

THE DEMOCRATIC SIGNIFICANCE OF THE CLASSICAL ATHENIAN COURTS

Daniela Cammack¹

[Note to readers, April 27, 2020: This paper was originally written for inclusion in *Decline: Decadence, Decay and Decline in History and Society*, ed. William O'Reilly (Central European University Press, expected pub. 2017). Since that volume appears to have been abandoned, I have written a fully updated and revised version under the new title "The Popular Courts in Athenian Democracy," which I hope to publish elsewhere. However, since this version has been cited in a few places, I'm happy for it to remain publicly available.]

Is modern democracy inferior to ancient? Arguably, yes. In the words of the political theorist Cynthia Farrar, "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."² At least two differences are well known. Ancient Greek *dēmokratia* was direct democracy, meaning that ordinary citizens, acting *en masse*, made decisions themselves, while modern democracy is representative, meaning that a small number of specially chosen citizens make decisions on behalf of the rest. And the ancient Greeks used random selection rather than election as a way of choosing office-holders. Today, elections are widely regarded as the best if not the only way to realize democracy, but the ancient Greeks actually called government by election "aristocratic," since its alleged purpose was to choose *hoi aristoi*, the best, to rule (in Greek, to hold *kratos*). The only truly democratic mode of selection, Aristotle assumed, was the lot.³

This essay explores another difference between ancient and modern democracy, arguably the most important. This is the significance for ancient democracy of popular control of the administration of justice. As represented by Aristotle in the *Rhetoric*, politics in the ancient world had two components: deciding what was advantageous (*sympheron*) for the community and deciding what was just (*dikaion*) within it. The first task he assigned to assemblies, the second to courts.⁴ In ancient democracies, ordinary citizens constituted both bodies. Classical democratic assemblies were open meetings at which all or most citizens were welcome to attend, to speak and to vote. Judicial panels tended to be

¹ Fellow, Stanford Law School, 2016/17. I thank Roger Brock, Paul Cammack, Stefan Dolgert, Bryan Garsten, David Grewal, Melissa Lane, Adriaan Lanni, Jane Mansbridge, George Scialabba, Richard Tuck, John Tully and several anonymous reviewers for comments. Greek texts are from the Loeb Classical Library; translations are my own unless otherwise stated.

² Farrar, "Power," 170. Cf. M. Ignatieff, *The Needs of Strangers* (London: Picador, 2001), 107; J. Dunn, *Western Political Theory in the Face of the Future* (Cambridge: Cambridge University Press, 1993), 28.

³ Aristot. *Pol.* 1294b7-10. Cf. E. Callenbach and M. Phillips, *A Citizen Legislature* (Berkeley/Bodega, CA: Banyan Tree Books/Clear Grass, 1985).

⁴ Aristot. *Rhet.* 1358b-59a. Cf. 1354a, *NE* 1141b30; Ps-Xen. 1.13; D. Mirhady, "Aristotle and the Law Courts," *Polis* 23 (2006): 302-18.

smaller but were also mass bodies of ordinary voters. I will suggest not only that this double-pronged approach made ancient Greek democracies more democratic than any modern polity, where most judicial decisions, including those of great political importance, are produced by members of a dedicated professional elite, but also that Athenian judicial panels may well have been regarded as an even *better* vehicle of the rule of the *dêmos* (defined as the collective common people as distinct from those who took leading political roles)⁵ than the assembly—certainly in classical Athens, my focus here owing to the abundance of evidence.

Importantly, this is not the conventional interpretation of Athenian democracy. In fact, the political power of Athens' courts has more commonly been associated with a decline in the level of democracy than with its flourishing. Of particular significance here is a debate over a series of legal reforms passed towards the end of the fifth century BC that took place during the 1980s and early 1990s and was never, to my mind, satisfactorily resolved. Though superficially those on either side of the debate were at loggerheads, they in fact shared the fundamental assumption that, with respect to democracy, the courts were a moderating force. I will suggest that that assumption was anachronistic, but it was not a simple mistake. Rather, it strikingly reveals the extent to which judicial activity has disappeared from the modern conception of democracy. The “democratic decline” it illuminates is our own, not the Athenians’.

The late fifth-century legal reforms

Between 410 and about 399 BC, roughly halfway through the classical democratic period, the Athenian assembly passed a series of reforms that—formally at least—significantly expanded the political powers of judges at the direct expense of assemblygoers, arguably giving judges 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.⁶

Next, in 403/2, a new distinction between a law (*nomos*) and a decree (*psêphisma*) was laid down, together with a new law-making procedure (*nomothesia*). In the latter half of the fifth century the assembly had enacted all

⁵ This interpretation is advanced in D. Cammack, “The Demos in *Dêmokratia*,” forthcoming.

⁶ Andoc. 1; Lys. 30. E. Carawan, “The Athenian Amnesty and the ‘Scrutiny of the Laws’,” *Journal of Hellenic Studies* 122 (2002): 1-23; M. Canevaro and E. Harris, “The Documents in Andocides’ *On the Mysteries*,” *Classical Quarterly* 62 (2012): 98-129; M.H. Hansen, “Is Patrokleides’ Decree (Andoc. 1.77-79) a Genuine Document?” *Greek, Roman and Byzantine Studies* 55 (2015): 884-901; M. Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (Berkeley, CA: University of California Press, 1986), 414-20, 511-20; N. Robertson, “The Laws of Athens, 410-399 BC,” *Journal of Hellenic Studies* 110 (1990): 43-75; P.J. Rhodes, “The Athenian Code of Laws, 410-399 BC,” *Journal of Hellenic Studies* 111 (1991): 87-100; J. Sickinger, *Public Records and Archives in Classical Athens* (Chapel Hill, NC: University of North Carolina Press, 1999), 93-138.

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 judges⁷ who voted their decisions following what looked rather like a trial of the proposed law, with nominated speakers arguing for and against it.⁸ 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.⁹

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.¹⁰ 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.¹¹ Acquittal with respect to an as yet unapproved proposal, however, had the effect of enacting it.¹² After the invention of the indictment against inexpedient laws, the indictment against illegal proposals was used only against decrees.¹³

⁷ That is, citizens who had taken the judicial oath and were thus allowed to serve as judges (*dikastai*). *Dikastai* may also be translated “jurors,” 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.

