, Thucydides’ Nicias accused Alcibiades of packing the assembly for the vote on Sicily, while Demosthenes, a couple of generations later, suggested that “three hundred to do the shouting” were part of the entourage of any successful politician. Aristophanes’ Assemblywomen (c.392) provides the most amusing evidence of the assembly’s vulnerability.
The conspirators arrive first thing in the morning, fill the front benches, and the result is a women-only government.101

Such shenanigans would have been impossible in the courts. In 409, the well-known general and political figure Anytus (later one of the prosecutors of Socrates) became notorious as the first person ever successfully to bribe an entire judicial panel, but that was before the Athenians began the practice of assigning judges to courtrooms by lot; after that tampering became much more difficult.102 The nametag-sorter (himself randomly selected) could still make the choice of given individuals slightly more or less probable, and judges could still be lobbied on the way to courtrooms, though later in the fourth century an enclosed complex helped to minimize harassment.103 But it was certainly much harder to shape or corrupt judicial panels than the assembly.

Trial procedures also supported the independence of judges. In the assembly, almost anyone who wished could speak and everyone present could vote.104 These features are often deemed distinctively democratic, but on closer inspection things look more complicated. Though perhaps some 2-5% of the citizen population sponsored a motion or an amendment at least once in their lives, this did not, in fact, entail making a public speech.105 Many motions were launched, in writing, in the council, and a subsequent oral defence appears not to have been required.106 Moreover, at least in the mid-fourth century, even amendments launched from the assembly floor could be submitted in writing, read aloud by the secretary, and immediately put to the vote.107 The acoustics of the Pnyx were also challenging. Not for nothing, it seems, did Aristophanes describe the Knights’ Demos as “half-deaf”: reconstructions suggest that one would certainly have had to be a trained speaker in order to be heard, and even then, in ideal conditions, only about half the audience will regularly have been able to make out what was being said.108 Altogether, the evidence suggests that a much smaller group of regular speakers, perhaps twenty to forty at any one time, dominated the stage.109 The vast majority of assemblygoers communicated through heckling and voting alone.110

Accordingly, the problem for ordinary voters was how to make use of its orators without being ruled or abused by them—no easy task.111 Thucydides considered Pericles’s rhetorical gifts a major factor in the outbreak of the Peloponnesian war, while Cleon’s almost provoked mass slaughter in Mytilene.112 Alcibiades helped to restart the war with the Peloponnesians by deceiving the assembly, and the main speaker in favour of executing the Arginousae generals in 406 was alleged by Xenophon to have been bribed.113 Most striking, nearly everyone involved in the two coups was a well known political figure. The leading conspirators in 411 (with the single exception of the shadowy Antiphon) had all been thought to be committed democrats, while the men who became known as the Thirty Tyrants had been entrusted by the assembly with the task of producing new laws.114

The courts could not resolve the power disparity between speakers and listeners, but restrictions on speech arguably ameliorated it. Any citizen could bring a public suit, and speakers could argue whatever they wished, though they might later be charged with false witness.115 But only litigants and co-pleaders specified in advance were allowed to address the judges,116 strict time limits were enforced,117 and perhaps most importantly, the judges did not discuss cases among themselves. As soon as both sides had been heard, they began to vote. As in the assembly, heckling during the speeches was common, and conversation was 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 almost certainly deliberate. Aristotle reports that most legislators explicitly prohibited discussion among judges. As a result, the final decision reflected the will of each voter equally, rather than the views of the most rhetorically powerful in the group.

Still more important, the independence of judges was preserved by the secret ballot. In the assembly, as noted, everyone could vote, but with thousands in attendance and numerous (Hansen suggests regular minimum of nine) decisions to be taken at every meeting, this required open voting, i.e. by raising hands (cheirotonia). With this came vulnerability to intimidation. Both Thucydides and Lysias emphasized the chilling effect on voters of the reign of terror in the city immediately prior to the 411 coup. One democratic leader had been killed and further violence and reprisals seemed likely. As Thucydides observed, it was no surprise that when the abolition of democracy was proposed, no one voted against it.

In the courts, however, all votes were cast secretly, and again, the process was refined over time. Down to at least 405, judges had a choice of two voting urns, one representing the prosecutor, the other the defendant. The urns were placed side by side with a wicker funnel covering the openings, so when a judge dropped his ballot in it was hard for an onlooker—either a fellow judge or a spectator—to see which he had chosen. By 345, each judge had two ballots, a pierced one representing the prosecutor and an unpierced one representing the defendant. When held between thumb and forefinger it was impossible to tell which was which, and judges simply dropped the one they wished to count into a bronze urn, the discard into a wooden one. Both systems protected judges from possible reprisals or the promise of rewards, arguably making judicial decisions a better reflection of the will of those involved than those of the assembly. As Lysias commented when prosecuting Eratosthenes for his actions during the reign of the Thirty, “Nobody today is compelling you to vote against your judgment.” Demosthenes, a couple of generations later, agreed. The ballot ensured that “every one of the citizens, being completely free from interference, may decide for himself.”

