THE POPULAR COURTS IN ATHENIAN DEMOCRACY

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Lawcourts are often portrayed as a check upon legislatures. That interpretative paradigm is visible within the scholarship on classical Athenian democracy, in the claim that certain legal reforms of the late fifth and early fourth centuries BC that enhanced the role of the popular courts in law-making were intended to check hasty decision-making by assembly-goers. This article argues that, on the contrary, those reforms were intended to help secure the political supremacy of the *demos* ("assembly," "collective common people") over the political elite (office-holders and political leaders). The relative poverty and age of judges, random selection, restrictions on speech, the secret ballot, the openly self-regarding quality of demotic justice, and judges' role in disciplining politicians made the courts an excellent guarantor of popular rule, better in some respects than the assembly. Assembly-goers and judges delivered a "one-two punch" that preserved *demokratia* by keeping the political elite in its place.

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According to the classical liberal doctrine of the separation of powers, a primary political function of lawcourts is to check the legislature, pre-eminently through the judicial review of legislation (Bickel 1962; cf. Hirschl 2004; Waldron 2006). From that vantage point, judges are envisioned as, ideally, non- or extra-political actors. Their role is to be as far as possible impartial interpreters of the law, where law is portrayed as at least one remove from politics proper (Montesquieu 1989; Dworkin 1977).

That interpretative paradigm is visible within the scholarship on classical Athenian democracy, especially in the claim that certain late fifth- and early fourth-century legal reforms that gave judges (*dikastai*)[1] a greater role in law-making were intended to check hasty decision-making by assembly-goers. Against that view, I argue that the relevant reforms were intended to secure the political supremacy of the *demos* ("assembly," "collective common people": Cammack 2019) over its own leaders. There is no evidence that the assembly-goers who authorized the reforms regarded themselves as having previously acted hastily, nor is there any sign that judges were regarded as performing a less "political" role than assembly-goers. Above all, the conventional interpretation of the reforms is belied by the composition, procedures, and functions of the popular courts (*dikasteria*). The relative poverty and age of judges, the use of random selection, restrictions on speech, the secret ballot, the openly self-regarding quality of demotic justice, and judges' role in disciplining politicians made the popular courts an excellent guarantor of rule by the common people, better in certain respects than the assembly. In short, whereas judicial supremacy and popular rule are today often counterposed, in classical democratic Athens, the two were mutually reinforcing. Ordinary citizens acting as both assembly-goers and judges delivered a "one-two punch" that preserved *demokratia* by keeping the political elite in its place.

[1] I translate *dikastai* "judges" not "jurors" since although *dikastai* sat in mass panels, they did not discuss cases collectively and had power to determine fact, law, and penalty.

In emphasizing the importance of the judicial empowerment of the relatively humble to late fifth-century Athenian democrats, this article consciously interprets *demokratia* as the rule of the mass over the elite as opposed to self-rule or the rule of the whole people over itself. My argument is partly recursive. From the context, we must assume that the reforms passed by ordinary Athenian voters following the *demos*'s victory over a cadre of murderous oligarchs (discussed below) were intended to strengthen *demokratia* as they understood it; and from their actions and other evidence, we must infer that they took *demokratia* to mean the political empowerment of the relatively humble, including through demotic judicial power. Whether that understanding of *demokratia* is or should be compatible with how "democracy" is conceived and practiced today is another question. Either way, Athenian judicial activity, properly understood, has the potential to illuminate modern conceptualizations of democracy, if only by revealing what we are missing.

The "era of legal reform" and its interpretation

Athens' legal reforms have long been contentious among ancient historians. Although I shall emphasize the widespread scholarly consensus as to the motivation behind them, the details of the reforms and the disputes they have engendered will be sketched first.

To begin, starting in 410 when democracy was restored following a brief coup by an oligarchical council known as the Four Hundred, and continuing in 403/2 when democracy was restored a second time following the oligarchical regime of the Thirty, the Athenians revised, repromulgated, and reinscribed their laws and established a new public legal archive (Andoc. 1.81-89; Lys. 30.2-5; *IG* I^3 104; Ostwald 1986, 414-20, 511-20; Robertson 1990; Rhodes 1991; Sickinger 1999, 93-138; Carawan 2002; Joyce 2008; on the sources, see Canevaro and Harris 2012, 2016-17; Canevaro 2015; Hansen 2015, 2016a; Carawan 2017). Next, around 402/1, the Athenians established a new distinction between a law (*nomos*)—a permanent general rule—and a decree (*psephisma*)—an *ad hoc* enactment of an explicitly lower status than laws. Thenceforth, no decree could trump a law, and if any were found to conflict, the decree would be abolished ([Plat.] *Def.* 415b; Dem. 24.18, 59; Hansen 1983, 2018; Canevaro 2015). Ordinary assemblies would be ablr to pass only decrees and the power to make law was transferred to a new body, the *nomothetai* or "lawmakers" (Dem. 20.89-93, 24.17-38, 149; Hansen 1983, 1985, 2016b, 2016c, 2017, 2019; Rhodes 1985, 2003; Ostwald 1986, 520-4; Piérart 2000; Canevaro 2013, 2015, 2018; Carawan 2016). The identity of the *nomothetai* is controversial, but it is agreed that, either, they were citizens who had taken the judicial oath, or judges played a crucial role in the new process.[2] Finally, the Athenians created an indictment against inexpedient laws, which allowed the

[2] On the conventional view, they were several hundred sworn judges who voted their decisions following a "trial" of the proposed law (Hansen 1985; Rhodes 2003; Hansen 2019). Canevaro (2016) argues that they were assembly-goers acting under another name; sworn judges played an important role earlier in the process (cf. Canevaro and Esu 2018; Piérart 2000). Carawan (2020) suggests that they were originally drawn from the ranks of sworn judges, but that over time that requirement fell into disuse. I find Carawan persuasive, but my argument does not depend on his.

proposer of a law to be prosecuted for making a disadvantageous proposal.[3] Cases were heard by ordinary judges and conviction of the defendant abolished the law; if a case was brought within a year of the original vote, the defendant was also liable to a penalty, not excluding the death penalty (Dem. 24.1, 68-71, 108, 138, cf. 139-141; Hansen 1974, 1985, 350-1). This charge paralleled one established a decade or more earlier, the indictment against illegal proposals, conviction under which led to rescission of the enactment and a fine or, on the third offence, loss of citizenship (Andoc. 1.17, 22; Ostwald 1986, 125-9, 135-6; Hansen 1999, 205-12). After the introduction of the indictment against inexpedient laws, the indictment against illegal proposals was used only against decrees, thus confirming the distinction between (wholly or partly) judge-made laws and assembly-made decrees (Hansen 1983, 171-5).