⁸ Dem. 20.89-93, 24.17-38, 149. M. Canevaro, “*Nomothesia* in Classical Athens: What Sources Should We Believe?” *Classical Quarterly* 63 (2013): 139-60; M.H. Hansen, “Athenian *Nomothesia*,” *Greek, Roman and Byzantine Studies* 26 (1985): 345-71; A.R.W. Harrison, “Law-Making at the End of the Fifth Century BC,” *Journal of Hellenic Studies* 75 (1955): 26-35; D. MacDowell, “Law-Making at Athens in the Fourth Century BC,” *Journal of Hellenic Studies* 95 (1975): 62-74; Ostwald, *Popular Sovereignty*, 520-4; M. Piérart, “Qui étaient les nomothètes à Athènes à l’époque de Démosthène?” in *La Codification des lois dans l’antiquité* ed. E. Lévy (Paris: de Boccard, 2000), 229-56; P.J. Rhodes, “*Nomothesia* in Fourth Century Athens,” *Classical Quarterly* 35 (1985): 55-60; P.J. Rhodes, “Sessions of *Nomothetai* in Fourth-Century Athens,” *Classical Quarterly* 53 (2003): 124-9.

⁹ Plat. *Def.* 415b; Dem. 24.18, 59. M.H. Hansen, *The Athenian Ecclesia* (Copenhagen: Museum Tusulanum Press, 1983), 161-76, 179-205.

¹⁰ Dem. 24.1, 68-71, 108, 138, cf. 139-141. M.H. Hansen, *The Sovereignty of the People’s Court in Athens in the Fourth Century B.C.* (Odense: Odense University Press, 1974), 44-8, “Athenian *Nomothesia*,” 350-1 with nn. 8-9; H. Wolff, ‘*Normenkontrolle*’ und *Gesetzesbegriff* in der *attischen Demokratie* (Heidelberg 1970), 30-41.

¹¹ Andoc. 1.17, 22; Ostwald, *Popular Sovereignty*, 125-9, 135-6; M.H. Hansen, *Athenian Democracy in the Age of Demosthenes* (Norman, Okla., 1999), 205-12.

¹² M.H. Hansen, *The Athenian Ecclesia II* (Copenhagen: Museum Tusulanum Press, 1989), 271-81; Hansen, “Athenian *Nomothesia*,” 351 with nn.19, 20.

¹³ Hansen, *Athenian Ecclesia*, 171-5.

Accordingly, as the peerless ancient historian Mogens Hansen emphasized, from the beginning of the fourth century, everything decided by the Athenian assembly could ultimately be reversed by a court, but nothing decided by a court could ultimately be reversed by the assembly.¹⁴ And this, Hansen suggested, constituted a sea change in the character of Athenian democracy. The fifth-century sovereignty (later “supremacy”) of the assembly gave way to the fourth-century supremacy of the courts;¹⁵ the radical democracy of post-Periclean Athens was replaced by the more moderate (later “modified”) system of the age of Demosthenes.¹⁶ Along similar lines, Martin Ostwald interpreted the reforms as 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.¹⁷ To these historians, it seemed clear that the raw power of the *dêmos* had been at least 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.¹⁸ 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;¹⁹ the indictment for proposing an inexpedient law was likewise rare.²⁰ 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.²¹ Many historians felt the Athenians had failed to observe the

¹⁴ Hansen, *Sovereignty*, 17.

¹⁵ Hansen, *Sovereignty*, 15-18; M.H. Hansen, “The Political Powers of the People’s Court in Fourth-Century Athens,” in *The Greek City from Homer to Alexander*, ed. O. Murray and S. Price (Oxford: Oxford University Press, 1990), 239-43; Hansen, *Athenian Democracy*, 150-1, 351-2. Hansen was criticized for using the term “sovereignty” and since 1987 has used “supremacy” or the Greek *kyrios* instead. However, as J. Ober, *The Athenian Revolution* (Princeton, NJ: Princeton University Press, 1996) 120-1, n. 26, observes, this does not much affect his argument.

¹⁶ Hansen, *Sovereignty*, 59-61, “Political Powers,” 226, *Athenian Democracy*, 151, 303-4.

¹⁷ Ostwald, *Popular Sovereignty*, 497-524; R. Sealey, *The Athenian Republic* (University Park, PA: University of Pennsylvania Press, 1987), 146-8; W. Eder, “Aristocracy and the Coming of Athenian Democracy,” in *Democracy 2500? Questions and Challenges*, ed. I. Morriss and K. Raafaub (Dubuque IO: Kendall/Hunt, 1998), 105-40.

¹⁸ J. Ober, *Mass and Elite in Democratic Athens* (Princeton, NJ: Princeton University Press, 1989), 22; M.I. Finley, *Politics in the Ancient World* (Cambridge: Cambridge University Press), 56.

¹⁹ Hansen, *Sovereignty*, 47 n.22. Cf. Finley, *Politics*, 71 n. 4; P.J. Rhodes, “Athenian Democracy after 403 BC,” *Classical Journal* 75 (1980): 306. The number has since increased to nine: see M. Canevaro, “The Twilight of *Nomothesia*,” *Dike* 14 (2011): 57 n.7.

²⁰ Aeschin. 1.34, Dem. 1.102-7, 20, 24, and 24.138 (two instances). For comparison, we know of around 35 cases of *graphê paranomôn*: Hansen, *Sovereignty*, 28-48, *Athenian Ecclesia*, 171-5.