All these features preserved the integrity of judicial activity. Certain others may have enhanced the sense that the courts were a demotic stronghold. One was the age of the judges: they had to be over thirty, possibly because young men were often perceived as unreliable, emotionally immature, and more likely than others to support oligarchy. The judicial oath, which included clauses against oligarchy, tyranny, the subversion of democracy and accepting bribes, also surely boosted the courts’ credibility. But perhaps the most powerful reason late fifth-century assemblygoers were happy to transfer political powers to judicial panels was their traditional political function.

Aristotle, in the Rhetoric, distinguished between two political tasks: deciding what was advantageous (sympheron) for the community, which he assigned to assemblies, and deciding what was just (dikaion) within it, which he assigned to courts. Athenian politics supported this distinction reasonably well. The assembly determined state policy: war, peace, foreign affairs, defence, public finance, expenditures, imports and exports, and until 403/2 legislation. 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. The courts judged all other disputes, as well as the scrutinies (dokimasiai) and audits (euthynai) of those entrusted with
personal political responsibility, including orators. And it seems possible that the power to decide what was just was deemed more essential to the démos’s rule.

For one thing, deciding what was just seems traditionally to have been perceived as the supreme political function. It is judicial activity, not that of a council or assembly, that is in the Iliad represented as emblematic of a community at peace. Equally, the primary task of princes in Hesiod’s Works and Days is to dispense justice, Herodotus attributed Deioces’ rise to power wholly to his standing as a judge, Aeschylus, in the Oresteia, tied political stability specifically to judicial institutions, Aristotle called dikê, “the decision of what is just,” “the backbone (taxis) of the political community,” and Cleanthes, the Stoic philosopher, defined polis as “a habitation where people seek refuge for the purposes of the administration of justice.”

For another, judicial activity was especially implicated in the rise of democracy in Athens. As we saw earlier, Aristotle, in his only sustained discussion of Athenian politics, put the démos’s control of the courts centre stage. He also represented Ephialtes’ and Pericles’ use of the courts to dock the power of the council of the Areopagos around 462 as a major watershed. Conversely, the only thing on the agenda at the 411 meeting when the coup was launched was the suspension of the rights of citizens to impeach speakers and to prosecute them for making illegal proposals. The Thirty, in 404, also immediately rescinded these powers, as did Antipater in 322.

Why were the courts’ political powers so important? The answer arguably lies in the control they gave the collective people over those who performed individual political roles, either self-selected (such as drafting motions or making speeches), elected (such as acting as an ambassador or a general), or assigned by lot (such as acting as a councillor or minor official). Not all such roles were equally powerful. Councillors and other minor officials had relatively little decision-making power, though they were nonetheless carefully scrutinized pre-tenure, subject to votes of confidence and audits while in office, and given a final audit (euthyna) on stepping down. Generals and démagógoi, “leaders of the démos,” also called rhêtores, “orators” or “politicians” (who were also likely candidates for ambassadorial roles) had in principle equally little or even less formal decision-making power, but they had far greater influence, and it was this that judicial action sought to constrain. Initially, the principal mechanism was impeachment, used to launch prosecutions concerning (for example) treason, taking bribes or lying to the démos, but from the mid-fifth century audits, too, were used, at least against generals and ambassadors. Hansen has minimized the significance of the audit, as it seems not to have led to many prosecutions; but we may equally suppose that office-holders behaved well because they knew that any malfeasance was almost certain to be caught. And the same logic may be seen in the indictments against illegal proposals and disadvantageous laws, which made rhêtores more generally subject to judicial control.

A passage from Aristophanes’ Knights suggests how the assembly and courts worked together to maintain the démos’s power over its leaders. Towards the end of the play, the chorus of knights, members of Athens’ second-highest socio-economic class, accuse Demos of being too easily manipulated by politicians. 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.” What is notable are the locations of this “raising” and “swatting” respectively. As the knights (who do not contest 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 wicker funnel used to conceal judges’ votes as a “probe.”