Accordingly, in the early fourth century, laws and law-making enjoyed a new distinctness in Athens and the "judicial review" of laws and decrees became part of the political landscape (Hansen 1974; Maio 1983; Carawan 2007, cf. 2020; Lanni 2010; cf. Schwartzberg 2013). Several historians have interpreted this as a sea change in the character of Athenian democracy. Hansen argued that everything decided by the Athenian assembly could now be reversed by a court, while nothing decided by a court could be reversed by the assembly (1974, 17).[4] The fifth-century sovereignty (later "supremacy") of the assembly had given way to that of the courts (Hansen 1974, 15-18; 1990, 239-43; 1999, 150-1, 351-2; 2018, 29-31); [5] alternatively, the radical democracy of post-Periclean Athens had been replaced by the more moderate (later "modified") system of the age of Demosthenes (Hansen 1974, 59-61; 1990, 226; 1999, 151, 303-4; 2018, 27-29). Similarly, Ostwald (1986, 497-524) interpreted the reforms as a shift "from popular sovereignty to the sovereignty of law," Sealey (1987, 146-8) as a move from democracy to "republicanism and the rule of law," and Eder (1998) as a shift from unlimited popular sovereignty to a constitutional system proper to a mature democracy.

Others disagreed, advancing two important counter-arguments. First, it is argued that whatever the Athenians' intentions had been, the *effects* of the reforms were insignificant. Ober (1989, 22) suggests that Hansen and the rest had fallen into what Finley (1983, 56) had called the "constitutional-law trap," namely the belief that the outward form of institutions tells us much about political practice. As Hansen himself acknowledged, the new legislative procedures were seldom used (1974, 47; cf. Finley 1983, 71; Rhodes 1980, 306).[6] Some felt that the Athenians

[3] This reform is normally dated to 403/2 but Carawan 2020 defends a later date. The indictment against inexpedient laws may also have had a role in the new legislative process, in being used to abolish contradictory laws prior to a new law being enacted: Canevaro 2016 with Dem. 20.93.

[4] That was an overstatement: as Harris (2016, 80) argues, the assembly habitually overrode the decisions of decisions of judges when it recalled those who had been sent into exile.

[5] When "sovereignty" attracted criticism, Hansen switched to using "supremacy" or *kyrios*. This does not much affect his argument (Ober 1996, 120-1; cf. Lane 2016; Hoekstra 2016).

[6] We have some sixteen stone *stelai* bearing laws enacted by *nomothetai* (Attic Inscriptions Online, accessed June 11, 2019). More laws are known from references elsewhere (Harris 2013, appendix 5). Against that, we have over 500 fourth-century decrees on stone and some 240 more are mentioned in the literary sources, which suggests that most political business continued to be done

had failed to observe the new distinction between laws and decrees (Atkinson 2003; Ostwald 1986, 2; Rhodes 1977, 52; Sinclair 1988, 84). Others suggested that even when the distinction was respected, the assembly had retained the upper hand, since (at least as conventionally reconstructed) it was responsible for convening the *nomothetai* and voting their pay (MacDowell 1978, 49; Sinclair 1988, 84). Still others argued that Athens' judges had interpreted their new powers narrowly (Sundahl 2003, 139) and that the coherence of the new law-code proved unsustainable (Lanni 2006, 142-7; Todd 1993, 57; cf. Canevaro 2013, 159-60).

Second, it is argued that even if the reforms *had* had significant effects, they could not have altered the character of Athenian democracy. Numerous scholars have stressed that judicial panels (including the *nomothetai*, if they were indeed sworn judges) were no less democratic than the assembly. Both represented, or were manifestations of, the Athenian people at large, so shifting tasks from one institution to the other scarcely mattered (Christ 1998, 20-1; Finley 1985, 27, 80, 117-18; Harris 2006, xxi; Ober 1989, 145-7, 1996, 117-20; Ostwald 1986, 34-5, 74; Rhodes 1980, 320-1; Sinclair 1988, 70-1; Todd 1993, 299; MacDowell 1975, 40, 48; cf. Blanshard 2004; Cammack 2021b). Judges formed "committees" of the assembly, enjoying "delegated" powers, or even as the assembly itself "sitting in a judicial capacity" (Gomme 1962, 188; Finley 1985, 116; Forrest 1966, 19, 166; Ober 1989, 96-7; Ostwald 1986, 9-12, 28-35; Rhodes 1972, 168). The language of "radical" and "moderate" democracy is also rejected as anachronistic (Strauss 1991; Boegehold 1996; Millett 2000). More recently, Canevaro and especially Harris (2016) have argued that the Athenians would not have seen a contradiction between democracy and the rule of law. To the contrary, they suggest, the Athenians were always resistant to legal change, and the reforms merely established self-conscious "rules of change" that made their longstanding resistance to tinkering with laws compatible with the practical requirements of an evolving legal order (Canevaro 2015, 2018; cf. Schwartzberg 2004).

These disputes seemingly run deep. Yet a point of agreement remains: the belief that the reforms had been motivated by a wish to put a stop to hasty decision-making by assembly-goers. The catastrophic failure of the Athenian invasion of Sicily in 415-13, the irregular trial and execution of six of Athens' ten generals (at the assembly's insistence) after the battle of Arginusae, and—most traumatic—two oligarchical takeovers, both legitimated by a vote of the assembly, were said to have made the Athenians seek a "brake" to "slow down the machine" (Harrison 1955, 35; cf. Bauman 1990, 77; Carey 1994, 173; Farrar 2007, 176; MacDowell 1975, 48; Ostwald 1986, 509-10, 522-4; Sinclair 1988, 84; Sundahl 2003, 127-9, 137; Yunis 1988, 377-8). "Our general impression," wrote MacDowell (1975, 74), "is that after the turmoil of 403, the Athenians … wanted to make it difficult for themselves to introduce changes in the laws." Above all, it is agreed, they wished to prevent "snap votes" and "hasty decisions" (Harrison 1955, 35; Sinclair 1988, 67, 83-4; Bauman 1990, 2, 77-8; Hansen 1999, 307-8, 351; Lanni 2006, 142; Pasquino 2010; Todd 1993, 55; cf. Schwartzberg 2004, 2013). The new measures

by the assembly (Hansen 1999, 156, 167). Similarly, we know of only six cases of the indictment against inexpedient laws (Aeschin. 1.34, Dem. 1.102-7, 20, 24; two at 24.138), as against 35 cases of the indictment against illegal decrees (Hansen 1974, 28-48; 1983, 171-5).

offered a "pause for thought" (Todd 1993, 55) and the "opportunity to reconsider a decision they had themselves taken" (Finley 1985, 27, cf. 118), thus counteracting assembly-goers' "unthinking haste and passion" (Finley 1985, 72), "rabid tendencies" (Sundahl 2003, 137), and even "mass psychosis" (Hansen 1974, 50). In Ober's words, the "errors" made by the assembly during the Peloponnesian War had "brought home to the Athenians the dangers of unrestrained exercise of the popular will," so they "enacted constitutional measures aimed at correcting the problem" (1989, 301; cf. Hansen 1999, 303-4). Even Canevaro (2016b), who (as noted) has emphasized the continuity of the Athenians' attachment to the rule of law, argues that the new procedures "helped to protect [the laws] against hasty and ill-considered legal changes" by the *demos*.