²¹ Hansen, *Athenian Democracy*, 156, 167.

distinction between laws and decrees they had laid down;²² 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.²³ Judges, moreover, appeared to be unwilling to annul new decrees unless a formal violation of a prior law could be shown.²⁴ As for the new law-code, attempts to maintain its coherence proved unsustainable.²⁵

The second counter-argument was bolder still. This was that even if the reforms *had* 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 *dêmos*, so shifting tasks from one institution to the other hardly mattered.²⁶ 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.”²⁷ Additionally, the language of “radical” and “moderate” democracy

²² J. Atkinson, “Athenian Law and the Will of the People in the Fourth Century BC,” *Acta Classica* 46 (2003): 21-47; Harrison, “Law-Making,” 27; R. de Laix, *Probouleusis in Athens* (Berkeley, CA: University of California Press, 1973), 57-8; Ostwald, *Popular Sovereignty*, 2; P.J. Rhodes, *The Athenian Boule* (Oxford: Clarendon Press, 1972), 52; R. Sinclair, *Democracy and Participation in Athens* (Cambridge: Cambridge University Press, 1988), 84.

²³ D. MacDowell, *The Law in Classical Athens* (Ithaca, NY: Cornell University Press, 1978), 49; Sinclair, *Democracy*, 84; D. Stockton, *The Classical Athenian Democracy* (Oxford: Oxford University Press, 1990), 52.

²⁴ Sundahl, “Rule of Law,” 139.

²⁵ Lanni, *Law and Justice*, 142-7; S. Todd, *The Shape of Athenian Law* (Oxford: Clarendon Press, 1993), 57; S. Todd, “Lady Chatterley’s Lover and the Attic Orators,” *Journal of Hellenic Studies* 110 (1990): 130. Cf. Canevaro, “What Sources?” 159-60 with n. 71.

²⁶ M. Christ, *The Litigious Athenian* (Baltimore, MD: Johns Hopkins University Press, 1998), 20-1; M.I. Finley, *Democracy Ancient and Modern* (New Brunswick, NJ: Rutgers University Press), 27, 80, 117-18; E. Harris, *Democracy and the Rule of Law in Classical Athens* (Cambridge: Cambridge University Press, 2006), xxi; Harrison, “Law-Making,” 35; Ober, *Mass and Elite*, 145-7; Ober, *Revolution*, 117-20; Ostwald, *Popular Sovereignty*, 34-5, 74; Rhodes, “Athenian Democracy,” 320-1 with n.112; Sinclair, *Democracy*, 70-1, 84; Stockton, *Athenian Democracy*, 52, 82; Todd, *Shape*, 299 n.15; MacDowell, *Law*, 40, 48. Contrast, however, A. Blanshard, “What Counts as the *Demos*?” *Phoenix* 58 (2004), 28-36.

²⁷ A.W. Gomme, *More Essays in Greek History and Literature* (Oxford: Oxford University Press, 1962), 188; Finley, *Democracy*, 116; W.G. Forrest, *The Emergence of Greek Democracy* (New York 1966), 19, 166; Hignett, *Constitution*, 233; Ober, *Mass and Elite*, 96-7; Ostwald, *Popular Sovereignty*, 9-12, 28-35; Rhodes, *Boule*, 168.

was criticized as anachronistic, reflecting nineteenth-century political groupings more than anything authentically Athenian.²⁸

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 Arginusae 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."²⁹ "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."³⁰ Above all, it is said, they hoped to prevent "snap votes" and "hasty decisions."³¹ The new measures offered a "pause for thought"³² and the "opportunity to reconsider a decision they had themselves taken,"³³ thus counteracting "unthinking haste and passion,"³⁴ "rabid tendencies"³⁵ or even "mass psychosis"³⁶ 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

²⁸ B. Strauss, "On Aristotle's Critique of Athenian Democracy," in *Essays on the Foundations of Aristotelian Political Science*, eds. C. Lord and D. O'Connor (Berkeley, CA: University of California Press, 1991), 212-33; A. Boegehold, "Resistance to Change in the Law at Athens," in *Demokratia* (Princeton, NJ: Princeton University Press, 1996), 203-16; P. Millett, "Mogens Hansen and the Labelling of Athenian Democracy," in *Polis & Politics*, ed. P. Flensted-Jensen *et al.* (Copenhagen: Museum Tusulanum Press, 2000), 339-60.

²⁹ Harrison, "Law-Making," 35. Cf. R. Bauman, *Political Trials in Ancient Greece* (London: Routledge, 1990), 77; C. Carey, "Legal Space in Classical Athens," *Greece & Rome* 41 (1994): 173; C. Farrar, "Power to the People," in *Origins of Democracy in Ancient Greece*, ed. K. Raaflaub *et al.* (Berkeley, CA: University of California Press, 2007), 176. MacDowell, *Law*, 48; Ostwald, *Popular Sovereignty*, 509-10, 522-4; Sinclair, *Democracy*, 84; Stockton, *Athenian Democracy*, 45; M. Sundahl, "The Rule of Law and the Nature of the Fourth Century Athenian Democracy," *Classica et Mediaevalia* 54 (2003): 127-9, 137; H. Yunis, "Law, Politics and the *Graphe Paranomon* in Fourth-Century Athens," *Greek, Roman and Byzantine Studies* 29 (1988): 377-8.

³⁰ D. MacDowell, "Law-Making at Athens in the Fourth Century BC," *Journal of Hellenic Studies* 95 (1975), 74.

³¹ 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.

³² Todd, *Shape*, 55 n.4.

³³ Finley, *Democracy*, 27, cf. 118; Finley, *Politics*, 55.

³⁴ Finley, *Democracy*, 72.

³⁵ Sundahl, "Rule of Law," 137.

³⁶ Hansen, *Sovereignty*, 50.

unrestrained exercise of the popular will.” Accordingly, they “enacted constitutional measures aimed at correcting the problem.”³⁷

These are exactly the kinds of formulations that 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. These scholars thus reprised a widespread view of the appropriate relationship between judicial bodies and 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.³⁸ The division of labour implied by this schematization is clear. The Athenian assembly represented the fully democratic “self,” judicial bodies “restraint.”

This conceptualization correlates with the longstanding representation of the assembly as the heart of Athenian democracy. It was, it is said, the “key decision-making body in the Athenian state,”³⁹ the “prime democratic body,”⁴⁰ the “supreme power of the state,”⁴¹ “in a very real sense a sovereign body,”⁴² the “crown”⁴³ of the political system, the embodiment of “absolute democracy.”⁴⁴ The assembly was not, of course, 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.⁴⁵ 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 council⁴⁶—no one has suggested that another institution may have been more *democratic*, in the specific

³⁷ Ober, *Mass and Elite*, 301. Cf. Hansen, *Athenian Democracy*, 303-4.

