Zeitschrift: Entretiens sur l'Antiquité classique
Herausgeber: Fondation Hardt pour l'étude de l'Antiquité classique
Band: 56 (2010)

Artikel: Judicial review and the Athenian 'constitution'
Autor: Lanni, Adriaan
DOI: https://doi.org/10.5169/seals-660897

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ADRIAAN LANNI [1]

JUDICIAL REVIEW AND THE ATHENIAN 'CONSTITUTION'

What do the Athenian procedures for reviewing the legality of statutes (known to us, but not the Athenians, as 'judicial review') tell us about the existence of a 'higher law' in Athens? Anyone familiar with Athenian history might assume that the answer would throw an unflattering light on Athens. Our first detailed information about the procedure for judicial review of legislation is the infamous Arginusae affair, in which the Athenians had several generals sentenced to death collectively and executed without trial. And all of our surviving law court speeches in constitutional cases appear to be motivated first and foremost by political rivalry, rather than a desire to protect the Constitution.[2] Nevertheless, I think we can discern from these sources a coherent theory of the Athenian 'Constitution'— that is, a sense of which types of higher law were considered important enough to justify overturning new legislation.

This paper describes the procedures for reviewing legislation in Athens, then turns to a close examination of the legal

[1] I thank Victor Bers, Richard Fallon, Mogens Hansen, Wesley Kelman, Michael Klarman, Daryl Levinson, Michael Gagarin, Jed Shugerman, Matthew Stephenson, Mark Sundahl, Mark Tushnet, and Harvey Yunis for advice on this project.

[2] Of course, the American practice of judicial review was also firmly established in a case that was fundamentally a partisan political dispute — *Marbury vs. Madison*.

arguments in our surviving speeches. I argue that prosecutors consistently attempted to depict the statute as a threat to the basic democratic legislative or adjudicative process. This suggests that the legal review of statutes was understood as a means of preserving popular decision making structures rather than enforcing substantive values. From a modern perspective, classical Athens offers an interesting alternative model of a highly democratic form of 'judicial review' in which constitutional precommitments were limited and constitutional challenges were adjudicated by large juries of ordinary citizens. Far from taking issues out of the realm of popular decision making, judicial review in Athens was quite limited in scope and focused on preserving the key democratic political values: the citizenry's lawmaking power, and the jury's wide power to adjudicate disputes.

II. The Review of Legislation in Athens

In this section I describe the procedures for overturning legislation in Athens. Our understanding of these procedures, as of so much of Athenian institutional history, has been greatly enhanced by the work of our convener, Mogens Hansen.[3] The *graphē paranomōn*, which was introduced not later than 415 B.C.,[4] was the original mechanism for challenging legislation as *paranomos* ("contrary to law," or "unconstitutional"). The legal reforms at the end of the fifth century established a

[3] E.g., M.H. HANSEN, *The Sovereignty of the People's Court in Athens in the Fourth Century B.C. and the Public Action Against Unconstitutional Proposals* (Odense 1974); ID., "*Graphe Paranomon* Against *Psephismata* Not Yet Passed by the *Ekklesia*", in *C&M* 38 (1987), 63-73.

[4] AND. 1.17, 22. For discussion of various theories on the origin of the *graphē paranomōn*, see M.J. SUNDAHL, *The Use of Statutes in the Seven Extant* graphe paranomon *and* graphe nomon me epitedeion theinai *Speeches* [Unpublished Ph.D. Dissertation] (Brown University 2000), 24-6.

hierarchy between laws (*nomoi*) that proclaimed general and permanent higher norms of general application and time-limited decrees (*psephismata*); in theory, at least, no decree could contravene a law, and no new law could contradict an existing law unless the pre-existing law was simultaneously repealed.[5] Following this reform, the *graphē paranomōn* was limited to challenges to decrees, while a new procedure, the *graphē nomon mē epitēdeion theinai* ("public procedure for introducing an unsuitable law"), was introduced for challenging new laws.[6]

Any male citizen could lodge a challenge, which would result in a jury trial in which the sponsor of the legislation was charged with defending his law or decree. The typical jury included 501 members, but in high-profile cases more jurors might be used.[7] Proposed legislation could be challenged either before or after it was enacted by the Assembly or (in the case of a law) the *nomothetai*;[8] in both cases, the legislation was suspended pending the outcome of the trial. If the prosecution was successful, the decree or law was nullified and, if the challenge was initiated within a year, the defendant was subject to a punishment assessed by the jury.[9] If the jury upheld a decree or law that had already been duly enacted prior to being challenged, then the legislation became valid. It seems that if in a

[5] M.H. HANSEN, "Athenian *Nomothesia*", in *GRBS* 26 (1985), 345-71; ID., *The Athenian Democracy in the Age of Demosthenes. Structures, Principles and Ideology* (Oxford 1991), 171-4.

[6] M.H. HANSEN, *op. cit.* (n. 3), 44-8; H.J. WOLFF, *'Normenkontrolle' und Gesetzesbegriff in der attischen Demokratie* (Heidelberg 1970), 40-1. I refer to *nomoi* as laws, *psephismata* as decrees, and use the general terms statute or legislation to refer to both *nomoi* and *psephismata.*

[7] AND. 1.17.

[8] XEN. *Hell.* 1.7.12-14; DEM. 22.5, 9-10; M.H. HANSEN, *art. cit.* (n. 3), 75-80. E. CARAWAN, "The Trial of the Arginousai Generals and the Dawn of Judicial Review", in *Dike* 10 (2007), 36-7 suggests that, at least in the fifth century, a decree could not be overturned after it was implemented.

[9] DEM. 20 hyp.2.3; cf. DEM. 20.144; 23.104; H.J. WOLFF, *op. cit.* (n. 6), 9-10; E. CARAWAN, *art. cit.* (n. 8), 32-5 argues that the one-year time-limit on liability may not have been true of the fifth-century *graphē paranomōn.*

graphē paranomōn the jury upheld a decree that had been challenged prior to enactment, the decree automatically became valid even though the Assembly had never voted on the measure.[10]

The sufficiency of a court verdict in a *graphē paranomōn* to give a proposed but unenacted decree the force of law is but one indication that the court's role in these cases extended beyond simply insuring that the decree was consistent with the existing laws. As has often been pointed out, our surviving *graphē paranomōn* and *graphē nomon mē epitēdeion theinai* speeches contain both 'legal' arguments—that is, discussion about why the legislation does or does not contravene existing law—and 'political' or 'policy' arguments about whether the legislation is in the city's interest.[11] In fact, prosecutors in these suits explicitly divide their speeches into legal and policy arguments.[12]

Scholars differ on the relative importance of legal and policy arguments to the jury's decision. Based on the tendency of prosecutors to begin with legal arguments and isolated comments suggesting that the prosecutor had an obligation to demonstrate that the decree was unconstitutional,[13] Wolff concludes that the legal issues were paramount and the (admittedly copious) political arguments were merely superfluous attempts to prejudice the jury.[14] Hansen, by contrast, emphasizes that speakers tend to devote more time to the political arguments

[10] DEM. 24.9-14; M.H. HANSEN, *art. cit.* (n. 3); cf. J.M. HANNICK, "Note sur la *graphe paranomon*", in *AC* 50 (1981), 393-397. Presumably in the case of proposed laws upheld in a *graphē nomon mē epitēdeion theinai*, the measure would still need to be duly enacted through the *nomothetai*. DEM. 20.100; M.J. SUNDAHL, *op. cit.* (n.4), 19; M.H. HANSEN, *art. cit.* (n. 5), 360-370.

[11] E.g., M.H. HANSEN, *art. cit.* (n. 3), 71; H. YUNIS, "Law, Politics, and the *Graphē paranomōn* in Fourth-Century Athens", in *GRBS* 29 (1988), 361-82. In the case of honorary decrees, there is a third argument, that the beneficiary is unworthy of the honor, which is often considered a form of 'political' plea (for example, by H. YUNIS, *art. cit.*, 361).

[12] E.g. DEM. 23.18; H. YUNIS, *art. cit.* (n. 11), 370-5.

[13] E.g. DEM. 18.110.