What is regurgitated in the play is money. Yet it may also be interpreted as power. The dominance of political leaders in the assembly, predicated on the démos’s sufferance, is reversed in the courts, where they can be humiliated at the démos’s hands. This suggests two points. First, the interdependence of the assembly and courts: rule by the démos requires both. And second, the final significance of demotic judicial power. The “fattening” process to which Demos refers would be self-undermining without some way of recovering the goods, and to that extent the ultimate political security of the démos is predicated on its control of the judicial function.

The scale of judicial action against political leaders in Athens has been regarded with dismay. Aristophon boasted that he had been taken to court 75 times under the graphê paranomôn and been acquitted every time; others were not so lucky. Hansen has called the number of politicians targeted by impeachment “a serious defect in the system,” and other historians agree. As Knox has emphasized, nearly all known politicians eventually faced conviction, including famous figures such as Pericles and Demosthenes, often spelling the end of their careers or even lives. Two interpretations are suggested: either the Athenians persecuted many honest men, or they were incapable of selecting honest leaders. Yet there is a third possibility. Once-honest men may become lax, and a low tolerance for dubious behaviour may be appropriate in politics. Moreover, if chicanery seems to have been rife in Athens, one may wonder how much dubious activity escapes notice under less robust systems of detection.

Either way, this aspect of judicial activity suggests another reason why late fifth-century assemblygoers chose to expand the political power of judges at their own expense. They were not seeking to restrain themselves. Rather, as was conventional, they were seeking to limit the freedom of their political class. The indictments against illegal proposals and disadvantageous laws brought those who advanced new policies and legislation under the purview of the courts; the review and reinscription of the laws and the new legal archive made prosecutions easier; and nomothesia reduced the advantage held by gifted speakers and organizers in the assembly by transferring decision-making power to a more demotic organ. Each reform put politically influential individuals one step further from power and thus strengthened the démos’s rule.

Conclusion: democracy’s decay

The feeling that modern political life lacks something found in ancient Greece—once amusingly dubbed “polis envy”—has become a cliché. In Farrar’s words, “We admire what we think the Athenians had, we want it, we fear it, we suspect it is unattainable, we are determined to do without it.” At least two forms of loss have been well rehearsed. Ancient Greek démokratia was direct democracy, meaning that ordinary voters decided law and policy, whereas modern democracy is representative, meaning that a small number of specially selected individuals decide them on behalf of everyone else. And ancient democracies typically used lot rather than election to select office-holders. The Greeks called government by election “aristocratic,” since its alleged purpose was to choose hoi aristoi, “the best,” but today, elections are widely regarded as the best if not the only way to realize democracy.

These changes may be interpreted a form of decay not only in the general sense of deterioration over time, but also for a more precise reason. “Decay” suggests the breakdown of
something into its component parts and the subsequent loss of one or more of those parts, and that is precisely what we find if we compare the extent of the political power enjoyed by voters in Greek democracies—not only Athens but there perhaps above all—with that of voters today.

Of the two political functions identified by Aristotle, citizens en masse retain at least an indirect influence over what is deemed advantageous for the community, but remarkably little over what is deemed just. Even when juries are used, they are extremely small, often handpicked, potentially dominated by charismatic speakers, authorized to decide only fact rather than law, and subject to instruction from a presiding judge. Moreover, they play no role in either the judicial review of legislation or in disciplining politicians and office-holders. Aristotle treated elections and audits together: the one presupposed the other. Today, the principal method of disciplining politicians is simply to elect someone else at the next opportunity.

By Athenian standards, this represents a significant loss. Yet it is a loss of which most modern citizens are not conscious. Even historians, despite knowing perfectly well that Athens’ courts were highly democratic and played a significant political role, have been less sensitive than they might have been to the differences between judicial activity in ancient Greek democracies and today, interpreting Athenian judicial activity as a form of self-restraint in the absence of any evidence that contemporaries shared that perception. To be sure, both scholarly camps were right in at least one respect: Hansen et al. that the reforms were a significant step, their critics that the democracy was not thereby rendered more moderate. But in the ideological context of the late twentieth century, the possibility that the democracy was rendered more extreme did not surface easily. And that, surely, reflects the fact that modern democracies lack the demotic control of the administration of justice that the ancients took for granted. If any decline in the power of the démos is in view here, it is not within the classical period, but between ancient times and our own.

What then changed? No doubt many factors are involved, but one, perhaps, dates back to the classical era itself. There exists today 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. This claim may be traced back to Athenian democracy’s best-known critic, Plato. Ancient Greek democrats seem to have taken the perceptions of the community to be the only available benchmark of what is just, but Plato’s justice is transcendent, something that only a small number of specially trained or inspired people can access. And it is Plato’s conceptualization, not that of his fellow citizens, that continues to influence our thinking about justice today. What Athenian democrats took to be the “bulwark” of democracy, the control of the administration of justice by ordinary people, now looks far-fetched, even dangerous. Rather, professional judges—the modern analogue of Plato’s philosophers—are expected to deliver the right results for the rest of us.