These formulations unmistakably echo modern discourse on constitutional and supreme courts, which are often said to limit what democratically empowered legislatures can do. Just as the judicial review of legislation today is interpreted as a check on the potential excesses of untrammelled democracy, where untrammelled democracy is identified with unrestrained rule by the legislature, so has Athenian judicial activity been interpreted as a check on untrammelled democracy, where untrammelled democracy is identified with unrestrained rule by the assembly. The division of labor implied by this schematization is clear: Athenian assembly-goers represented the democratic "self," judges a semi-detached "restraint."

That perspective corresponds to a long-standing tendency to portray the assembly as the heart of Athenian democracy—the "key decision-making body in the Athenian state" (Ober 1989, 7), the "prime democratic body" (Osborne 2010, 27), the "supreme power of the state" (Ehrenberg 1969, 58), "in a very real sense a sovereign body" (Jones 1957 [1980], 3), the "crown" of the political system (Finley 1985, 49-50). As is always rightly stressed, the assembly was not the only democratic body in Athens: the council, courts and offices were also democratically constituted and played vital roles (Hansen 1999, 178-9, 225-6, 247; Sinclair 1988, 17-20; Forrest 1966, 16-20; Cartledge et al 1990). Yet, although it has sometimes been argued that other institutions were more *powerful* than the assembly—the courts (Hansen 1974, 1990) or the council (Gomme 1962, 177-93; Ehrenberg 1969, 56; Rhodes 1972, 64-81, 213-23; de Laix 1973, 192-4; Sinclair 1988, 84-8)—it has not been argued that another institution was in some respects more "demotic," that is, more likely to favour the *demos* (*qua* collective common people) over the elite and thus more integral to popular rule.[7] None the less, some such argument is attractive, because—as Blanshard (2004, 29) and Schwartzberg (2013, 1062) rightly note—there is no evidence that classical Athenians regarded judicial activity as a restraint on ordinary citizens. To the contrary, ancient authors consistently portray Athenian judges as champions of the interests of ordinary citizens against the political leaders who often sought to dominate them.

Counter-indications from the ancient sources

[7] On the distinction between "demotic" (*demotikos*, "on the side of the *demos*," a well-attested term, normally translated "democratic") and "democratic" (*demokratikos*, "characteristic of *demokratia*," attested only three times outside Plato and Aristotle), see Cammack 2019.

Intuitive as the conventional explanation of Athens' legal reforms may seem, it is not supported by the evidence. To begin, there is no sign that assembly-goers blamed themselves for the vicissitudes of the period immediately preceding the reforms. On the contrary, as Ober (1989, 156-170) and Hansen (1990, 350) argue, it was a basic tenet of Athenian democratic ideology that the *demos* was always right and that any fault, if things went wrong, lay not with voters but with the speakers who had misled them. As the celebrated democratic orator Demosthenes noted in 352, all political meetings, including trials, began with a prayer and a curse—the latter pronounced "not upon those who [may be] misled, but upon whoever makes a misleading speech to the council, assembly, or court" (23.97). When that precaution failed, the Athenian solution was not to restrain the voters but to punish the speakers. "You have often been deceived into passing decrees," Demosthenes argued in 354. "Shall we then make a law that the council shall not preconsult nor the assembly vote on anything? Not in my opinion; for we ought not to be deprived of our rights where we have been misled, but be taught how not to be thus persuaded, and we ought to make a law, not to strip us of our own authority, but to punish those who mislead us" (20.3-4; cf. Ps. Xen. *Ath. Pol.* 2.17, Thuc. 2.59-60, Aristot. *Ath. Pol.* 28.3).

That attitude of blame for those who played the public false and exoneration for those who were persuaded appears in several sources on the late fifth century. Thucydides remarked that when the Athenians heard of the failure of the Sicilian expedition in 413, they were furious with the orators who had supported the voyage, "as if they had not decreed it themselves" (8.1). After the oligarchical coup of 411, assembly-goers passed the decree of Demophantos, directing that anyone who thenceforth attempted to suppress democracy could be killed on sight (Lycurg. 1.124-7; Andoc. 1.96-98; cf. Thuc. 8.86; Shear 2011).[8] In 406, when the Athenians regretted the irregular trial and executions of the six Arginusae generals, they did not blame themselves but "voted that complaints be brought against any who had deceived the assembly," and so isolated one man who had assisted in the proceedings that he starved to death (Xen. *Hell*. 1.7.35). As for the 404 coup, in which thirty political leaders elected to a position of trust murdered scores of citizens and triggered a civil war, the sources are unanimous in condemning no one but the Thirty themselves. In both cases, the assembly was said to have been forced by fear and deceit to vote against its wishes, not to have erred (Andoc. 2.27; Aeschin. 2.176; Lys. 12.72-75, 90; Aristot. *Ath. Pol.* 29.1, 34.3), and those who cooperated with the Thirty were deemed unsuitable for public office for years afterwards (Lys. 26.9). Xenophon—no democrat—painted a damning picture of the hubris of the Thirty by contrast with the righteousness, courage, and intelligence of the resurgent *demos* (*Hell*. 2.4.40-42). Altogether, there is no indication that Athenian assembly-goers, fresh from victory over their oligarchical enemies, would have been anything other than affronted by modern scholars' supposition that they

[8] The authenticity of this document is denied by Canevaro and Harris 2012, Harris 2013-14; cf. Sommerstein 2014, Hansen 2015, 898-901, and Carawan 2017. Following Carawan, I suppose that although this was not the "authentic" document read aloud at the trial, it nonetheless contains valuable information about the original decree, given the likely path of transmission.

took *themselves*, rather than the oligarchs, to have been in need of greater self-restraint (*pace* Eder 1998; Taylor 2002).