³⁸ A.H.M. Jones, *Athenian Democracy* (Baltimore 1980 [1957]), 4; D. Maio, “*Politeia* and Adjudication in Fourth-Century Athens,” *American Journal of Jurisprudence* 28 (1983): 22, 34; Finley, *Democracy*, 136; Ober, *Mass and Elite*, 8; Hansen, *Athenian Democracy*, 179, 209, 337; E. Carawan, “The Trial of the Arginousai Generals and the Dawn of ‘Judicial Review,’” *Dike* 10 (2007): 19-56; A. Lanni, “Judicial Review and the Athenian ‘Constitution,’” in *Démocratie Athénienne—Démocratie Moderne: Tradition et Influences*, ed. P. Pasquino et al. (Geneva: Fondation Hardt, 2010): 235-76; M. Schwartzberg, “Was the *Grapsos* a Form of Judicial Review?” *Cardozo Law Review* 34 (2013): 1049-62.

³⁹ Ober, *Mass and Elite*, 7.

⁴⁰ R. Osborne, *Athens and Athenian Democracy* (Cambridge: Cambridge University Press, 2010), 27.

⁴¹ V. Ehrenberg, *The Greek State* (London: Methuen, 1969), 58.

⁴² Jones, *Athenian Democracy*, 3.

⁴³ Finley, *Democracy*, 49-50.

⁴⁴ Glotz, *Greek City*, 162.

⁴⁵ Hansen, *Athenian Democracy*, 178-9, 225-6, 247; Sinclair, *Democracy*, 17-20; Forrest, *Emergence*, 16-20.

⁴⁶ 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.

sense that it was a better vehicle of the rule of the *dêmos*. Indeed there would seem to be a very good reason for that: the word *dêmos* itself often directly indicated the assembly.⁴⁷ Thus it would seem highly paradoxical, if not absurd, to suggest that any institution could have been more thoroughly implicated in the rule of the *dêmos* than the assembly itself.

Nonetheless, it is possible that although Athenian judicial panels were distinct from the *dêmos* conceived as the assembly—a fact surely confirmed 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 *dêmos*'s will when *dêmos* is conceived more broadly as the collective common people. Some such formulation, at any rate, will 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 *dêmos*.⁴⁸ To the contrary, our sources suggest that the courts were regarded as the most demotic (*dêmotikon*) element in the political system, that is the institution most reliably on the *dêmos*'s side and historically—as it turns out—most integral to its rule.⁴⁹

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 *dêmos* had achieved supreme power in the community overall.⁵⁰ 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 though not in the assembly—“it is master of the political system.”⁵¹ The same author asserted that since 403 the Athenian *dêmos* had been “continually increasing the power of the majority,”⁵² a claim today judged

⁴⁷ As in the enactment formula of many extant decrees, “it was decided by the council (*boulê*) and assembly (*dêmos*).” M.H. Hansen, “The Concepts of *Demos*, *Ekklesia* and *Dikasterion* in Classical Athens”, *Greek, Roman and Byzantine Studies* 50 (2010): 502-3, 507.

⁴⁸ As noted by Blanshard, “What Counts?” 29.

⁴⁹ *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 *dēmokratia* obtaining overall. See further Cammack, “Demos.”

⁵⁰ Aristot. *Pol.* 1273b36-1274a23. Cf. 1305b20-40.

⁵¹ Ps. Aristot. *Ath. Pol.* 9.1. Cf. 10.1, 25.2, 27.4, 29.4, 35, 45.2, 63-8.

⁵² Ps. Aristot. *Ath. Pol.* 41.2.

“mistaken,”⁵³ but which may make some sense if the transfers of power to judicial agents mentioned subsequently can be understood as democratizing moves.⁵⁴

The democratic significance of judicial activity also loomed large in fourth century rhetoric. Lycurgus said that the three main bulwarks of *dēmokratia* 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 *dēmos* from the depredations of the elite.⁵⁵ 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.⁵⁶ 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.⁵⁷ 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!”⁵⁸ 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 *dēmos*’s control of the political system.⁵⁹ Finally, our most striking witness to the democratic significance of the classical Athenian courts is Plato. It is very suggestive that in his work, when the judgment and capacities of “the many” (*hoi polloi*) are attacked, the institutional context is more often than not the courts.⁶⁰

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

⁵³ P.J. Rhodes, “Introduction” to Aristotle, *The Athenian Constitution* (rev. ed., Harmondsworth: Penguin, 2002) 18, 85; P.J. Rhodes, *A Commentary on the Aristotelian Athenaiōn Politeia* (2nd ed., Oxford 1993), 488; P.J. Rhodes, “Stability in the Athenian Democracy after 403 BC,” in *Zwischen Monarchie und Republik* (Stuttgart: Franz Steiner Verlag, 2010), 67. Contrast Aeschin. 2.177; Lycurg. 1.124-7.

⁵⁴ Ps. Aristot. *Ath. Pol.* 45.1, 3, 49.3, 53.1, 55.3-4. Cf. Ps. Aristot. *Ath. Pol.* 41.2; D. Whitehead, *The Demes of Attica 508/7-c.250 BC* (Princeton, NJ: Princeton University Press, 1986), 287; H. Wade-Gery, *Essays on Greek History* (Oxford: Blackwell, 1958), 195.

⁵⁵ 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.

⁵⁶ Dem. 13.16, tr. Vince.

⁵⁷ Thuc. 1.77; Aristoph. *Kn.* 1315, *Cl.* 206-8, *Peace* 500-5, *Birds* 36-41, 109. Cf. Todd, *Shape*, 147-9.

⁵⁸ Aristoph. *Lys.* 379-80 tr. Henderson. Cf. *Eccl.* 460.

⁵⁹ Ps. Xen. *Ath. Pol.* 3.2-9. Cf. 1.16-18.