[14] H.J. WOLFF, *op. cit.* (n. 6), 13-4; 60-4.

and at times suggest that they are the most important.[15] He views both types of argument as relevant, but contends that proof that a decree was inexpedient was sufficient to overturn it, even if it did not contravene existing law.[16] Yunis contends that both legal and political pleas were necessary to a verdict: he agrees with Wolff that prosecutors were obliged to show that the legislation was unconstitutional, but argues that a prosecutor could not convince a jury to overturn a decree unless he could also show that it was contrary to Athens' interests.[17]

My own view is that both types of argument were considered relevant, and it was up to the jury in each individual case to decide the relative importance of the legal and policy arguments for and against the statute. Scholars have interpreted the evidence on the status of the legal plea so differently because this question was itself part of what was at issue in these cases, leading to contradictory statements by different speakers depending on which position best supported their case.[18] And litigants could make very different choices about which types of evidence to include in their speeches. The *graphē paranomōn* concerning Demosthenes' crown, one of the few cases in which both sides of a case survives, illustrates the lack of consensus on the relative importance of legal and political arguments:

[15] E.g. AESCHIN. 3.49; M.H. HANSEN, *art. cit.* (n. 3), 71 and nn. 34-5.

[16] M.H. HANSEN, *art. cit.* (n. 3), 71-2 (citing DEM. 58.89-91).

[17] H. YUNIS, *art. cit.* (n. 11), 364-70. He emphasizes the way that speakers approach legal and political arguments as "complementary strands to be consulted by jurors" (364), citing both the organization of speeches and specific passages (e.g. AESCHIN. 3.260).

[18] Compare: DEM. 18.110 ("I must first, in sequence, present arguments concerning the illegality itself"); HYP. Fr. 7 (Aristogeiton comes close to admitting in his defense that his proposal to free the slaves and restore all exiles in the aftermath of Chaeronea contravened the law but was justified on policy grounds: "But did you not read the laws which prohibit this? I was not able to, because Macedonian arms obstructed their words"); DEM. 59.91 (suggesting that citizenship grants could be overturned through a *graphē paranomōn* if "the man who received the gift was shown to be unworthy"); AESCHIN. 3.260 (charging the jurors to reach a decision based on both *ta dikaia kai ta sumpheronta*).

Aeschines offers a detailed discussion of the relevant laws,[19] while Demosthenes responds to these legal arguments in a mere nine sections, shunted off to an inconspicuous part of the speech.[20] Such a situation, in which the jurors are presented with two contrasting views of 'the case', each of which employs a radically different balance between legal and policy arguments, suggests that neither type of argument was considered ex ante decisive or even superior to the other.

In this respect, the different emphases in constitutional arguments is consistent with my more general approach to decision making in Athenian popular courts: there was no authoritative rule of decision, and the jury panel was typically presented with a highly contextualized account of the dispute and left to its own devices to arrive at a just resolution of each case.[21] In this way, each juror was free to decide for himself whether legal or extra-statutory norms were more important. However, the surviving constitutional cases differ from other popular court cases in three respects: (1) because the dispute centers on the validity of a statute, these cases tend to include more, and more detailed,

[19] AESCHIN. 3.8-48.

[20] DEM. 18.111-120. H. YUNIS, *art. cit.* (n. 11), 375-81 notes this difference and suggests that while prosecutors were obliged to argue for overturning the statute on both political and legal grounds a defendant with a weak legal case might emphasize policy arguments in his favor. M. GAGARIN, "Law and Politics in the Case on the Crown", Address delivered to the American Society for Legal History (Toronto 2008) argues that both the discussions of Demosthenes' career and his character in this case should be considered a 'legal' argument in Athenian terms because what mattered in a public suit was the wording of the indictment, not the statute. But the point remains that Aeschines and Demosthenes devote different levels of emphasis to the argument over whether the decree contravenes standing law.

[21] A. LANNI, *Law and Justice in the Courts of Classical Athens* (Cambridge 2006), 41-74. I argue that the Athenians consciously adopted a highly discretionary approach to justice in the popular courts. This choice reflects both a normative belief that a wide variety of contextual information was often relevant to reaching a just decision, as well as a political commitment to popular decision making in a direct democracy.

legal argumentation;[22] (2) the juxtaposition of separate, parallel statutory and extra-statutory arguments is generally quite explicit; and (3) many (but by no means all) of the extra-statutory arguments focus on forward-looking questions of Athens' policy interests (*to sumpheron*),[23] while speakers in ordinary cases tend to focus on the character of the litigants and notions of desert (*to dikaion*).[24] We will return in Part III to what these differences suggest about the unusual constitutional role of the jury in *graphē paranomōn* and *graphē nomon mē epitēdeion theinai* cases. What is important at this point is that the jury in these cases, as in all Athenian popular court cases, was free to disregard the law in favor of policy or other extra-statutory norms.

II. Legal Review of Statutes and the Athenian 'Constitution'

If I am right that the laws did not provide a determinative guide to a verdict in Athenian popular courts and jurors could freely ignore them in individual cases, then the *graphē paranomōn* and *graphē nomon mē epitēdeion theinai* present something of a paradox: if law is not ultimately authoritative but is just one piece of evidence for jurors to consider along with

[22] Cf. S.C. TODD, "The Purpose of Evidence in Athenian Courts", in *Nomos: Essays in Athenian Law, Politics, and Society*, ed. by P.A. CARTLEDGE, P.C. MILLETT, S.C. TODD (Cambridge 1990), 31-2 who notes the greater legal argumentation in *graphē paranomōn* cases and suggests that statutes take the place of witnesses in these cases.

[23] Of course, other forms of extra-statutory argument are also prominent in constitutional cases, including not only the question of worthiness in cases involving honorary decrees, but also the character of the litigants. As H. YUNIS, *art. cit.* (n. 11), 369 n. 29 points out, these cases were a mixture of what Aristotle would characterize as deliberative and forensic oratory.

[24] Discussions of a speaker's past and promised future liturgies and deterrence arguments are two instances where speakers in non-constitutional cases appeal to Athens' policy interests, but both these types of arguments tend to be couched in terms that are consistent with justice and moral desert.

competing (and often contradictory) norms, why have procedures to insure that new legislation does not contravene existing law? A close examination of the 'legal' arguments in constitutional cases — that is, prosecution arguments that a law or decree contravenes existing law — may offer some clues.

It may be helpful to summarize briefly my thesis and its relationship to previous scholarship at the outset before delving into an analysis of the cases. I contend that prosecutors sought to present the statute under review as one that interfered with the democratic legislative or adjudicative process by, for example, charging that it was not enacted through the proper legislative procedures or that it violated the right to a trial or the finality of court judgments. Our evidence suggests that the Athenians thought the legal review of statutes should be focused on preserving basic democratic decision making structures (which in Athens included the popular courts as well as the Assembly); in practice only statutes that were perceived to threaten democratic procedures were considered *paranomos* (unconstitutional) in the legal sense (though, as we have seen, statutes could be independently overturned for policy reasons as well). Although the grounds for overturning legislation as contrary to law was limited in scope, legal review of statutes through the *graphē paranomōn* and *graphē nomon mē epitēdeion theinai* procedures was considered vital to preserving the democratic Constitution.

Previous scholarship analyzing legal pleas in constitutional cases has focused on distinguishing the different types of legal argument found in the speeches and evaluating their relative importance without attempting to suggest a common theory of the Athenian 'Constitution' that underlies the various arguments. Lipsius identified two types of argument for challenging a statute as unconstitutional: (1) procedural violations in the process of proposing or enacting the statute; and (2) contradictions with the substance of an existing law.[25] Wolff's landmark

[25] J.H. LIPSIUS, *Das attische Recht und Rechtsverfahren* (Leipzig 1905), 390-2; cf. M.H. HANSEN, *op. cit.* (n. 5), 205, who distinguishes between arguments based on 'formal' and 'material' illegality.

study, *"Normenkontrolle" und Gesetzesbegriff in der attischen Demokratie*, added a third category of legal argument: the statute under review contravened general principles that could be logically derived from existing statutes, as opposed to directly contradicting a specific provision.[26] Wolff viewed this third category of argument as most central to Athenian notions of constitutionality, and carefully traced the Athenians' increasing sophistication at extracting fundamental principles from statutes over time. Two additional aspects of Wolff's theory are important for our purposes: first, the fundamental principles involve moral and social values and institutions (*Institutionen der Gesellschaftsordnung*) as well as democratic political and legal norms (*die Rechtsordnung als Ganzes*: "the legal system as a whole");[27] and, second, the general principles are always derived from statutes and are never appealed to as independent, abstract values.[28]

In a recent dissertation and article, Sundahl catalogues the legal arguments in the surviving constitutional speeches according to the three categories described above.[29] He argues, contra Wolff, that arguments that the statute contravened general legal principles were actually the least prominent, and were primarily limited to one speech, Demosthenes 23, *Against Aristocrates*.[30] Sundahl demonstrates that the other two types of argument—procedural illegality and direct conflict with a provision of a standing law—dominate the speeches.[31] He argues that the grounds for challenging a statute was therefore relatively narrow, limited mostly to formal procedural violations or evident contradictions, and concludes that the procedures for legal

[26] H.J. WOLFF, *op. cit.* (n. 6), 45-67.