Another reason to be skeptical of the conventional explanation of Athens' legal reforms is that ancient Greek authors consistently represented judicial activity and decision-making in the assembly as equally "political" activities. In Book 3 of the *Politics*, Aristotle explicitly defined a citizen (*polites*) as one who has the right to share in deliberative and judicial office (1275b20). The same stance was revealed when he portrayed deciding what is advantageous (*sympheron*) and deciding what is just (*dikaion*) as the two pre-eminent political tasks, the first performed by assembly-goers and the second by judges (*Rhet.* 1358b-59a; cf. 1354a, *Nic. Eth.* 1141b30, Ps. Xen. 1.13; Mirhady 2006). Elsewhere, deciding justice was represented as the supreme political function. In the *Iliad*, judicial activity is depicted as emblematic of a community at peace (18.491-509); the primary task of princes in Hesiod's *Works and Days* is to dispense justice (225-9); Herodotus attributed Deioces' rise to power wholly to his standing as a judge (1.96-7); Aeschylus tied political stability specifically to judicial institutions (*Eum*. 433-5, 484, 490-565, 681-710); Aristotle called *dike*, "the decision of what is just," "the backbone (*taxis*) of the political community" (*Pol*. 1253b25); and Cleanthes defined the *polis* as "a habitation where people seek refuge for the purposes of the administration of justice" (Stob. *Flor*. 2.7.iii).

Judicial activity was represented as especially significant in democracies, above all in Athens. Aristotle actually identified Athens' popular courts—*not* the assembly—as the demotic (*demotikos*) element in the sixth-century regime of Solon, by comparison with the aristocratic elected offices and oligarchic Areopagos council (*Pol*. 1273b36-40; cf. Hansen 2013). Specifically, he argued that Solon "had given the *demos* political standing by constituting the courts from everyone" and "was said to have dissolved the power of the other bodies by making the courts, which were selected by lot, all-powerful" (*Pol*. 1273b36-74a23; cf. 1305b20-40). Aristotle portrayed Ephialtes' and Pericles' use of the courts to dock the power of the Areopagos council around 462 as another watershed in the history of the democracy (*Pol*. 1274a5-22; cf. Aristot. *Ath. Pol*. 9.1, 25-6, 27.2-28). Similarly, the *Constitution of the Athenians* written at Aristotle's school argued that of the three reforms of Solon said to have most advanced the power of the *demos*, the most important was the right of appeal to a popular court, because "when the *demos* is master of the *psephos*"—that is, the ballot used almost exclusively in the courts—"it is master of the political system" (9.1; cf. 10.1, 25.2, 27.4, 29.4, 35, 45.2, 63-8). This author also claimed that since 403 the Athenian *demos* had been "continually increasing the power of the multitude (*plethos*)" (41.2), an assertion judged "mistaken" by the foremost commentator on that text (Rhodes 1993, 488; 2002, 18, 85; 2010, 67), but which looks plausible if the various transfers of power to judges mentioned in that text are interpreted as democratizing moves (Aristot. *Ath. Pol.* 45.1, 3, 49.3, 53.1, 55.3-4, cf. 41.2; Aeschin. 2.177; Lycurg. 1.124-7). Moreover, anti-democrats appear to have agreed in regarding demotic judicial power as a main prop of *demokratia*. The only item on the assembly's agenda during the 411 coup was the suspension of the rights of citizens to impeach speakers and to prosecute them for making illegal proposals. The Thirty, in 404, also rescinded these powers,

as did Antipater, the Macedonian regent, in 322 (Aristot. *Ath. Pol*. 29.4, 35; cf. Aeschin. 3.5, 191, 196, 234; Dem. 24.154, 58.34; Boegehold 1995, 41; Brock 1988, 136-8; Hansen 1974, 55; Hansen 1975, 17).

The democratic significance of Athens' judges was also emphasized by fourth-century orators (as noted by Harris 2016). Lycurgus (1.4) argued that the three main bulwarks of *demokratia* in Athens were the legal system, the vote of the judges, and the procedures by which wrongdoers were handed over to them. Aeschines (3.7) called judges democracy's "guards," and Demosthenes (21.222-5) argued that it was only the control of the laws by judges that protected the *demos* from the depredations of the elite (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). An anonymous assembly speaker complained that certain phrases had "passed into your common speech," namely "in the courts lies your salvation" and "it is the ballot (*psephos*) that must protect the *polis*"—again, the ballot that was, at this point, strongly associated with the courts (Dem. 13.16).

A couple of generations earlier, Thucydides had portrayed Athenians as highly litigious (1.77), while the Athenians' passion for judging, especially if they were old and poor, supplied the plot of Aristophanes' *Wasps* and formed a running joke in several other plays (e.g. *Kn*. 1315, *Cl*. 206-8, *Peace* 500-5, *Birds* 36-41, 109; cf. Todd 1993, 147-9). Aristophanes used judicial analogies to exemplify the power of ordinary citizens, as in "I'll put a stop to your yelling!/You're not judging now, you know!" (*Lys*. 379-80; cf. *Eccl.* 460). The *Constitution of the Athenians* attributed to Xenophon also insisted that the courts could not be altered without materially weakening the *demos*'s control of the political system (Ps. Xen. *Ath. Pol*. 3.2-9; cf. 1.16-18). Another striking witness to the democratic significance of the courts is Plato. It is very suggestive that in his work, when the judgment and capacities of "the many" (*hoi polloi*) are criticized, the institutional context is more often than not the courts (e.g. *Theaet.* 173c, *Gorg*. 452e, 454b-e, 455ª, *Rep*. 553ª-b, 565b-e; Cammack 2015).

Some of these authors have been deemed unreliable in this context. The philosophers, historians, and Aristophanes are often discounted on the topic of democracy, since they did not support it (Jones 1957 [1980], 41-2; Finley 1985, 28; Hansen 1983, 150-3; Hansen 2010, 505-7). The orators are dismissed on other grounds. Since most extant speeches were written for trials, the claim that judges played an especially important role in *demokratia* has been read as flattery (cf. Hansen 1974, 18; Todd 1993, 150-78). But clever critics and satirists are likely to offer salient criticisms, since their bite is dulled the further they stray from the realm of the plausible. Flattery, too, fails if it is wholly implausible (cf. Cohen 1990, 2002), Moreover, as Hansen has stressed, extant assembly speeches, where one might expect to find flattery in equal measure, contain no equivalent claims (1974, 18). Altogether, I see no reason to discount the tendency of the above evidence. Contemporaries did not expect Athenian judges to check the activities of assembly-goers. On the contrary, they were regarded as deeply involved in demotic rule.

The composition, procedures, and functions of the Athenian courts, especially as compared with those of the assembly, reveal ample grounds why that should have been the case. To be sure, demotic control of policy-making and

judicial activity were *both* crucial to classical Athenian democracy. As the author of the Aristotelian *Constitution of the Athenians* observed, the fourth-century *demos* ruled through both decrees and popular courts (41.2). Nonetheless, as we shall now see, in the immediate aftermath of the coups, there were good reasons why pro-democratic Athenians should have thought it prudent to give the popular courts the upper hand.