⁶⁰ Plat. *Theaet.* 173c; *Gorg.* 452e, 454b-e, 455a; *Rep.* 553a-b, 565b-e; D. Cammack, “Plato and Athenian Justice,” *History of Political Thought* 36 (2015): 611-42.

same may be said of the historians and Aristophanes.⁶¹ 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.⁶² 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.⁶³

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.⁶⁴ They hoped to render their system of government neither less (with Hansen) nor equally (with Ober) 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.⁶⁵ But our sources do not support that claim. Rather, Athenian voters seem to have been straightforwardly angry with the conspirators. That is the message of the decree of Demophantos, 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.⁶⁶ 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.⁶⁷ 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.⁶⁸

This interpretation also makes better sense of the indictments against illegal proposals and disadvantageous laws. It is hard to believe that these measures had

⁶¹ Jones, *Athenian Democracy*, 41-2; Finley, *Democracy*, 28; Hansen, *Athenian Ecclesia*, 150-3; Hansen, "Concepts," 505-7.

⁶² Hansen, *Sovereignty*, 18; Todd, *Shape*, 150-78.

⁶³ Hansen, *Sovereignty*, 18.

⁶⁴ As suggested but not pursued by Rhodes, "Stability," 68.

⁶⁵ Eder, "Aristocracy," 115; M. Taylor, "Implicating the Demos: A Reading of Thucydides on the Rise of the Four Hundred," *Journal of Hellenic Studies* 122 (2002): 91-108.

⁶⁶ Lycurg. 1.124-7; Andoc. 1.96-98. Cf. Thuc. 8.86; Canevaro and Harris, "Documents," 119-25; A.H. Sommerstein, "The Authenticity of the Demophantus Decree," *Classical Quarterly* 64 (2014): 49-57.

⁶⁷ Andoc. 2.27; Aeschin. 2.176; Lys. 12.72-75, 90; Ps. Aristot. *Ath. Pol.* 29.1, 34.3.

⁶⁸ 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.

different goals, yet why the *dêmos* should have been aiming at self-restraint in the 420s or earlier is unclear.⁶⁹ More likely both aimed at combatting the subversion of democracy by the elite.⁷⁰

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 were regarded as the more demotic body, especially following certain changes passed around 409 BC.⁷¹

The assembly and judicial panels compared

i) Composition

The Athenian assembly, as is well known, was open to all adult male citizens.⁷² This did not mean that all could attend.⁷³ 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.⁷⁴ 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.⁷⁵ 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.⁷⁶ 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.⁷⁷ Whoever

⁶⁹ Cf. Sundahl, "Rule of Law," 136.

⁷⁰ As supposed by Bauman, *Political Trials*, 77; Christ, *Litigious*, 22-3; Farrar, "Power," 177.

⁷¹ Ps. Aristot. *Ath. Pol.* 41.2.

⁷² Ps. Aristot. *Ath. Pol.* 42.1 with Rhodes, *Commentary*, 497-8.

⁷³ 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."

⁷⁴ For demographic estimates, see Hansen, *Athenian Democracy*, 90-4.

⁷⁵ A. Boegehold, *The Lawcourts at Athens* (Princeton: Princeton University Press, 1995), 24 with n. 17. On the difference between the two types of case, see Todd, *Shape*, 99-112.

⁷⁶ Andoc. 1.17.

⁷⁷ A. Boegehold, "Many Letters: Aristophanes *Plutus* 1166-1167," in *Studies Presented to Sterling Dow*, ed. K. Rigsby (Durham, NC: University of North Carolina Press, 1984), 23-9; Boegehold, *Lawcourts*, 22, 31-2.

wished to serve henceforth had to turn up outside the courts at dawn, hand in his *pinakion* and wait to see if he were chosen, again by lot.⁷⁸ After this the selection and case-assignment process became ever more sophisticated: by the late 330s it involved nine rounds of sortition.⁷⁹

One might assume that the greater size of the assembly will automatically have made it seem more democratic, but it is not clear that the Athenians thought that way. One 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.”⁸⁰ 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.⁸¹ 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.”⁸² 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.⁸³

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

⁷⁸ Perhaps 125-225 days per year, with cases lasting no more than a day: Hansen, *Athenian Democracy*, 186-7; Sinclair, *Democracy*, 225-7; D. MacDowell, “The Length of Trials for Public Offences in Athens,” in *Polis & Politics*, ed. P. Flensted-Jensen *et al.* (Copenhagen: Museum Tusulanum, 2000), 563-8. Pace I. Worthington, “The Length of an Athenian Public Trial: A Reply to Professor MacDowell,” *Hermes* 131 (2003): 364-71.

⁷⁹ Three different systems appear in Aristoph. *Wasps* (422), *Eccl.* (c. 393) and Ps. Aristot. *Ath. Pol.* 63-9. Cf. Boegehold, *Lawcourts*, 21-42; C. Farrar, “Taking Our Chances with the Ancient Athenians,” in *Démocratie Athénienne—Démocratie Moderne: Tradition et Influences*, ed. P. Pasquino *et al.* (Geneva: Fondation Hardt, 2010), 167-234; S. Dow, “Aristotle, the *Klêroteria*, and the Courts,” *Harvard Studies in Classical Philology* 1 (1939) 1-34; V. Bers, “Just Rituals: Why the Rigmarole of Fourth-Century Athenian Lawcourts?” in *Polis & Politics*, ed. P. Flensted-Jensen *et al.* (Copenhagen: Museum Tusulanum, 2000), 553-62; D. Mirhady and C. Schwarz, “Dikastic Participation,” *Classical Quarterly* 61 (2011): 744-8.

⁸⁰ [Andoc.] 4.4 tr. Maidment. Cf. W.R. Connor, *The New Politicians of Fifth-Century Athens* (Princeton, NJ: Princeton University Press, 1971), 82-3.

⁸¹ Lys. 28.3, 29.9; Isoc. 8.130, 15.152; Dem. 24.123. Cf. Jones, *Athenian Democracy*, 36, 109; Sinclair, *Democracy*, 124-5; Hansen, *Athenian Democracy*, 126-7; Todd, “Lady Chatterley,” 170-3.

⁸² Plat. *Prot.* 319d, Xen. *Mem.* 3.7.6. Theophr. *Char.* 26.2 tr. Rusten.