[27] *Ibid.*, especially 49-50 and 65.

[28] *Ibid.*, 66.

[29] M.J. SUNDAHL, *op. cit.* (n. 4); ID., "The Rule of Law and the Nature of Fourth-Century Athenian Democracy", in *C&M* 54 (2003), 127-56.

[30] M.J. SUNDAHL, *op. cit.* (n. 4), 122; M.J. SUNDAHL, *art. cit.* (n. 29), 138-9.

[31] M.J. SUNDAHL, *op. cit.* (n. 4), 116-29.

review of statutes was only a 'weak restraint' on the sovereignty of the Assembly.[32]

In the analysis below, I isolate what I think is a common thread among most of the legal arguments that have previously been separated into the three distinct categories described above: allegations that the statute interferes with the basic legislative or adjudicative procedures of the democratic Constitution. Some of these procedures — for example, aspects of the fourth-century legislative process — were explicitly enumerated by statute, while others, such as the right to a trial, were implicit. The procedures for legal review of statutes were less concerned with enforcing substantive consistency with standing law than with safeguarding popular decision making in the Assembly and courts. Under this view, arguments regarding formal or procedural irregularities in passing the statute under review reflect concerns about safeguarding the legislative process. And we will see that the majority of the arguments alleging either direct contradictions with existing laws or contravention of general principles involve basic procedural rights or otherwise implicate the integrity of the adjudicative process in the popular courts. The Athenian 'Constitution' was thus both broader and narrower than Wolff's characterization: broader, because the arguments challenging the constitutionality of statutes do seem to suggest an appreciation for an overarching set of abstract democratic principles to which legislation must conform, independent of individual existing statutes; and narrower, because those principles seem to have been limited to protecting popular decision making in the legislative and adjudicative process, rather than including substantive moral and social values.

The most useful sources for analyzing the legal review of statutes are the four surviving *graphē paranomōn* speeches

[32] M.J. SUNDAHL, *art. cit.* (n. 29), 127.

(Aeschines 3, Demosthenes 18, 22, and 23),[33] the two remaining *graphē nomon mē epitēdeion theinai* speeches (Demosthenes 20 and 24), and Xenophon's account of the Assembly debate concerning the Arginusae affair.[34] A difficulty immediately presents itself: four of these seven speeches involve challenges to honorary decrees, hardly the most promising subject matter for discerning the nature of the Athenian 'Constitution'. And this is not a statistical blip; of the thirty-two *graphē paranomōn* prosecutions where we know the subject of the challenged decree, nineteen involved honorary decrees.[35] In practice, the *graphē paranomōn* procedure was commonly used merely as a weapon against political enemies—either by challenging decrees proposed by one's enemy or by challenging honors voted to him.[36] Yet even in cases involving apparently unimportant honorary decrees, the way that prosecutors frame their challenges — the way they tried to depict the decree as interfering with the legislative and adjudicative process — is revealing of the principles the Athenians viewed as important enough to justify overturning a statute. In what follows, I analyze the legal arguments in the Arginusae affair, the two surviving *graphē nomon mē epitēdeion theinai* prosecution speeches, and the three surviving *graphē paranomōn* prosecution speeches.[37]

[33] We also have fragments of two other speeches: (1) the end of a fifth speech, Hyperides 2, *Against Philippides*, which includes a quotation of the honorary decree under review, but does not include extended legal argument, and (2) the recently discovered fragments from Hyperides, *Against Diondas*, which is a defense speech and therefore does not present arguments for the unconstitutionality of the decree.

[34] XEN. *Hell.* 1.7.9-35; we also have fragments or references to several additional cases, catalogued in M.H. HANSEN, *op. cit.* (n. 3), 28-43, but as discussed below these fragments are of only limited use in discerning how prosecutors framed their legal arguments.

[35] M.H. HANSEN, *op. cit.* (n. 5), 211.

[36] M.H. HANSEN, *op. cit.* (n. 3), 62-5.

[37] I do not separately discuss the one surviving defense speech in a *graphē paranomōn*, Demosthenes 18, for which we have the corresponding prosecution speech (Aeschines 3). I also do not discuss the references to other constitutional cases collected by Hansen. Even in the few cases where we have some informa-

The Arginusae affair

The only case pre-dating the legislative reforms about which we have significant information is the Arginusae affair.[38] The generals in charge of the naval victory at Arginusae in 406 B.C. were criticized for failing to rescue the shipwrecked sailors after the battle. Kallixenos introduced a decree calling for the Athenians to decide on the guilt of the eight accused generals in a single vote during the current Assembly meeting. Euryptolemos challenged the decree as unconstitutional. When it was proposed that Euryptolemos be judged in the same vote as the generals, he withdrew his challenge and instead moved a counterproposal—ultimately unsuccessful— suggesting alternative procedures through which the generals could be given a proper trial. Xenophon provides an account of Euryptolemos' speech in the Assembly,[39] which gives us some indication of the arguments he would have presented if his *graphē paranomōn* had gone to trial. He argues that Kallixenos' decree is unconstitutional because it contravenes the general principle, not explicitly provided for by statute, that defendants have right to a trial and to an individual assessment of guilt.[40] Thus the very first

tion regarding the nature of the legal challenge to the statute, it is impossible to tell whether we know of all the legal arguments that were employed, which legal arguments were emphasized, and how they were presented; we will see that even where substantive contradictions exist prosecutors often present them in a way that emphasizes that the statute interferes with the legislative or judicial process. One observation from the catalog that may be worth noting: setting aside challenges to honorary decrees and decrees involving foreign policy, the only challenges for which we have more than one example involve procedural rights (execution without trial: Hansen Cat. Nos. 3, 14, 29; imprisonment: Hansen Cat. No. 1). M.H. HANSEN, *op. cit.* (n. 3), 62.

[38] XEN. *Hell.* 1.7.9-35. E. CARAWAN, *art. cit.* (n. 8) argues that the function of the *graphē paranomōn* was significantly different in the fifth and fourth centuries. In my view, we simply do not have enough evidence about fifth-century *graphē paranomōn* procedures to evaluate this claim. What is important for our purposes is that even the single fifth-century case that we have some information about accords with the thesis that the Athenians viewed decrees that intervened with basic procedural rights as *paranomos*.

[39] XEN. *Hell.* 1.7.16-33.

[40] XEN. *Hell.* 1.7.23.

discussion of the constitutionality of a statute that survives involves an attempt to protect the basic procedural right to trial in the popular courts.[41]

Demosthenes 24: Against Timokrates

Androtion and two other Athenians seized an enemy ship and hoped to keep the booty, but a political opponent passed a decree requiring that those in possession of the enemy property pay back the money or become state debtors, which would result in imprisonment until the debt was paid.[42] In an apparent attempt to escape with the booty, Androtion and his associates then had Timokrates, a political ally, propose a law (*nomos*) which permitted state debtors to avoid prison until the ninth prytany if the Assembly approved sureties put forward by the debtors.[43] Demosthenes wrote the first prosecution speech on behalf of the prosecutor Diodorus in the *graphē nomon mē epitēdeion theinai* challenging Timokrates' law.