Composition

The Athenian assembly was an open meeting (*ekklesia*) held some forty times per year on the Pnyx, a hillside ten minutes' walk from the *agora* at the center of the city. All males over eighteen (or perhaps twenty) who had taken the citizenship oath were eligible to attend (Aristot. *Ath. Pol*. 41.2), although in the late fifth century, according to the most widely cited estimates, the space could only accommodate some 6000-8000 out of around 30,000 citizens (Hansen 1999, 90-4, but cf. Stanton 1996). However, there were no other limitations on entry. Those who wished to take part simply had to arrive at dawn and find themselves a space. Equally, until the 390s, there was no pecuniary incentive to attend. At that point, payment was introduced at a rate of one, two and then three obols per meeting, reaching six for a regular meeting and nine for the main assembly of the month by the 330s (Hansen 1999; cf. Markle 1985, Todd 1990).

Judicial panels were organized quite differently. Judges had to be over thirty years old and to have sworn the judicial oath (Fränkel 1878; Carawan 2020). Any day a sworn citizen wished to judge a trial, he had to arrive at dawn at the gates of the courts, hand in his official name-plate, and submit to the sortition process (Kroll 1972; Hansen 1999, 186-7). For much of the fifth century, judges seem to have been assigned to a single panel for the entire year, but at some point, perhaps around 409, they began to be allotted to a different panel each day and to a specific seat within the court-room (Boegehold 1984; 1995, 22, 31-2). By the late 330s, the selection and case-assignation process involved nine rounds of sortition (Boegehold 1995, 21-42; Farrar 2010; Dow 1939; Bers 2000; Mirhady and Schwartz 2011; Carawan 2016). Panels of 200 judges or multiples thereof heard private charges (*dikai*), while panels of 500 or multiples thereof heard public charges (*graphai*) (Boegehold 1995, 24; Todd 1993, 99-112). Assuming a need for some 1500 judges whenever the courts were in session (some 225 days per year), something like 2500 citizens will have had to turn up on any given morning to ensure that each panel had the requisite number of judges (Mirhady and Schwartz 2011). An essential incentive was the judicial stipend, introduced at two obols by the great popular leader, Pericles, around 450 (Aristot. *Ath. Pol*. 27). Cleon, another popular champion, got it increased to three in 425, roughly equivalent to a day's low-paid labour (no trial lasted more than a day) (Markle 1985; Todd 1990, 153-4, 1993; Hansen 1999). That was apparently adequate to fill the courtrooms and it remained at that level.

One may assume that the greater size of the assembly will automatically have made it seem a better vehicle of the wishes of ordinary citizens, but it is not certain that assembly-goers in this period thought that way. Strikingly, one early fourth-century writer remarked that 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" ([Andoc.] 4.4, tr. Maidment; cf. Connor 1971, 82-3). On that view, the size of the decision-making body was less important than its construction, and here two points stand out.

One is the social make-up of the assembly and courts. As far as we can tell, the assembly attracted a relatively broad mix of citizens. Among fourth-century sources, Xenophon's Socrates mentions "fullers, shoemakers, builders, smiths, farmers, merchants, and profiteers" (*Mem*. 3.7.6), Plato's Socrates suggests that a speaker might be "a blacksmith, shoemaker, merchant, sea-captain, rich, poor, of noble family or low-born" (*Prot*. 319d), and Theophrastus sketched an oligarch "ashamed" to find himself sitting next to a "scrawny, unwashed type" (*Char*. 26.2, tr. Rusten). Closer to our period, Aristophanes' assemblyman Dikaiopolis is a farmer living in the city for the duration of the war (*Ach*. 34-7), while his "Demos of Pnyx Hill" in *Knights* (420) is a grumpy, half-deaf old countryman (40-3; cf. Lys. 28.3, 29.9; Isoc. 8.130, 15.152; Dem. 24.123. Jones 1980, 36, 109; Sinclair 1988, 124-5; Hansen 1999, 126-7; Todd 1990, 170-3).

Judges skewed older, since they had to be over thirty. This is significant given that young men were often represented as unreliable, emotionally immature, and—most importantly—a core constituency of support for oligarchy (Hom. *Il*. 3.107-10; Eur. *Supp*. 230-7; Thuc. 6.28, 8.65; Xen. *Hell*. 2.3.23; Aristot. *Nic. Eth.* 1128b15-20; Hyp. 5, col. 21; Hansen 1974, 50, and 1999, 185-86; Strauss 1993). Judges were also commonly represented as skewing poorer (*pace* Jones 1980, 36-7; Ober 1989, 142-4; Todd 1990). 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 (251-2, 290-315; cf. *Kn*. 255-7, 797-8, 804, 1089, *Plut*. 27, Ps. Xen. *Ath. Pol*. 1.18; Isoc. 7.54; Dem. 21.182, 24.123, 29.22; Aeschin. 1.88). Aristophanes surely exaggerated for comic effect, but the fact that judges were paid—unlike assembly-goers until 390—makes it likely that this was a caricature, not sheer fiction. The stipend was said to have been instituted by Pericles with the specific aim of strengthening his popular power base against his wealthy rival Cimon (Aristot. *Ath. Pol.* 27.3-4; Plat. *Gorg*. 515e). According to the Aristotelian *Constitution of the Athenians*, some people argued that courts "deteriorated" at this point, since "any chance people" (*ton tuchonton*) always thereafter "took more care to get allotted than did the better sort" (Aristot. *Ath. Pol.* 27.4). No doubt, payment for judging dishonoured the office in the eyes of the elite (cf. Aristot. *Nic. Eth.* 1163b5-10, *Pol*. 1297a35-40, 1300a1); certainly prominent young men such as Alcibiades or Plato's brother Glaucon did not fantasize about taking their turn as a judge or even as a prosecutor, but about speaking in the assembly (Plat. *Alc*. I, II; Xen. *Mem*. 3.6). In the period prior to the reforms, the courts were likely widely associated the lower classes.