⁸³ Aristoph. *Ach.* 34-7, *Kn.* 40-3.

family will be unable to eat if he cannot judge.⁸⁴ No doubt Aristophanes exaggerates for comic effect, but there is a good reason to think that this was a caricature rather than sheer fiction: 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.⁸⁵ The amount was not huge: two obols initially, increased to three by Cleon in 425, about equivalent to a day's low-wage labour.⁸⁶ 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."⁸⁷ Payment for judging surely dishonoured the office in the eyes of the upper classes;⁸⁸ certainly elite young men such as Alcibiades or Plato's brother Glaucon did not fantasize about queuing up at dawn to take their turn as a judge, but of gaining a reputation as a speaker in the assembly.⁸⁹ 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.⁹⁰

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 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.⁹¹ Another example is the vote on the Arginusae 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,

⁸⁴ Aristoph. *Wasps* 251-2, 290-315. Cf. *Kn.* 255-7, 797-8, 804, 1089, *Plut.* 27. Cf. Ps. Xen. *Ath. Pol.* 1.18. Among later texts, see Isoc. 7.54; Dem. 21.182, 24.123, 29.22; Aeschin. 1.88.

⁸⁵ Ps. Aristot. *Ath. Pol.* 27.3-4; Plat. *Gorg.* 515e.

⁸⁶ Cf. Jones, *Athenian Democracy*, 124; M.M. Markle, "Jury Pay and Assembly Pay at Athens," in *Crux: Essays in Greek History* ed. P. Cartledge and F.D. Harvey (Exeter: Duckworth, 1985), 265-97; "Todd, "Lady Chatterley," 153-4.

⁸⁷ Ps. Aristot. *Ath. Pol.* 27.4 tr. Rackham.

⁸⁸ Aristot. *NE* 1163b5-10, *Pol.* 1297a35-40, 1300a1.

⁸⁹ Plat. *Alc.* I, II; Xen. *Mem.* 3.6.

⁹⁰ Ps. Aristot. *Ath. Pol.* 41.3, 62.2; cf. Aristoph. *Eccl.* 289, 309-10.

⁹¹ Thuc. 8.67-9; Lys. 12.44, 75-6. Cf. Finley, *Democracy*, 53.

begging for retribution.⁹² 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.⁹³ 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.⁹⁴

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 to bribe an entire judicial panel, but this was before the Athenians began to assign judges to courtrooms by lot; after that tampering became much more difficult.⁹⁵ The *pinakion*-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.⁹⁶ But it was certainly much harder to shape or corrupt judicial panels than the assembly.

ii) Procedures

Trial procedures also supported the independence of judges. In the assembly, almost anyone who wished could speak and everyone present could vote.⁹⁷ 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.⁹⁸ Many motions were launched, in writing, in the council, and a subsequent oral defence appears not to have been required.⁹⁹ 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

⁹² Xen. *Hell.* 1.7.8; Hansen, *Athenian Democracy*, 284 with n.185.

⁹³ Thuc. 6.13.1; Dem. 2.29-30, 13.20; cf. 14 225-6, 18.143, 312-13, 22.38; Connor, *New Politicians*, 18-22, 75-9, 134; Finley, *Politics*, 76-84; P.J. Rhodes, "Political Activity in Classical Athens," *Journal of Hellenic Studies* 106 (1986): 132-44; P.J. Rhodes, "The 'Acephalous' Polis?" *Historia* 44 (1995): 153-67.

⁹⁴ Aristoph. *Eccl.* 296-7, 300-1, 372-477. Cf. Hansen, *Athenian Ecclesia*, 27-8.

⁹⁵ Ps. Aristot. *Ath. Pol.* 27.5; Ps. Xen. 3.7; Boegehold, *Lawcourts*, 34.

⁹⁶ Aeschin. 3.1; Dem. 19.1, 332; Boegehold, *Lawcourts*, 14, 22, 33, 36-7; Dow, "Aristotle," 31.

⁹⁷ 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.

⁹⁸ Hansen, *Athenian Ecclesia II*, 93-125, esp. 97. See further D. Cammack, "Not Talking but Thinking: Democratic Deliberation in Classical Athens," forthcoming. Cf. Ober, *Mass and Elite*, 104-18, Rhodes, "Acephalous," 159-60; Osborne, *Athens and Athenian Democracy*, 5-7.

⁹⁹ Ps. Aristot. *Ath. Pol.* 29.1, 45, with Rhodes, *Boule*, 57-81.

immediately put to the vote.¹⁰⁰ The acoustics of the Pnyx were also challenging. Not for nothing did Aristophanes describe Demos, in *Knights*, 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.¹⁰¹ Altogether, the evidence suggests that a much smaller group of regular speakers, perhaps twenty to forty at any one time, dominated the stage.¹⁰² The vast majority of assemblygoers communicated through heckling and voting alone.¹⁰³

Accordingly, the problem for ordinary voters was how to make use of their orators without being ruled or abused by them, and this was no easy task.¹⁰⁴ Thucydides counted Pericles’s rhetorical gifts as a major factor in the outbreak of the Peloponnesian war, while Cleon’s almost provoked mass slaughter in Mytilene.¹⁰⁵ 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.¹⁰⁶ 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 previously been assumed 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.¹⁰⁷

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.¹⁰⁸ But only litigants and co-pleaders specified in advance were allowed to address the judges,¹⁰⁹ strict time limits were enforced,¹¹⁰ and perhaps most importantly, 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

¹⁰⁰ Aeschin. 2.64, 68, 83-4.

¹⁰¹ C. Johnstone, “Greek Oratorical Settings and the Problem of the Pnyx,” in *Theory, Text, Context* ed. C. Johnstone (Albany NY: State University of New York Press, 1996), 122-7.

¹⁰² Hansen, *Athenian Ecclesia II*, 121-5; Hansen, *Athenian Democracy*, 144. Cf. Ober, *Mass and Elite*, 107-9.

¹⁰³ On heckling, see J. Tacon, “Ekklesiastic ‘Thorubos’,” *Greece & Rome* 48 (2001): 173-92; N. Villacèque, “Chahut et délibération,” *Participations* 3 (2012): 49-69.