Nearly all of Diodorus' legal arguments allege that the law undermines democratic decision making by interfering with the legislative or adjudicative process. He begins with a detailed description of the requirements for enacting a new law, and argues that Timokrates intentionally circumvented the deliberative process by trying to sneak his law through during a holiday.[44] Timokrates did not follow the ordinary procedures

[41] Interestingly, many of the early American instances of judicial review also involved the preservation of the right to a jury trial. For discussion, see M.J. KLARMAN, "How Great were the 'Great' Marshall Court Decisions?", in *Virginia Law Review* 87 (2001), 1111-84.

[42] DEM. 24.12-14. The decree called on the trierarchs to pay the treasury and then seek reimbursement from those in possession, with recourse to a lawsuit if necessary. If Androtion and his associates forced a trial and were unsuccessful, it seems that as state debtors a penalty would be added, making them liable for twice the original debt. D.M. MACDOWELL, *The Law in Classical Athens* (London 1978), 166-7.

[43] DEM. 24.39-40.

[44] DEM. 24.17-32.

of publicly posting the law and having the proposal read out at a prior Assembly meeting before bringing it to vote.[45] Instead, while the Council was adjourned for a festival he had the *nomothetai* called in an emergency session, ostensibly to deal with urgent financial matters related to the festival, but in fact "in order that the law be passed and become law uncontested without anyone noticing or speaking against it".[46] Diodorus urges the jurors to overturn the law as unconstitutional because Timokrates "completely stripped you of your right to deliberate (*bouleusasthai*) and examine these matters by trying to pass a law during the festival".[47] Diodorus also notes that Timokrates has contravened the law prohibiting legislative proposals on behalf of the disenfranchised or the indebted unless special procedures — presumably intended to insure that the Athenians are not tricked into enacting legislation against the city's interests — are observed.[48]

Diodorus then turns from discussion of how the law was improperly enacted to an examination of the unconstitutional provisions in the law. He charges that the law violates a series of laws that safeguard the finality of duly-decided judicial verdicts. He contends that the law's provision that an imprisoned debtor may appeal to the Assembly to approve his sureties and release him violates (1) the law prohibiting a convicted defendant or his representative from seeking reconsideration of a judicial sentence in the Council or the Assembly; (2) the law prohibiting officials from bringing up for reconsideration any matter that has been decided by a court, and (3) the law providing that all verdicts and awards decided under the democracy (but not those decided during the reign of the Thirty tyrants) shall be valid.[49] Later in the speech, Diodorus under-

[45] DEM. 24.26.
[46] DEM. 24.28.
[47] DEM. 24.32.
[48] DEM. 24.45-48.
[49] DEM. 24.53-59.

scores the broader implications of upholding a law that interferes with a court's sentence: "I suppose that all would agree that to render invalid court judgments that have been made is monstrous, unholy, and subverts the democracy".[50] Diodorus also contends that because Timokrates introduced his law with Androtion in mind,[51] it contravenes the prohibition against ad hominem legislation, noting that this 'democratic' prohibition assures that all citizens are treated equally under the laws. Among the long list of statutes Diodorus alleges the law contradicts, only one — the law that provides for defendants convicted through the *eisangelia* procedure to be imprisoned until they pay any fine assessed[52] — involves a straightforward substantive contradiction with the proposed law that does not implicate the integrity of democratic legislative or judicial procedures.

Demosthenes 20: Against Leptines

The Social War (357-355 B.C.) put Athens in financial crisis. Several measures were proposed to try to bolster the city's revenues, one of which was a law (*nomos*) proposed by Leptines to abolish all exemptions from liturgies, the public services imposed on wealthy citizens and metics. Citizens (for example successful generals) and foreigners who had done services for Athens could be offered life-long exemptions from these duties by decree. Leptines' proposed law would abolish past and future exemptions, and would punish anyone who claims an exemption with disenfranchisement and confiscation of property.[53]

[50] DEM. 24.152.

[51] DEM. 24.59-60. He also argues, falsely, that because the law exempts certain classes of debtors— namely tax-farmers, lessees, and their sureties — it does not apply equally to all and therefore constitutes ad hominem legislation.

[52] DEM. 24.62-65.

[53] M.J. SUNDAHL, *op. cit.* (n. 4), 185 reconstructs the law from partial quotations in DEM. 20.29, 127, 156, 160.

Demosthenes delivered the speech that survives as a supporting speaker (*sunegoros*) for the prosecutor in the successful[54] *graphē nomon mē epitēdeion theinai* challenging the law.[55]

Demosthenes presents four legal challenges to the law. The first, and most detailed, legal argument (88-101) charges that Leptines violated the proper legislative procedure in enacting his law. Demosthenes argues that Leptines has violated several aspects of the procedures for ratifying a new law: he did not move to repeal an existing contradictory law;[56] he did not publicly post the proposed law,[57] and he did not have the proposed law read out at the Assembly prior to the vote.[58] Throughout, he emphasizes that Leptines has subverted the laws designed to protect the legislative process: these procedures prevent laws from "taking force just as they happened to take shape in a moment of crisis, without undergoing proper scrutiny"[59] and ensure that "each of you hear [the laws] many times and examine them at leisure and make them law only if they are just and in the public interest".[60] In the course of this discussion, Demosthenes quotes a law providing "all awards granted by the people shall be valid", a provision intended to confirm awards granted by the democracy while cancelling those enacted during the tyranny of the Thirty.[61] Although Demosthenes does point out that Leptines' law abolishing exemptions from liturgies appears to contradict this pre-existing law and is therefore unconstitutional, it is remarkable that he makes this point offhandedly in the midst of his discussion of procedural violations.

[54] DIO CHRYS. 31.128; for discussion see E.M. HARRIS, *Demosthenes, Speeches 20-22* (Austin 2008), 20-1.

[55] On the procedure for this action, see M.H. HANSEN, *art. cit.* (n. 5), and M.H. HANSEN, "Athenian *Nomothesia* in the Fourth Century B.C. and Demosthenes' Speech Against Leptines", in *C&M* 32 (1980), 87-104.

[56] DEM. 20.89; cf. DEM. 24.34.

[57] DEM. 20.94.

[58] DEM. 20.94; cf. DEM. 24.21, 25; M.H. HANSEN, *art. cit.* (n. 5).

[59] DEM. 20.90.

[60] DEM. 20.94.

[61] DEM. 20.96; E.M. HARRIS, *op. cit.* (n. 54), 51, n.131.

His quotation of the pre-existing law is followed immediately with the procedural violation, not the substantive contradiction, arguing that Leptines should not have proposed his law before repealing the standing law that all awards are valid.[62]

Demosthenes also claims that Leptines' law interferes with the integrity of the adjudicative process. He argues that the law violates the principle prohibiting any public or private charge from being brought twice. He gives an example of a man who successfully defeated a *graphē paranomōn* challenging a decree that granted him an exemption from liturgies, and argues, falsely, that since Leptines' law would deprive the man of his exemption it would constitute re-trying the previous case contrary to law.[63]

Against Leptines includes two legal arguments that do not fit our scheme. First, Demosthenes argues that the portion of Leptines' law imposing disenfranchisement and confiscation of property on anyone who asks for an exemption is unconstitutional because it contravenes an existing law providing that court-assessed penalties must take the form of a punishment that affects either the person or the property of the convicted person, but not both.[64] The thrust of this plea is that the law is unconstitutional because the penalty it proposes is substantively too severe. Second, Demosthenes contends that by limiting the people's ability to grant rewards to benefactors, Leptines' law violates the principle implicit in Solon's law on testaments that Athenians have the right to give away their property to whomever they wish.[65] However, both of these arguments are brief, occupying a total of only four sections.

[62] DEM. 20.96-97.

[63] DEM. 20.147. Of course, this is a specious argument: the issues in the previous case involving this individual's exemption and the current case were not the same and did not in fact constitute retrying the case twice.

[64] DEM. 20.155-157. In fact, this argument is false because the law cited did not limit the use of multiple penalties in statutes, but only in penalty hearings (*timesis*).

[65] DEM. 20.102-104.

These two exceptions aside, the primary legal arguments in this speech focus on how the law allegedly contravenes legislative or judicial procedures rather than on why the law is substantively unconstitutional.