If so, this suggests something else about political decay. The systemic breakdown and loss of institutions over time may be the result neither of nature nor of chance but of will. Human interventions, including intellectual interventions, may help to generate what would later appear to be enduring background conditions. And successful ideological innovations tend to obscure their own origins. It follows that diagnosing decay in this context is especially difficult. It requires an observer capable of entering imaginatively into two states, the pre- and the post-decay. Without such an observer, change becomes invisible, taken for granted, and hence more
difficult to remedy. For this reason, comparing ancient and modern democracy may be not just an interesting historical exercise but also a useful political one. Plato, no doubt, would find the modern practice of partly democratizing the initial development of law while outsourcing its final approbation, interpretation, and application to small bodies of highly trained and entirely unaccountable experts quite acceptable. An Athenian democrat, on the other hand, would fear that the lack of demotic control of the administration of justice invites the oligarchical capture of the entire political system. What to make of this is worth pondering.
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Hes. _WD_ 109-201.

Hyp. 6.1.


M.H. Hansen, _Athenian Democracy in the Age of Demosthenes_ (Norman, Okla., 1999), 21-2.

_Dikastês_ may also be translated “juror,” e.g. A. Lanni, _Law and Justice in the Courts of Classical Athens_ (Cambridge: Cambridge University Press, 2006), 38. I slightly prefer “judge,” since _dikastai_ did not discuss cases and had complete authority to decide fact, law and penalty.


This interpretation is defended in D. Cammack, “The _Demos_ in _Dêmokratia_,” forthcoming.


That is, citizens who had taken the judicial oath and were thus allowed to serve as judges.


Andoc. 1.17, 22; Ostwald, _Popular Sovereignty_, 125-9, 135-6; Hansen, _Athenian Democracy_, 205-12.


Sundahl, “Rule of Law,” 139.


Harrison, “Law-Making,” 35; Sinclair, Democracy, 67, 83-4; Bauman, Political Trials, 2, 77-8; Hansen, Athenian Democracy, 307-8, 351; Lanni, Law and Justice, 142; Todd, Shape, 55 n.4.

Todd, Shape, 55 n.4.

Finley, Democracy, 27, cf. 118; Finley, Politics, 55.

Finley, Democracy, 72.

Sundahl, “Rule of Law,” 137.

Hansen, Sovereignty, 50.


Ober, Mass and Elite, 7.

R. Osborne, Athens and Athenian Democracy (Cambridge: Cambridge University Press, 2010), 27.


Jones, Athenian Democracy, 3.

Finley, Democracy, 49-50.

Glotz, Greek City, 162.

Hansen, Athenian Democracy, 178-9, 225-6, 247; Sinclair, Democracy, 17-20; Forrest, Emergence, 16-20.

Hignett, Constitution, 242-3; Gomme, More Essays, 177-93; Ehrenberg, Greek State, 56; Rhodes, Boule, 64-81, 213-23; Laix, Probouleusis, 192-4; Sinclair, Democracy, 84-8.

As in the enactment formula of many extant decrees, “it was decided by the council (boulê) and assembly (dêmos).” Cf. M.H. Hansen, “The Concepts of Demos, Ekklesia and Dikasterion in Classical Athens’,” Greek, Roman and Byzantine Studies 50 (2010): 502-3, 507.

As noted by Blanshard, “What Counts?” 29.

Dêmotikos is often translated “democratic,” but agents or actions may be demotic, that is, “in favour of (or in the interests of) the dêmos” (P. Cartledge, Ancient Greek Political Thought in Practice (Cambridge: Cambridge University Press, 2009), 49) without dêmokratia obtaining overall—for example, Solon and his reforms.

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See further Cammack, “Demos.”


Lycurg. 1.3, Aeschin. 3.7, Dem. 21.222-5. Cf. Lycurg. 1.4, 138, Aeschin. 1.4-5, 3.6, 23, Dem. 7.7, 24.2, 24.37, 152, 57.56; Din. 3.15.

Dem. 13.16, tr. Vince.


Hansen, *Sovereignty*, 18; Todd, *Shape*, 150-78.


As suggested but not pursued by Rhodes, “Stability,” 68.


Andoc. 2.27; Aeschin. 2.176; Lys. 12.72-75, 90; Ps. Aristot. *Ath. Pol.* 29.1, 34.3.