¹⁰⁴ 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.

¹⁰⁵ Thuc. 1.29-31, 127, 145, 2.59, 65, 3.49; Aristoph. *Peace* 603-80.

¹⁰⁶ Thuc. 5.43-5; Xen. *Hell.* 1.7.8.

¹⁰⁷ Thuc. 8.68, Lys. 13.9-10, Ant. fr. B1, Andoc. 1.36; Ps. Aristot. *Ath. Pol.* 34-5.

¹⁰⁸ R. Osborne, “Law in Action in Classical Athens,” *Journal of Hellenic Studies* 105 (1975): 53.

¹⁰⁹ Dem. 24.23; Hyp. 1.10, 4.11.

¹¹⁰ Aristoph. *Ach.* 692, *Wasps* 857. Cf. Boegehold, *Lawcourts*, 27.

possible on the way down to the voting urns.¹¹¹ 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.¹¹² 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 a regular minimum of nine)¹¹³ decisions to be taken at every meeting, this required open voting, i.e. by raising hands (*cheirotomia*).¹¹⁴ 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.¹¹⁵ 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.¹¹⁶

In the courts, however, all votes were cast secretly, and again, the process was refined over time.¹¹⁷ 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 was hard for an onlooker—either a fellow judge or a spectator—to tell which he had chosen.¹¹⁸ 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.¹¹⁹ 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 Eratoshenes for his actions during the reign of the

¹¹¹ V. Bers, "Dikastic Thorubos," in *Crux: Essays in Greek History* ed. P. Cartledge and F. Harvey (Exeter: Duckworth, 1985), 1-15; Boegehold, *Lawcourts*, 26.

¹¹² Aristot. *Pol.* 1268b5-10.

¹¹³ Hansen, *Athenian Ecclesia II*, 98-101.

¹¹⁴ 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.

¹¹⁵ 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.

¹¹⁶ Thuc. 8.66. Cf. 5.92; Andoc. 2.8.

¹¹⁷ We do not know how the *nomothetai* voted, though the size of the panels and the significance of their task may imply a secret ballot. See Piérart, "Qui etaient..?"; Rhodes, "Sessions".

¹¹⁸ Boegehold, *Lawcourts*, 27-9 (with sketch).

¹¹⁹ Boegehold, *Lawcourts*, 35-6.

Thirty, “Nobody today is compelling you to vote against your judgment.”¹²⁰ 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.”¹²¹

All these procedures preserved the integrity of judicial activity.¹²² Certain other features 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.¹²³ The judicial oath, which included clauses against oligarchy, tyranny, the subversion of democracy and accepting bribes, also surely boosted the courts’ credibility.¹²⁴ But perhaps the most powerful reason late fifth-century assemblygoers were happy to transfer political powers to judicial panels was their traditional political function.

iii) Functions

As noted above, 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.¹²⁵ 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.¹²⁶ 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.¹²⁷ The courts judged all other disputes, as well as the scrutinies (*dokimasiai*) and audits (*euthynai*) of those entrusted with personal political

¹²⁰ Lys. 12.91. Cf. Hyp. 2.5.

¹²¹ Dem. 59.90. Cf. Thuc. 4.88; Dem. 19.239; Aeschin. 3.233; Ps. Aristot. *Ath. Pol.* 68.

¹²² Cf. Boegehold, *Lawcourts*, viii-ix.

¹²³ Hom. *Il.* 3.107-10; Eur. *Supp.* 230-7; Thuc. 6.28, 8.65; Xen. *Hell.* 2.3.23; Aristot. *NE* 1128b15-20; Hyp. 5, col. 21. Cf. Hansen, *Sovereignty*, 50; B. Strauss, *Fathers and Sons in Athens* (London: Routledge, 1993).

¹²⁴ 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; Canevaro, *Documents*, 173-80.

¹²⁵ Aristot. *Rhet.* 1358b-59a. Cf. 1354a, *NE* 1141b30; Ps-Xen. 1.13; D. Mirhady, “Aristotle and the Law Courts,” *Polis* 23 (2006): 302-18.

¹²⁶ Hansen, *Athenian Democracy*, 155-60.

¹²⁷ M.H. Hansen, *Eisangelia* (Odense: Odense University Press, 1975), 51, counts eleven impeachments judged by the assembly in the period 493-324 as against 86 judged by a court. Cf. E. Carawan, “*Eisangelia* and *Euthyna*,” *Greek, Roman and Byzantine Studies* 28 (1987): 176-7. P.J. Rhodes, “*Eisangelia* in Athens,” *Journal of Hellenic Studies* 99 (1979): 103-114; R. Sealey, “Ephialtes, *Eisangelia*, and the Council,” *Classical Contributions* ed. G.S. Shrimpton et al. (Locust Valley, NY: Augustin, 1981), 131.

responsibility, including orators.¹²⁸ And it seems quite likely that the power to decide what was just was regarded as more essential to the *dêmos*'s rule.

As far as we can tell, deciding what was just was traditionally perceived as the supreme political function. In the *Iliad*, it is judicial activity, not that of a council or assembly, that is depicted as emblematic of a community at peace.¹²⁹ The primary task of princes in Hesiod's *Works and Days* is to dispense justice, Herodotus attributed Deioeces' 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."¹³⁰

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 *dêmos*'s control of the courts centre stage.¹³¹ Ephialtes' and Pericles' use of the courts to dock the power of the council of the Areopagos around 462 was also portrayed as a major watershed.¹³² Conversely, the only item on the 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 immediately rescinded these powers, as did Antipater in 322.¹³³

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 functions, 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.¹³⁴ Generals and *dêmagôgoi*, "leaders of the *dêmos*," 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

¹²⁸ Hansen, *Athenian Democracy*, 179-80, 218-24; Todd, *Shape*, 154-63. The courts also had other minor responsibilities such as overseeing state auctions.

¹²⁹ Hom. *Il.* 18.491-509.

¹³⁰ 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.

¹³¹ Arist. *Pol.* 1273b36-74a23.

¹³² Aristot. *Pol.* 1274a5-22; Ps. Aristot. *Ath. Pol.* 9.1, 25-6, 27.2-28.