Another notable feature of the courts' composition was the difficulty of stacking or otherwise corrupting judicial panels. Though the assembly's openness may seem democracy-enhancing, it may not have been regarded that way 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 a factor in the 411 coup: the meeting had been moved to a small location outside town, near the Spartan military camp, thus discouraging anyone without his own shield and spear (i.e. the humbler majority) from attending. Other poorer citizens were away with the fleet, and the result was the abolition of democracy (Thuc. 8.67-9, Lys. 12.44, 75-6; cf. Finley 1985, 53). Also relevant is the vote on the Arginusae fiasco, when, according to Xenophon, the ships' captains succeeded in pinning the blame on the generals in part because they recruited bereaved relatives (or those who claimed to be relatives) to turn up to the meeting, begging for retribution (Xen. *Hell*. 1.7.8; Hansen 1999, 284; Carawan 2007). Thucydides' Nicias accused Alcibiades of packing the assembly for the vote on Sicily (6.13.1), while a couple of generations later, Demosthenes suggested that "three hundred to do the shouting" were part of the entourage of any successful politician (2.29-30, 13.20; cf. 18.143; Connor 1971, 18-22, 75-9, 134; Finley 1983, 76-84; Rhodes 1986; Rhodes 1995). Aristophanes' *Assemblywomen* (c. 392) provides another sign 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 (*Eccl*. 296-7, 300-1, 372-477; cf. Hansen 1983, 27-8).

Such manipulations were impossible in the courts. In 409, the well-known general and political leader Anytus (later one of the prosecutors of Socrates) became notorious as the first person ever to bribe an entire judicial panel, but that was before the Athenians began to assign judges to courtrooms by lot; thereafter tampering became much more difficult (Aristot. *Ath. Pol.* 27.5; Ps. Xen. *Ath. Pol.* 3.7; Boegehold 1995, 34). The name-plate sorter (himself randomly selected) could make the choice of given individuals slightly more or less probable, and judges could be lobbied on the way to courtrooms, though later in the fourth century an enclosed complex helped to minimize harassment (Aeschin. 3.1; Dem. 19.1, 332; Boegehold 1995, 14, 22, 33, 36-7; Dow 1939, 31). But it was far harder to influence judicial panels than assemblies.

Procedures

Virtually all assemblygoers had the right to speak and everyone present could vote (Hdt 5.78; Eur. *Supp*. 438, 441; Ps. Xen. *Ath. Pol.* 1.2; Plat. *Gorg*. 461e, *Prot*. 319b-d, 322d-23a). Those features are often represented as paradigmatically democratic (e.g. Finley 1985, 18-19; Ober 1989, 72-3, 78-9, 296-7), but on closer inspection things look more complicated. It is estimated that in the mid-fourth century, some 2-5 percent of the citizen population proposed a motion or an amendment at least once in their lives, but we cannot infer that they all spoke publicly (Hansen 1989, 93-125, esp. 97; cf. Ober 1989, 104-18; Rhodes 1995, 159-60; Osborne, 2010, 5-7; cf. Cammack 2020a, Cammack 2021a). The acoustics of the Pnyx were challenging, especially before the end of the fifth century, when a reorientation of the stage and construction of retaining walls provided some shelter from the wind (Forsén and Stanton 1996). A careful reconstruction suggests that one would have had to be a trained speaker in order to be heard and even in ideal conditions, only about half the audience will have been able to make out what was said (Johnstone 1996, 122-7; cf. Aristoph. *Kn*. 42). Accordingly, first, writing played a key role in

the initiation process: proposals launched in the council had to be drafted in writing and publicly displayed three days in advance of meetings (Aristot. *Ath. Pol.* 29.1, 45, with Rhodes 1972, 57-81), while amendments and proposals made from the assembly floor were also submitted in writing and read aloud by the secretary (Aeschin. 2.64, 68, 83-4). Second, advising the audience which way to vote fell largely to a small number of capable speakers, perhaps twenty to forty at any one time (Hansen 1989, 121-5; Hansen 1999, 144; Ober 1989, 107-9).

Accordingly, the problem for ordinary voters was how to make use of their orators without being dominated or abused by them—a difficult task (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; Rhodes 2016). Thucydides counted Pericles's rhetorical gifts as a major factor in the outbreak of the Peloponnesian war, while Cleon's nearly led to mass slaughter in Mytilene (Thuc. 1.29-31, 127, 145, 2.59, 65, 3.49; Aristoph. *Peace* 603-80). Alcibiades helped to restart the war with the Peloponnesians by deceiving the assembly, and the main speaker in favour of executing the Arginusae generals in 406 was alleged by Xenophon to have been bribed (Thuc. 5.43-5; Xen. *Hell*. 1.7.8). Most striking, nearly everyone involved in the coups of 411 and 404 was a well known political figure. According to Thucydides (8.68), the leading conspirators in 411 (with the exception of the shadowy Antiphon) had previously been identified as democrats (cf. Lys. 13.9-10, Antiph. Fr. B1, Andoc. 1.36), while in 404, the oligarchs known as the Thirty were elected by the assembly to the task of producing new laws (Aristot. *Ath. Pol*. 34-5).

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 prosecution and speakers could argue whatever they wished, although they might later be charged with slander (Osborne 1985). But only litigants and co-pleaders specified in advance were allowed to address the judges (Dem. 24.23; Hyp. 1.10, 4.11) and time limits were enforced (Aristoph. *Ach*. 692, *Wasps* 857; cf. Boegehold 1995, 27; Thür 2008). Still more significant, the judges did not discuss cases among themselves. As soon as both sides had been heard, voting began. As in the assembly, heckling during the speeches was common, and conversation was also possible on the way down to the voting urns (Bers 1985; Boegehold 1995, 26). But there was no formal opportunity for judges to influence each others' views and that was deliberate. Aristotle (*Pol*. 1268b5-10) reports that legislators in most ancient Greek *poleis* explicitly prohibited "joint speaking" (*koinolegeomai*) among judges. Consequently, verdicts reflected as closely as possible the personal will of each judge, rather than that of the most rhetorically gifted in the group.

Most importantly, judges' imperviousness to prejudicial outside influence was preserved by the secret ballot. In the assembly, as noted, everyone could vote, but with thousands of attendees and numerous decisions to be taken at every meeting (Hansen 1989, 98-101, suggests a regular minimum of nine), open voting by raising hands was the best available mechanism (Aristoph. *Eccl*. 260-5; Hansen 1983, 103-21; Schwartzberg 2010). With that came vulnerability to influence and intimidation. Thucydides (8.65-6, 68) and Lysias (12.72-5, 20.8-9) emphasized the chilling effect on voters of the reign of terror in the city immediately prior to the 411 coup. One popular leader had been killed and further violence and reprisals

seemed likely: it was no surprise that when the abolition of democracy was proposed, no one voted against it (Thuc. 8.66, cf. 5.92; outside Athens, see Thuc. 3.70-1, 4.74, 6.51; Andoc. 2.8; Xen. *Hell*. 2.3-4; Aristot. *Ath. Pol.* 29-33, 34-40; Aristot. *Pol*. 1304b10-15; Lys. 13.33-7; cf. Ober 2008).