Aeschines 3: Against Ktesiphon

Ktesiphon proposed a decree that his ally Demosthenes be awarded a golden crown in the theater during the Dionysia to honor his services to Athens.[66] Aeschines, Demosthenes' political enemy, challenged the proposed decree via a *graphē paranomōn*. Both the prosecution speech and Demosthenes' defense speech on behalf of Ktesiphon survive. This case is a prime example of the use of the *graphē paranomōn* procedure as a political weapon, and both speakers devote a significant portion of their speech to discussion of Demosthenes' character and political career. Nevertheless, Aeschines does offer detailed legal arguments challenging the honorary decree as unconstitutional. (9-48).[67]

Aeschines begins by characterizing his prosecution as not about partisan politics but rather about the preservation of the democratic Constitution. He emphasizes that the *graphē paranomōn* is the mechanism through which the laws, and hence

[66] DEM. 18.118.

[67] Aeschines attempts to couch his argument that Demosthenes is unworthy of the honors as a legal argument by suggesting that the praise of Demosthenes in the proposed decree violates the prohibition against lying in a public decree (AESCHIN. 3.49-50). As H. YUNIS, *art. cit.* (n. 11), 371 points out, the locution "all … the laws" (AESCHIN. 3.50) suggests that there was no specific law against lying in a decree. I follow Yunis in characterizing this portion of the speech as part of the political rather than the legal plea. For an argument that all issues in the indictment, including this one, were considered 'legal' in the Athenian sense, see M. GAGARIN, *art. cit.* (n. 20). Even if we were to consider this a legal argument, it would conform to my thesis: the general principle banning proposing decrees including false statements was presumably intended to safeguard popular decision making by preventing the people from being misled by politicians.

the democracy, are preserved.[68] Referring to the jurors in such cases as "guardians of the democracy",[69] he states: "No man should be unaware, but each should be clear that whenever he goes into a court to judge a *graphē paranomōn*, on that day he is destined to cast a vote concerning his own right to free speech (*parrhesia*)".[70] In accordance with this strategy, Aeschines depicts the honorary decree as a danger to the integrity of democratic mechanisms of accountability. In his first and most detailed legal challenge, he contends that the decree contravenes a statute forbidding the crowning of an official prior to the mandatory audit of his conduct at the end of his term.[71] He explains that a corrupt official could convince a politician to get the Assembly, unaware of his misdeeds, to vote him a crown, which would then prejudice the jury assigned to conduct the audit.[72] Permitting officials to preempt the audit with crowns and honorary decrees would lead, he argues, to the acquittal of guilty officials and thus hamper the mechanism set up to insure accountability for public officials.[73] Aeschines' secondary legal argument—that the decree provides for the crown to be awarded in the theater, which contravenes a statute prescribing that crowns voted by the people be announced in the Assembly[74]— does not implicate the integrity of the Constitution, and is another exception to the trend I have identified. Once again, however, this argument is given less attention than the argument alleging that the statute poses a threat to an impartial adjudication.

[68] AESCHIN. 3.1-8.
[69] AESCHIN. 3.7.
[70] AESCHIN. 3.6.
[71] AESCHIN. 3.9-31.
[72] AESCHIN. 3.9-12.
[73] AESCHIN. 3.9-12.
[74] AESCHIN. 3.32-48.

Demosthenes 22: Against Androtion

At the end of his year of service in the Council, Androtion proposed a decree, as was customary, honoring his cohort of outgoing Council members. A political enemy took the opportunity to bring a *graphē paranomōn* challenging the constitutionality of the decree. Demosthenes wrote the speech delivered by the second prosecutor in the case. The prosecution appears to have had a very strong argument for a direct substantive contradiction with standing law: a pre-existing law explicitly forbade a Council that had failed to build triremes during its term of office from requesting honors, and Androtion's Council had not built any triremes. Yet the speaker does not lead with this apparently iron-clad plea. Instead, he begins by alleging that Androtion has subverted the legislative process by bringing the issue directly to a vote in the Assembly without first obtaining the required approval of the Council to put it on the Assembly agenda.[75] Even when discussing the conflict with the trireme law, the speaker presents the proposed decree as dangerous not only because it decreases the incentives for the Council to build valuable triremes, but also because it might lead to the Assembly being "persuaded or tricked" by clever speakers into awarding unmerited honors.[76]

For good measure, the speaker challenges the decree as unconstitutional based on two additional 'formal' violations: Androtion was disqualified from proposing the decree because he had been a prostitute and was a state debtor.[77] The speaker explains at some length why prostitutes are barred from making proposals. He states that Solon imposed these restrictions to protect the 'constitution'[78] (*politeia*): "he [Solon] forbade their participating in deliberation to prevent the *demos* from

[75] DEM. 22.5-7.
[76] DEM. 22.8-13; quotations from 22.11.
[77] DEM. 22.21; 33.
[78] DEM. 22.31.

being tricked by them and doing wrong".[79] In this way, permitting someone who was disqualified due to character or citizenship status to propose a law was viewed as a threat to the rationality of the legislative process. Thus, even though the prosecution had a very strong case for the proposed decree's direct contradiction with a law, the speaker is careful to present the decree as unconstitutional in large part because it endangered the Assembly's democratic decision making procedures.

Demosthenes 23: Against Aristokrates

Aristokrates proposed a decree honoring Charidemus, a mercenary leader who fought with Athens' Thracian ally, Kersobleptes. The decree made Charidemus inviolable, providing that anyone who might kill him would be liable to seizure and removal from the territory of Athens' allies.[80] The decree further provided that "if any city or private person rescues him [i.e., the killer of Charidemus], he shall be excluded from any treaty (*ekspondos*)".[81] Demosthenes wrote the prosecution speech delivered by Euthykles in the *graphē paranomōn* challenging the decree.

The prosecution's primary legal argument is that the decree is unconstitutional because it denies anyone who might kill Charidemus various procedural rights, particularly the right to be tried in court. The decree calls for the killer to be seized without trial, violating the principle that punishment is not justified unless the accused has been found guilty in a trial.[82] By failing to provide for a trial, the decree circumvents all the special procedural protections afforded by Athens' homicide courts,[83] and prevents an accused killer from arguing to the

[79] DEM. 22.31-32.

[80] DEM. 23.16. On the political background to this case, see M.J. SUNDAHL, *op. cit.* (n. 4), 178-80.

[81] DEM. 23.91.

[82] DEM. 23.25-28.

[83] DEM. 23.63-79.

jury that his act was justified (for example, through self-defense), or involuntary.[84] In this way, the decree undermines the judicial process and strips the people of their power to judge homicide cases. The decree also contravenes other laws protecting defendants' procedural rights: he contends that the decree permits the accusers to torture and mistreat the accused in any way they wish, which violates laws that protect even convicted murderers of such treatment;[85] and the decree permits the killer of Charidemus to be seized outside of Athens, violating the laws which do not permit Athenians to pursue exiled murderers outside the country.[86] He suggests that the decree threatens the very judicial system and encourages self-help and violence "by exposing a man to arrest you allow everything the law forbids: that the man who has arrested him may exact money from him, may rough him up and abuse him, and, acting on his own, kill him. How could anyone be more guilty of an unconstitutional proposal?".[87] In this way the prosecutor converts a decree intended to honor and declare allegiance with one of Athens' allies in Thrace into a grave threat to the adjudicative process.

Conclusions

We have seen that most of the legal arguments challenging legislation as unconstitutional focus on depicting the statute as a threat to the legislative or judicial process. The thesis that the Athenians viewed the legal review of statutes as a mechanism for preserving basic democratic decision making institutions is bolstered by the well-known tendency of speakers to depict the

[84] DEM. 23.47-60.
[85] DEM. 23.27-31.
[86] DEM. 23.34-47.
[87] DEM. 23.35-36. The prosecutor also alleges that the decree violates the prohibition against *ad hominem* laws (DEM. 23.86).

graphē paranomōn as the safeguard of democracy.[88] Although the Athenians appear to have recognized only a limited set of constitutional principles that justified overturning legislation, these principles were fundamental to insuring the integrity of legislative and judicial decisions.