¹³³ Ps. Aristot. *Ath. Pol.* 29.4, 35. Cf. Aeschin. 3.5, 191, 196, 234; Dem. 24.154, 58.34; Boegehold, *Lawcourts*, 41; R. Brock, "The Courts in 411," *Liverpool Classical Monthly* 13 (1988): 136-8; Hansen, *Sovereignty*, 55; Hansen, *Eisangelia*, 17.

¹³⁴ Ps. Aristot. *Ath. Pol.* 25-7 with Rhodes, *Commentary*, 309-22.

that judicial action sought to constrain.¹³⁵ Initially, the principal mechanism was impeachment, used to launch prosecutions concerning (for example) treason, taking bribes or lying to the *dêmos*, but from the mid-fifth century audits, too, were used, at least against generals and ambassadors. Hansen has argued that the audit was relatively insignificant, since it seems not to have led to many prosecutions; but it is also possible that office-holders behaved well because they knew that any malfeasance was almost certain to be caught.¹³⁶ 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 in Aristophanes' *Knights* suggests how the assembly and courts worked together to maintain the *dêmos*'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."¹³⁷ What is striking 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".¹³⁸

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 *dêmos*'s sufferance, is reversed in the courts, where they can be humiliated at the *dêmos*'s hands. This suggests two points. First, the interdependence of the assembly and courts: rule by the *dêmos* 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 political security of the *dêmos* was ultimately 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.¹³⁹ Hansen has called the number of politicians targeted by

¹³⁵ On the term "politician," see Hansen, *Athenian Ecclesia II*, 1-23; Ober, *Mass and Elite*, 106 with n.6 (whose view I share).

¹³⁶ Hansen, *Athenian Democracy*, 224.

¹³⁷ Aristoph. *Kn.* 1124-30, tr. Henderson.

¹³⁸ Aristoph. *Kn.* 1150, tr. Henderson.

¹³⁹ Aeschin. 3.194. Cf. Plat. *Gorg.* 516d; Ps. Plat. *Ax.* 368d-9b; Dem. 18.251; Sinclair, *Democracy*, 162.

impeachment “a serious defect in the system,” and other historians agree.¹⁴⁰ As Knox has emphasized, nearly all known politicians were eventually convicted of something, including famous figures such as Pericles and Demosthenes, often spelling the end of their careers or sometimes even lives. This tendency has been interpreted in two ways: either the Athenians persecuted many honest men, or they were incapable of selecting honest leaders.¹⁴¹ 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.

On any account, 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 elite. 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, thus strengthening the *dēmos*'s rule.

Conclusion

What can we learn from this interpretation of the late fifth-century Athenian legal reforms and the account of Athenian democracy it suggests? First, it forces us to confront the relative impoverishment of democracy today. The view that ancient Greek democracy was superior to modern democracy, at least with respect to the powers enjoyed by ordinary citizens, looks strong on this evidence. Of the two political functions identified by Aristotle, modern citizens retain an indirect influence over what is deemed advantageous for the community, via their election of politicians presumed to share their values, but remarkably little over what is deemed just. Even when juries are used to decide cases, they are extremely small, often handpicked by the advocates presenting the case, 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 the regularized disciplining of politicians and office-holders. The latter function, strikingly, no longer exists. Aristotle treated

¹⁴⁰ Hansen, *Eisangelia*, 11, 65. Cf. F. Ahl, “The Art of Safe Criticism in Greece and Rome,” *American Journal of Philology* 105 (1984): 174-208; Bauman, *Political Trials*, 2; E. Harris, “Law and Oratory,” in *Persuasion: Greek Rhetoric in Action*, ed. I. Worthington (London: Routledge, 1994): 130–50; R. Knox, ““So Mischievous a Beaste”? The Athenian ‘Demos’ and its Treatment of Its Politicians,” *Greece & Rome* 32 (1985): 132-61.

¹⁴¹ Hansen, *Eisangelia*, 11; Knox, “Beaste,” 144.

elections and audits together: the one presupposed the other.¹⁴² Today, the only available method of disciplining politicians is to elect someone else at the next opportunity.

By Athenian standards, this represents a significant loss. Yet it is a loss of which few people today are conscious. Even a large number of deservedly well respected ancient historians, despite knowing perfectly well that Athens' courts were highly democratic and that they played a significant political role, would appear to have been less sensitive than they might have been to the differences between judicial activity in ancient Greek democracy and today, interpreting Athenian judicial activity as a form of self-restraint in the absence of any evidence that contemporaries shared that perception. With respect to the debate over the late fifth-century reforms in particular, each scholarly camp would seem to have been right on one point: Hansen *et al.* that the reforms were significant, 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 reforms might have rendered the Athenian political system *more* democratic was not noticed. And that, surely, reflects the fact that modern democracies lack the demotic control of the administration of justice that the ancients took for granted. The decline in the power of the *dêmos* in view here 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.¹⁴³ This position may be traced back to Athenian democracy's best-known critic, Plato.¹⁴⁴ 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 more significantly influences 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 inappropriate, 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 decline, or even more specifically decay, where decay is defined as the breakdown of a complex entity—here ancient democracy—into its component parts and the subsequent loss of one of those parts—here popular judicial control. The disappearance of political

¹⁴² Aristot. *Pol.* 1281b30-82a35.

¹⁴³ Mirhady, "Aristotle," 302.

¹⁴⁴ Cammack, "Plato," 639-42.

institutions and practices over time may be the result neither of nature nor of chance but of will. Human interventions, including intellectual interventions, often help to generate what later appear to be enduring background conditions. And successful ideological innovations tend to obscure their own origins. It follows that the mere act of diagnosing decay in this context may be difficult. It requires observers capable of entering imaginatively into two states, the pre- and the post-decay. Without such observers, historical change itself becomes invisible, taken for granted, and hence more difficult to remedy.

For this reason, drawing attention to the differences between 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, unaccountable experts quite acceptable. An Athenian democrat, on the other hand, would fear that the lack of demotic control of the administration of justice invited the oligarchical capture of the entire political system. It is worth pondering who is right.