By contrast, voting in court was secret. 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 that when a judge dropped his ballot onlookers could not see which he had chosen (Boegehold 1995, 27-9). Later (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 dropped the decisive one into a bronze urn and the discard into a wooden one (Boegehold 1995, 35-6). Both systems protected judges from reprisals or rewards. As Lysias argued when prosecuting of one of the Thirty Tyrants in 403, "Nobody today is making you vote against your judgment" (12.91). Demosthenes, similarly, argued that the ballot ensured that "every one of the citizens, being completely free from interference, may decide for himself" (Dem. 59.90; cf. Thuc. 4.88; Dem. 19.239; Aeschin. 3.233; Aristot. *Ath. Pol.* 68).

Judges were not free to decide as they pleased. The judicial oath bound them to judge in accordance with the laws and decrees of the Athenians and may have included clauses against oligarchy, tyranny, the subversion of democracy and accepting bribes (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. *Eux*. 40; Theophr. *Char*. 6.2, 13.11; Fränkel 1873; Johnstone 1999, 33-42; Mirhady 2007; Canevaro 2013, 173-80). The presence of spectators, too, may have encouraged "judicial responsibility" (Lanni 1997, 189), although the secrecy of the ballot arguably offset that. But judicial verdicts offered a better reflection of the unmanipulated will of participating voters than was possible in the assembly.

Functions

Perhaps the most significant reason to enhance the powers of judges was to strengthen their traditional function: deciding what was just. As noted, Aristotle suggested that deciding what was advantageous (*sympheron*) took place in assemblies, while deciding what was just (*dikaion*) took place in court (*Rhet.* 1358b-59a; cf. 1354a, *Nic. Eth.* 1141b30, Ps. Xen. 1.13; Mirhady 2006). Although he acknowledged that litigants sometimes made arguments from expediency and assembly speakers from justice, he insisted that no litigant would ever admit that his action was unjust, "for otherwise a trial would be unnecessary." Equally, no assembly speaker would admit that he advised something disdavantageous, whatever the justice of a proposal (*Rhet*. 1358b). That claim is supported by Thucydides' representation of the debate between Cleon and Diodotus on the punishment merited by the Mytilenaeans, who had revolted from their alliance with the Athenians. Even though Diodotus considered mass execution unjust, he argued explicitly that his case rested on considerations of "profit" (Thuc. 3.44).

Assembly-goers and judges thus enjoyed a division of labor with respect to determining questions of advantage and justice. Specifically, in Athens, the assembly decided policy: war, peace, foreign affairs, defence, public finance, expenditures, imports and exports, and until 403/2 legislation (Hansen 1999, 155-60). It also conferred honours, elected military officers, held monthly votes of confidence in office-holders, launched impeachments and until at least 361 occasionally judged them (Hansen 1975, 51; cf. Carawan 1987, 176-7; Rhodes 1979; Sealey 1981, 131). The popular courts judged all other disputes (barring homicide and intentional wounding, which were tried differently), as well as the scrutinies and audits of those who had special political responsibilities (Hansen 1999, 179-80, 218–24; Todd 1993, 154-63).

Within that, however, Athenian justice made room for the self-interest or self-regard of the judges (Cammack 2021b). As noted above, Athenian judges were not free to decide cases however they liked: the judicial oath bound them to judge in accordance with the laws and decrees of the Athenians. None the less, it did not escape the ancient Greeks' notice that laws themselves could be more or less democratic or oligarchic (Ar. *Pol*. 1281a38). Moreover, it was expected that in a democratic *polis*, where judicial activity was performed by large groups of ordinary citizens, the self-interest of the judges and justice within the *polis* would coincide (Cammack 2021b). Athenian judges were urged to "go to the limit of your powers, on your own behalf…in taking your vengeance" (Lys. 12.94); to "punish those who…have given false testimony, for your own sakes, for mine, for the sake of justice and the laws" (Dem. 46.28); to "mete out punishment in your own interest" (Dem. 50.64); and to "cast your votes, not only on behalf of yourselves and the laws, but also in the interest of reverence towards the gods" (Dem. 59.74; cf. Aeschin. 3.120, Din. 1.26, 98). Indeed, the exhortation to "vote what is just (*dikaion*) and in your own interests (*ta sympheronta hymin autois*)" was a rhetorical trope (Hyp. 2, Fr. 15b. Cf. Is. 1.40; Lys. 19.64; Aeschin. 3.8; Dem. 21.213, 26.14, 24, 35.56, 43.84, 45.49).

At least as revealed by forensic rhetoric, accordingly, many Athenians did not take justice and the self-interest of a mass of citizen-judges to be opposed—quite the contrary. And the supposition that, under normal circumstances, justice and interest would coincide made judges crucial political actors, never more so than when they judged the political elite. Popular control of the administration of justice gave ordinary Athenians a critical weapon over those who performed influential individual political roles, whether 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 official). That weapon was exploited to the full. Although councillors and other officials had little decision-making power, they were carefully scrutinized pre-tenure, subject to votes of confidence and audits while in office, and audited upon stepping down (Aristot. *Ath. Pol.* 25-7 with Rhodes 1993, 309-22). Generals, orators and proposers of decrees likewise had little or no formal decision-making power, but they did have influence, and that was what judicial action sought to constrain. Early in the democratic era, the principal mechanism was impeachment, used to launch prosecutions concerning (for example) treason, taking bribes or lying to the *demos*, but from the mid-fifth century

audits, too, were used. Hansen (1999, 224) argues that the audit was relatively insignificant, since it seems not to have led to many prosecutions; but office-holders may have behaved well because they knew that any malfeasance was virtually certain to be caught. The same logic may be seen in the indictments against illegal proposals and disadvantageous laws, which made the proposers of decrees subject to judicial control. Ostracism was another such mechanism, but it was abandoned after the invention of the indictment against illegal proposals (Hansen 1999, 205; Shaw 1991, 207). The new measure was simply more effective in combatting the subversion of demotic rule by the political elite (cf. Bauman 1990, 77; Christ 1998, 22-3; Farrar 2007, 177; Carawan 2020).

Aristophanes' *Knights* suggests how the assembly and popular courts worked together to maintain the *demos*'s power over its leaders. Towards the end of the play, the chorus of knights accuses Demos of being too easily manipulated by politicians. He 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" (1124-30, tr. Henderson). 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 that hid judges' votes as a "probe" (1150, tr. Henderson).

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 sufferance of ordinary citizens, was reversed in the courts, where they could be humiliated at citizens' hands. This suggests, first, the interdependence of the assembly and courts: rule by the *demos* required both. And second, it suggests the *final* significance of demotic judicial power. The "fattening" process to which Demos refers would have been self-undermining without a way of recovering the goods. To that extent, the supremacy of the *demos* was predicated on its control of the judicial function.