III. Democratic Judicial Review?

The previous section focused on prosecutors' arguments that the challenged legislation contravened existing law. But legal arguments form only part of the argumentation in constitutional cases; as Yunis has noted, *graphē paranomōn* cases involved "legal and political review at once".[89] I want to return briefly to the broader question of the constitutional role of jurors in *graphē paranomōn* and *graphē nomon mē epitēdeion theinai* cases. These procedures are generally compared to judicial review, particularly as practiced in its strong form in the United States.[90] But while there is no perfect modern analog to Athenian practice, American-style judicial review is particularly inapposite. In fact, we will see that the Athenian procedures provide an alternative model of 'judicial review' that avoids one of the central criticisms of American judicial review, namely that it is undemocratic.

[88] E.g. AESCHIN. 3.1-8; DEM. 24.5, 152. For discussion, see M.H. HANSEN, *op. cit.* (n. 3), 55-61.

[89] H. YUNIS, *art. cit.* (n. 11), 369.

[90] E.g., R.J. BONNER, G. SMITH, *The Administration of Justice from Homer to Aristotle* (Chicago 1938), 296-297; M.H. HANSEN, *op. cit.* (n. 5), 209; T.D. GOODELL, "An Athenian Parallel to a Function of our Supreme Court", in *Yale Review* 2 (1893-1894), 64-73. E. CARAWAN, *art. cit.* (n. 8) criticizes the "constitutional model" of the early *graphē paranomōn* procedure. For a brief summary of different types of modern judicial review (e.g. strong vs. weak), see J. WALDRON, "The Core of the Case against Judicial Review", in *Yale Law Journal* 115 (2006), 1353-9.

The Athenian procedures for reviewing legislation may have more in common with notions of bicameralism than modern judicial review, though this analogy is also imperfect.[91] The virtues of the reviewing Athenian court are similar to those typically attributed to the second chamber in a bicameral system, namely that it provides the opportunity for a second evaluation of the legislation, often in the context of a body whose deliberations are considered more rational and/or whose members are considered wiser or more experienced than the primary, and more representative, legislative chamber. By requiring a fresh hearing on a different day, the *graphē paranomōn* provided some safeguard against hasty or ill-advised legislation, particularly given the fear that skilled public speakers might mislead or whip the *demos* into a frenzy. The court hearing itself insured that the legislation was examined for an entire day, and that both sides of the case were given a full airing by prepared speakers.[92] And although there was substantial overlap between the Assemblymen and the jurors, the two groups were not exactly the same: the jury was limited to men over thirty years old,[93] a significant difference in a society like Athens, where age was very strongly associated with wisdom and rationality,[94] and where the life expectancy at birth was roughly twenty-five years.[95]

The comparison to bicameralism is supported by various aspects of the jury's role that suggest a legislative as well as

[91] M.H. HANSEN, *op. cit.* (n. 3), 50 is one of the few modern scholars to compare the *graphē paranomōn* to a bicameral system rather than judicial review.

[92] As M.H. HANSEN, *op. cit.* (n. 3), 50-1 points out, debate in the Assembly may have been significantly more chaotic.

[93] *Ibid.*, 50.

[94] E.g. AESCHIN. 1.24; for discussion, see K.J. DOVER, *Greek Popular Morality in the Time of Plato and Aristotle* (Oxford 1974), 102-6.

[95] M.H. HANSEN, "The Political Powers of the *Dikasteria*", in *The Greek City: From Homer to Alexander*, ed. by O. MURRAY, S. PRICE (Oxford 1991), 222-3.

judicial function. We have seen that jurors in constitutional cases were charged with evaluating the wisdom and expediency of the legislation as well as determining whether it was consistent with existing law. And the jury acted directly as a legislative body in the cases where its verdict upholding a proposed decree gave the decree the force of law even though it had never been approved by the Assembly. Of course, one major difference between the Athenian review of statutes and modern bicameral systems is that in Athens review was not automatic but was triggered only if a citizen challenged a proposed or enacted statute. The second difference is that while modern legislatures in constitutional systems may consider the constitutionality of proposed legislation in their deliberations, the Athenian procedures insured that legal argumentation was always present (if not necessarily determinative): the prosecutor was obliged to put forward the law(s) that the statute under review allegedly contradicted, and these laws were displayed on a board during the trial.[96] The overall picture that emerges from the Athenian constitutional cases is a hybrid without a modern parallel: a procedure that calls for a second look at legislation, in which the obligation to examine the constitutionality of the statute gives some protection to enduring principles while ultimately permitting the jury to ignore those principles in favor of short-term policy interests if they wish.[97]

From a modern point of view, the Athenian procedures are particularly striking because they offer an alternative model of 'democratic' judicial review, in fact of judicial review without

[96] M.J. SUNDAHL, *op. cit.* (n. 4), 36-9.

[97] The ability to ignore constitutional principles in favor of short-term policy interests is somewhat analogous to the "notwithstanding clause" of the Canadian Constitution, which permits Parliament to explicitly reenact statutes that have been held unconstitutional in court, though in Athens a single institution — the court — evaluates both the constitutionality and the expediency of the legislation.

professional judges. A central criticism of American-style judicial review is the 'counter-majoritarian difficulty' — that is, that judicial review permits unelected judges to impose their own values by overturning legislation that reflects the will of the majority.[98] This critique cannot be avoided by adopting the view that courts merely enforce democratically chosen long-term precommitments against the passions of the moment. Even under this notion of constitutionalism as "tying oneself to the mast" in the manner of Odysseus, critics contend that overturning the will of the current majority in favor of a previous majority is also democratically illegitimate.[99] 'Process theory', most closely associated with John Hart Ely, attempts to resolve the counter-majoritarian difficulty presented by judicial review.[100] Under this approach, American courts should avoid substituting their own substantive values for those of the majority in the legislature, and should only intervene to ensure the integrity of the democratic political process.[101] Ely's notion of what constitutes a democratic failure was different from the Athenians: Ely viewed expanded representation of minority viewpoints as central to protecting democratic process; for the Athenians 'preventing' some classes of people—state debtors,

[98] The classic formulation is A. BICKEL, *The Least Dangerous Branch* (New Haven 1986), 16-7. For a recent statement of the problem, see J. WALDRON, *art. cit.* (n. 90), 1386-1406; for a response, see R.H. FALLON, "The Core of an Uneasy Case for Judicial Review", in *Harvard Law Review* 121 (2008), 1693-1736.

[99] For a discussion and critique of this (and other) standard defenses of constitutionalism, see M.J. KLARMAN, "What's so Great About Constitutionalism?", in *Northwestern University Law Review* 93 (1998), 145-94.

[100] J.H. ELY, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge 1980).

[101] *Ibid.*, 74-89. For a critique, see L.H. TRIBE, "The Puzzling Persistence of Process-Based Constitutional Theories", in *Yale Law Journal* 89 (1980), 1063-1080; for a defense, see M.J. KLARMAN, "The Puzzling Resistance to Political Process Theory", in *Virginia Law Review* 77 (1991), 747-832.

former prostitutes, and the like—from proposing legislation was vital to ensuring the integrity of the political process.[102] But the underlying idea seems to have been similar: constitutional review should be used as a means of preserving popular decision making structures (which in Athens included courts) rather than enforcing substantive values. It is important to reiterate that the idea of limited, process-oriented review applied only to the 'legal' arguments in the Athenian constitutional cases; we have seen that jurors in these cases were encouraged to make explicit policy judgments about the legislation as well. But the range of constitutional principles that were thought to justify overturning legislation on 'legal' grounds was small, and limited to those that enhanced rather than constrained popular sovereignty.[103]

So far, we have examined one dimension in which Athenian 'judicial review' can be said to be 'democratic': in practice the content of the Athenian 'Constitution' was quite narrow, constraining the will of the current majority only when a proposed statute was thought to threaten the basic democratic legislative or judicial process. But in contrast to modern judicial review, Athenian judicial review was democratic in two other respects as well: (1) constitutional challenges were decided by large juries of ordinary citizens rather than expert judges; and (2) constitutional principles could be overridden by the popular jury to further current policy interests.

From a modern perspective, these two aspects of Athenian judicial review are of particular interest given the rise of the

[102] Despite the obvious differences in the treatment of minorities, most of the types of democratic failures discussed in the Athenian speeches would also be recognized as such under Ely's theory.