Ps. Xen. *Ath. Pol.* 2.17; Thuc. 2.59 (though cf. 2.60), 8.1; Xen. *Hell.* 1.7.35; Dem. 20.3-4, 23.97; Ps. Aristot. *Ath. Pol.* 28.3.


This is not always made clear. E.g. Finley, *Democracy*, 19: the assembly was “an outdoor mass meeting of as many thousand citizens...as chose to attend on any given day.”


Andoc. 1.17.


Ps. Aristot. *Ath. Pol.* 27.5; Ps. Xen. 3.7; Boegehold, *Lawcourts*, 34.

Aeschin. 3.1; Dem. 19.1, 332; Boegehold, *Lawcourts*, 14, 22, 33, 36-7; Dow, “Aristotle,” 31.

On the equal right to speak, see Hdt 5.78; Eur. *Supp.* 438, 441; Ps. Xen. *Ath. Pol.* 1.2; Plat. *Gorg.* 461e, *Prot.* 319b-d, 322d-23a. Cf. Finley, *Democracy*, 18-19; J.D. Lewis, “*Isegoria* at Athens: When Did It Begin?” *Historia* 20 (1971): 129-140; Ober, *Mass and Elite*, 72-3, 78-9, 296-7. Some citizens, such as state debtors, were prohibited: see e.g. Andoc. 1.73, 75; Lys. 10.1.


Aeschin. 2.64, 68, 83-4.


111 Eur. Med. 580-5, Supp. 410; Aristoph. Ach. 376, 625-37; Thuc. 7.8; Dem. 5.12, 9.64, 22.30-33; Aeschin. 3.170, 220.
113 Thuc. 5.43-5; Xen. Hell. 1.7.8.
116 Dem. 24.23; Hyp. 1.10, 4.11.
119 Aristot. Pol. 1268b5-10.
121 Hansen, Athenian Ecclesia, 103-21. Cf. Aristoph. Eccl. 260-5. When granting citizenship the assembly, too, voted by secret ballot (Dem. 59.90). But there was apparently no desire to use this method more widely.
122 Thuc. 8.65-6, 68; Lys. 12.72-5, 20.8-9. Cf. Xen. Hell. 2.3-4; Ps. Aristot. Ath. Pol. 29-33, 34-40; Aristot. Pol. 1304b10-15; Lys. 13.33-7. For cases outside Athens, see Thuc. 3.70-1, 4.74, 6.51.
123 Thuc. 8.66. Cf. 5.92; Andoc. 2.8.
124 We do not know how the nomothetai voted, though the size of the panels and the significance of their task surely suggests a secret ballot. See Piérart, “Qui etaient..?”; Rhodes, “Sessions”.
125 Boegehold, Lawcourts, 27-9 (with sketch).
126 Boegehold, Lawcourts, 35-6.
127 Lys. 12.91. Cf. Hyp. 2.5.
128 Dem. 59.90. Cf. Thuc. 4.88; Dem. 19.239; Aeschin. 3.233; Ps. Aristot. Ath. Pol. 68.
129 Cf. Boegehold, Lawcourts, viii-ix.
131 Dem. 24.149-51. Cf. 18.217, 20.118, 24.78, 90, 188; Aeschin. 1.88, 3.8, 3.208, 233; Eur. Supp. 1229; Thuc. 5.21; Andoc. 1.9; Lys. 10.32; Lycurg. 1.20, 79, 146; Hyp. Eur. 40; Theophr. Char. 6.2, 13.11; Canevaro, Documents, 173-80.
133 Hansen, Athenian Democracy, 155-60.
135 Hansen, Athenian Democracy, 179-80, 218–24; Todd, Shape, 154-63. The courts also had other minor responsibilities such as overseeing state auctions.
136 Hom. Il. 18.491-509.
137 Hes. WD 225-9; Hdt. 1.96-7; Aesch. Eum. 433-5, 484, 490-565, 681-710; Aristot. Pol. 1253b25; Stob. Flor. 2.7.iii.
138 Arist. Pol. 1273b36-74a23.


142 On the term “politician,” see Hansen, Athenian Ecclesia II, 1-23; Ober, Mass and Elite, 106 with n.6 (whose view I share).

143 Hansen, Athenian Democracy, 224.


146 Aeschin. 3.194. Cf. Plat. Gorg., 516d; Ps. Plat. Ax. 368d-9b; Dem. 18.251; Sinclair, Democracy, 162.


150 Aristot. Pol. 1281b30-82a35.


152 Cammack, “Plato,” 639-42.