The scale of judicial action against Athens' political leaders has often been regarded with dismay. Aristophon boasted that he had been charged with making an illegal proposal seventy-five times and was acquitted every time; others were not so lucky (Aeschin. 3.194; cf. Plat. *Gorg.* 516d; [Plat.] *Ax*. 368d-9b; Dem. 18.251; Sinclair 1998, 162). Hansen (1975, 11, 65) called the number of politicians targeted by impeachment "a serious defect in the system," and others agree (Ahl 1984; Bauman 1990, 2; Harris 1994; Knox 1985). As Knox notes, most known politicians were eventually convicted of something, including famous figures such as Pericles and Demosthenes. It is inferred that either the Athenians persecuted many honest men or they were incapable of selecting honest leaders (Hansen 1975, 11; Knox 1985, 144). Yet once honest men may become lax, and a low tolerance for dubious behaviour may be appropriate in politics.

The conventionality of judicial action against politicians supports the contention that in enhancing the powers of judges, assembly-goers were seeking to control political leaders further. 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 new

legal archive made prosecuting transgressions easier; and *nomothesia* reduced the advantage held by gifted speakers and organizers in the assembly. Each reform constrained politically influential individuals, thereby strengthening the the courts' and hence the *demos*'s rule.

Conclusion

This article has reinterpreted Athens' "era of legal reform" in a way that draws from both sides of the prior debate. Hansen was right that the reforms made the popular courts formally supreme, while his critics were right that Athenian democracy was not thereby rendered more moderate. Rather, the supremacy of judges enhanced rule by the *demos* because the popular courts were expected to serve the interests of the humbler majority. This reinterpretation has significant implications for our understanding of Athenian democracy. Maximizing the number of participants in decision-making looked, in this period, less important to Athenian democrats than promoting the influence of poorer and older citizens. Similarly, openness to all looked less important than procedural limits on unfair influence; the right to speak publicly looked less important than the right to vote secretly; and the power to shape policy looked less important than the power to decide justice, especially with respect to the behaviour of politicians.

Demotic judicial activity is not now regarded as an essential element of democracy. No doubt many factors explain that development, but one has its roots in democratic Athens. A key feature of modern political ideology is the belief 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 (Mirhady 2006, 302). That was the position of Athenian democracy's foremost critic, Plato. Ancient Greek democrats seem to have taken the perceptions of the community to be the benchmark of what is just, but Plato portrayed justice as something accessed by only a few specially trained or inspired people, and strikingly, it is Plato's conceptualization, not that of his fellow citizens, that echoes in discussions of justice today (Cammack 2015; Cammack 2020b). What Athenian democrats took to be the "bulwark" of democracy, namely the demotic administration of justice, now seems thoroughly alien—and with it, the kind of accountability procedures that Athenian leaders accepted as routine. Plato would likely have supported the modern practice of partly democratizing the initial development of law while handing its final approbation, interpretation, and application to small bodies of professionals. Athenian democrats, however, would have feared that the lack of citizen control over justice invited the oligarchical capture of the entire political system.

This argument invites us to consider the implications for democratic politics today. Of the two political functions distinguished by Aristotle, deciding what is advantageous and deciding what is just, citizens in democracies retain an indirect influence over the first, via the election of political representatives, but little influence over the second. Even when juries decide cases (an increasingly infrequent practice), they are very small, often vetted by each side's lawyers, authorized to decide fact but not law or penalty, subject to instruction from a presiding judge, and potentially dominated by the most forceful members.

Additionally, juries play no role in either the judicial review of legislation, since that is the prerogative of higher courts, or the routine auditing of politicians and office-holders, since that no longer occurs. Aristotle treated elections and audits together: the one seemingly implied the other (*Pol*. 1281b30-82a35). Today, the only routine method of disciplining politicians is to elect another government at the next opportunity. By Athenian standards, that falls far short of rule by the *demos*.

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Abbreviations

1. Ancient sources

Following the conventions of the *Liddell-Scott-Jones Greek-English Lexicon* (9th ed., Oxford University Press, 1940):

Aesch. Aeschylus
Eum. *Eumenides*

Aeschin. Aeschines

Andoc. Andocides

Antiph. Antiphon

Aristoph. Aristophanes
Ach. *Acharnians*
Cl. *Clouds*
Eccl. *Ecclesiazusae*
Kn. *Knights*
Lys. *Lysistrata*
Pl. *Plutus*

Aristoph. Thes.: Aristophanes, Thesmophoriazusae

Aristot. Aristotle
Ath. Pol. *Constitution of the Athenians*
Nic. Eth. *Nicomachean Ethics*
Pol. *Politics*
Rhet. *Rhetoric*

Dem. Demosthenes
Ex. *Exordia*

Din. Dinarchus

Eur. Euripides
Med. *Medea*
Supp. *Suppliants*

IG[1]3 *Inscriptiones Graecae* I, 3rd ed., http://pom.bbaw.de/ig/

Hdt. Herodotus

Hom. Homer

Il. *Iliad*

Hyp. Hypereides

Is. Isaeus

Isoc. Isocrates

Lys. Lysias

Lycurg. Lycurgus

Plat. Plato
- *Alc.* *Alcibiades*
- *Ax.* *Axiochus*
- *Def.* *Definitions*
- *Gorg.* *Gorgias*
- *Prot.* *Protagoras*
- *Rep*. *Republic*
- *Theaet.* *Theaeteus*

Ps. Xen. Pseudo Xenophon
- *Ath. Pol.* *Constitution of the Athenians*

Stob. Stobaeus
- *Flor*. *Florilegium*

Theophr. Theophrastus
- *Char.* *Characters*

Thuc. Thucydides

Xen. Xenophon
- *Hell*. *Hellenica*
- *Mem.* *Memorabilia*

2. Journals

Following the conventions of the *American Journal of Archaeology*:

AJJ *American Journal of Jurisprudence*
AJP *American Journal of Philology*
APSR *American Political Science Review*
CJ *Classical Journal*
CLR *Cardozo Law Review*
ClMed *Classica et Medievalia*

CP	*Classical Philology*
CQ	*Classical Quarterly*
GaR	*Greece and Rome*
GRBS	*Greek, Roman and Byzantine Studies*
HSCP	*Harvard Studies in Classical Philology*
HPT	*History of Political Thought*
JHS	*Journal of Hellenic Studies*
JPP	*Journal of Political Philosophy*
LCM	*Liverpool Classical Monthly*
OCD	*Oxford Classical Dictionary*
TAPS	*Transactions of the American Philological Society*
YLJ	*Yale Law Journal*

3. Presses

CUP	Cambridge University Press
FSV	Franz Steiner Verlag
OUP	Oxford University Press
UCP	University of California Press
YUP	Yale University Press