[103] In this way, the Athenians' limited approach to judicial review avoided the 'dead hand problem', that is, the difficulty of a previous legislature constraining the current legislature. The other countermajoritarian aspect of judicial review addressed by process theory — the power of unrepresentative judges — was much less of an issue in Athens because constitutional cases were decided by a jury similar, but not identical, in composition to the Assembly.

popular constitutionalism movement in recent years. 'Popular constitutionalism' has been used to describe work by progressive scholars who are skeptical of the antidemocratic nature of American-style judicial review and favor (in various forms) an enhanced role for constitutional interpretation by the people.[104] A common criticism of popular constitutionalist approaches is that it is not always clear how, where, and with what effect popular interpretation of the Constitution is to occur, and how this process differs from ordinary political debate. By contrast, Athens provided for a structured procedure in which ordinary Athenians were obliged to consider whether proposed legislation was unconstitutional while ultimately preserving popular sovereignty.

We do not know enough about the outcomes of Athenian constitutional cases to determine how effective these procedures were at protecting core democratic principles.[105] But the frequent use of the *graphē paranomōn*[106]— even if motivated in

[104] Major works in this vein include J. WALDRON, *art. cit.* (n. 90); L. KRAMER, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford 2005); M. TUSHNET, *Taking the Constitution Away from the Courts* (Princeton 2000); R.D. PARKER, *"Here, The People Rule": A Populist Constitutional Manifesto* (Cambridge 1994). For a critical discussion of the popular constitutionalism movement, see E. CHEMERINSKY, "In Defense of Judicial Review: The Perils of Popular Constitutionalism", in *University of Illinois Law Review* (2004), 673-89.

[105] At first glance, the Arginusae affair seems to suggest that constitutional principles like the right to trial could be easily pushed aside by the whims of an irrational *demos*. But on closer examination it seems possible that if the Athenians had employed their judicial review procedures in this case the disastrous decision might have been averted. Euryptolemos initially challenged the decree calling for the generals to be sentenced in the Assembly without trial, but withdrew his constitutional challenge and made a counter-proposal suggesting a trial. If he had persisted in his challenge his arguments might well have prevailed in a new day-long hearing before a jury: even in the heated atmosphere of the Assembly meeting, it was Euryptolemos' counter-proposal for a trial, not Kallixenos' original decree, that won the initial vote. It was only when an ally of Kallixenos asked for a second show of hands that Kallixenos' proposal ultimately passed. XEN. *Hell.* 1.7.23-35.

[106] M.H. HANSEN, *op. cit.* (n. 3), 25-6.

most cases by political rivalry — must have had some deterrent effect on politicians. And the *graphē paranomōn* was abolished during both of Athens' oligarchic revolutions, presumably because the oligarchs feared that this procedure could be used to block their actions.[107] It has often been remarked that the Athenian democracy was remarkably stable and enduring compared to other Greek city-states.[108] It is tempting to think that despite the apparently trivial nature of our surviving constitutional cases, the Athenian procedures for reviewing legislation played some role in Athens' success.

[107] THUC. 8.67; ARIST. *Ath.* 29.4; DEM. 24.154; AESCHIN. 3.191; M.H. HANSEN, *op. cit.* (n. 3), 55.

[108] E.g. J. OBER, *Democracy and Knowledge. Innovation and Learning in Classical Athens* (Princeton 2008), 71.

DISCUSSION

M. Hansen: I find Lanni's main thesis convincing: that the principal purpose of the *graphē paranomōn* was to protect the democratic legislative and adjudicative procedures and thereby to be the bulwark of the democratic constitution in general. The following comments are addenda about some questions which, I think, A. Lanni did not have sufficient space to deal with in the paper.

(1) To have judicial review of laws in a state presupposes that the state has a hierarchical system of norms which the relevant court can take into account when it has to uphold or quash a given act which has been indicted as 'unconstitutional'. Thus, judicial review presupposes the existence of some form of constitution or at least some form of hierarchy of norms.

Accordingly and correctly, from the beginning of the paper and throughout Lanni mentions: existence of a 'higher law' in Athens, constitution, hierarchy, higher norms, the Athenian 'constitution', etc. But Lanni does not debate the question to what extent there was an Athenian 'constitution' and what the relation was between the *politeia* and the two closely related types of public action: *graphē paranomōn* and *graphē nomon mē epitēdeion theinai.*

Contra M.I. Finley, *The Ancestral Constitution* (Cambridge 1971), I think there can be little doubt that both the philosophers and the Athenians had a fair understanding of the difference between a *politeia* (which — in this specific sense — consisted of norms of competence) and ordinary *nomoi* (which were norms of conduct). In *op. cit.* (n. 5), 65, 165, I have some reflections on what a *politeia* was in general and the relation in Athens between the *politeia* and the law code. I discuss the relation between *nomoi* and *politeia* in "Solonian democracy in

Fourth century Athens", in *ClMed* 40 (1989), 83-7 and there is a very good chapter in J. Bordes, *Politeia* (Paris 1982), 361-84.

Many of the constitutional norms seem to have been unwritten and the written constitutional norms did not form a separate and especially protected part of the Athenian law code. The Athenians — as we all know — had no constitution in the formal sense and their hierarchy of norms comes down to three principles. (a) Some acts were protected by an entrenchment clause which made it more difficult to change the law or decree in question (*IG* II2, 43.51-65). (b) The distinction made in 403 between *nomoi* (permanent and general rules) and *psephismata* (temporary and/or individual rules) (see my *op. cit.* [n. 5], 171). This distinction became fundamental for the use and importance of the *graphē paranomōn*. (c) If a new *nomos* was in conflict with an older *nomos*, the old *nomos* had priority over the new (Dem. 24.33*sqq*.). This distinction applied in *graphai nomon mē epitēdeion theinai*. Thus, by contrast with modern law, the Greek preferred the *lex prior* principle to the *lex posterior* principle (*op. cit.* [n. 5], 175, cf. Demosthenes' story about the Lokrians at 24.139-43) and the Athenians' idea that the best *politeia* was a *patrios politeia*. — But both (a), (b), and (c) applied to rules of all kinds, not to constitutional rules in particular.

(2) Lanni aptly compares the Athenian judicial review of law with that of the Supreme Court of the USA. But the recent constitutional development in Europe since 1945 might be just as relevant.

Inspired by Hans Kelsen's ideas and the Austrian constitutional court set up in the period between World War One and Two, almost all European democracies have got a constitutional court. Today, Britain, the Scandinavian countries, Switzerland and Holland are exceptional in not having one. The most famous is probably the German *Bundesverfassungsgericht* in Karlsruhe, but the French *Conseil Constitutionnel*, and some twenty other constitutional courts have been set up since

World War Two and are today extremely important. Furthermore, there is the European Court of Justice in Luxembourg that exercises judicial review of all national laws passed by the parliaments of the 27 member states of the EU. As I point out in *op. cit.* (n. 5), 209 (to which Lanni refers) several of the national constitutional courts have become more powerful than the US Supreme Court, and they are active all the time. Between 1951 and 2000 132,000 cases were brought before the German *Bundesverfassungsgericht*, and most of the member states have their own constitutional court. Ca. 95% of the verdicts passed by the *Bundesverfassungsgericht* relate to constitutional complaints concerning violations of individual rights protected by the constitution. In most cases the issue is the application of a law in a specific case. But during the same period the constitutional court has quashed 5% of the laws passed by the *Bundestag* as invalid or in conflict with the German Basic Law. In fact, I believe that the *Bundesverfassungsgericht* is more active and more important than the Supreme Court in USA. Similarly, the European Court of Justice in Luxembourg has in some respects become the most powerful of all the EU-institutions.

The European courts have become as active as the Athenian *dikasteria* were in the fourth century B.C. hearing *graphai paranomon* plus some *graphai nomon mē epitēdeion theinai*. Also, they have become the ultimate sovereign deciding battles fought between parties and leading politicians in the parliament, just as the Athenian *dikasteria* decided battles fought between leading *rhetores* in the *ekklesia*. And they play a central role in that new form of democracy that is commonly labelled 'constitutional democracy'.

Looking up the entry "democracy" in *Encyclopedia Britannica* (the micropedia edition of 2002) one finds that altogether three types of democracy are listed (1) direct democracy, (2) representative democracy and (3) constitutional democracy. No. (3) is new. Until the last decade of the 20th century, handbooks and textbooks describing democracy have no men-

tion of constitutional democracy. The basic idea behind this new type is that a democracy without a proper constitution protected by a constitutional court runs a considerable risk of becoming a tyranny of the majority, and is exposed to abuse of power by popularly elected parliamentarians and arrogant bureaucrats. One result is the violation of minority rights. The pivot of constitutional democracy is that section of the constitution of the country in question that protects human rights combined with the defence of these rights through the courts, especially through the constitutional court with its right to judicial review. Adherents of constitutional democracy mistrust the elected parliamentarians and mistrust too the people who elect the parliamentarians. Government by judges is to be preferred as the only proper protection of citizen rights and human rights.

But the modern constitutional courts are oligarchic or — at best — aristocratic institutions and for people who believe in a strong parliament elected by a sovereign people 'constitutional democracy' is simply undemocratic. As far as I can see, the chink in the constitutional democrats' armour is the question: *quis custodiet ipsos custodes?* If the constitutional democrats are right that power invariably corrupts and must be controlled, what about the power in the hands of the constitutional courts? Many of the judges are appointed according to party affiliation and are in fact themselves politicians and thus exposed to the same abuse of power as the parliamentarians. It is here the Athenian *dikasteria* stand out (as Lanni duly notes). The *graphē paranomōn* is a democratic institution, and modern constitutionalists ought perhaps to listen to the ancient Greeks and consider how the constitutional courts can be made democratic. One reform might be to have the judges appointed by popular election for a period of time so that — like the parliamentarians — they become accountable to the people when they have to stand for re-election (D.C. Mueller, *Constitutional Democracy* [Oxford 1996], 281-8). Such a system is unacceptable to most Europeans but may perhaps be more acceptable in

the USA where judges at state-level are elected by the people in about half the states. In Europe the independence of the courts is valued above having a democratic judiciary.

For constitutional democracy cf. e.g. D.C. Mueller, *op. cit.* and W.F. Murphy, *Constitutional Democracy* (Baltimore 2007).

A. Lanni: I think we have to be careful about comparing the number of constitutional cases heard in the United States Supreme Court and European constitutional courts to determine how active or important a court is. Constitutional courts in Europe are dedicated to deciding constitutional issues; in the United States, all lower federal courts can decide constitutional questions, and many constitutional cases are resolved without reaching the United States Supreme Court.

I agree that the Athenian approach of using ordinary citizens offers an intriguing possibility for those who view modern judicial review as undemocratic. But I am less optimistic about the suggestion of using elected judges; the American experience of a largely elected judiciary in the state courts has not been a happy one.

M. Hansen: I agree that when an Athenian *dikasterion* heard a *graphē paranomōn* or a *graphē nomon mē epitēdeion theinai*, it came to function as a kind of second legislative chamber. There is an interesting modern parallel. Between 1951 and 1999 the German *Bundesverfassungsgericht* has quashed 5% of all laws passed by the *Bundestag*. But in most cases the court's verdict is not the end of the matter: with its verdict the court appends an amended version of the law which can be accepted as constitutional. The result is usually that the *Bundestag* simply incorporates the changes *verbatim* and has the revised text accepted by the court. Thus, the *Bundesverfassungsgericht* becomes in fact a third legislative chamber alongside the *Bundestag* and the *Bundesrat*. See, e.g., M. Gallagher, M. Laver, P. Mair, *Representative Government in Modern Europe* (Boston ^{4}2006), 95-6; P. Schindler, *Datenhandbuch zur Geschichte des*

Deutschen Bundestages 1949 bis 1999 1-3 (Baden-Baden 1999), 2495-2511.

Finally, the question about tradition and inspiration. The modern judicial review of laws is — as we both agree — in important respects similar to the Athenian *graphē paranomōn* and *graphē nomon mē epitēdeion theinai*. But to the best of my knowledge there is no evidence that the Athenian institution in 1803 served as a model for the American judicial review by the Supreme Court. The similarity between the institutions is mentioned by T.D. Godell, *art. cit.* (n. 90), but there is no indication that the parallel was noted in 1803. Similarly, the model for the European constitutional courts is the Austrian court. It was part of the new constitution of 1920 as valid from 1930, and it was designed by Hans Kelsen, who was professor of public law at the University of Vienna. In an article published in *The Journal of Politics* 4 (1942), 183-200, Kelsen acknowledges inspiration from the Supreme Court of the USA, but neither in the article nor in Kelsen's book *Vom Wesen und Wert der Demokratie* (Tübingen ^{2}1929) is there any mention of the Athenian *graphē paranomōn* as a source of inspiration.

A. Lanni: There is a large literature on the origins of modern judicial review, but none of the theories suggest that the Athenian practice offered any inspiration. For discussion, see, e.g. M. S. Bilder, "The Corporate Origins of Judicial Review", in *Yale Law Journal* 116 (2006), 502-66; J. Rakove, "The Origins of Judicial Review: A Plea for New Contexts", in *Stanford Law Review* 49 (1997), 1031-64; L. D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford 2004), 77-8; D. J. Hulsebosch, "A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review", in *Chicago-Kent Law Review* 81 (2006), 825-66.

P. Pasquino: We all agree that the existence of the *graphē paranomōn* implies that a *psephisma*, a decision passed by the

ekklesia can be cancelled by the *dikasteria*. That suggests that there is a hierarchy between the two institutions. The court can nullify what the *ekklesia* decided. In this sense Hansen's doctrine of the sovereignty (perhaps better 'superiority') of the *dikasteria* is vindicated, it is difficult indeed to claim that the *ekklesia* is the supreme power if another organ can cancel its decisions! The point I want to stress is that, because of the absence of reasons given in courts' decisions, the hierarchy of norms is *de facto* simply coincident with the hierarchy of organs, it may even be nothing more than that. It is unclear which constraints operate upon the members of the people's courts, who moreover vote by secret ballot. The reading and analysis of the speeches held in courts gives us some ideas of the arguments considered persuasive to win a case, but these seem to be largely *ad personam* and the explicit reference to *nomoi* and to the contradiction between *psephisma* and *nomos* is thin and mostly concerning procedural aspects.

Sure we have too little evidence about both *graphē paranomōn* and *graphē nomon mē epitēdeion theinai*; nonetheless it is clear that the Kelsenian idea of norms hierarchy doesn't apply strictly to the Athenian case. *Nomoi* are, as far I can understand following Wolff, 'both' what we call *statute laws* and *constitutional norms*. *Psephismata* by the way are not simply acts of the administration but more often decisions of what Rudolf Smend called *politische Gewalt*, often *auswärtige politische Gewalt*. In that sense I fully agree that the function of the *graphē paranomōn* seems more comparable to the self-defense mechanisms we call militant democracy (K. Loewenstein, "Militant Democracy and Fundamental Rights", in *The American Political Science Review* 31, 3 (1937), 417-32 and 31, 4 (1937), 638-58) than with the Kelsenian constitutional syllogism. Athens, because of the experiences of 411 and 403 lived in the anxiety of oligarchic attacks to the democratic order and used apparently the courts to protect and defend *demokratia* from internal/endogenous political threats. More than protection of an abstract hierarchy of norms or defense of entrenched

constitutional rights the courts were a political organ in charge of protecting the democratic *politeia*. If all that makes sense, there should have been reasons to believe that the jurors were able to fulfill this task, somehow better than the *ekklesiastai*. Why was a *dikasterion* more democratically minded than the people's assembly? — which implies also the supplementary question: what exactly 'more democratic-minded' mean? Probably both 'anti-oligarchic' and able to resist the establishment of a dominant political elite. And why? because of composition of the people's courts or because of their decision-making procedures, or both — as I tend to believe? The first dimension is more political (see M.H. Hansen, *op. cit.* [n. 5], 184, about the composition of the *dikasteria*: more poor people, whom because of the secret voting procedure nobody can control), the second one more epistemic: to avoid bad *ekklesiastic* decisions. Both are in any event preservative of the democratic order.

In this perspective the distinction between legal and political arguments may be a modernizing and after all a misleading approach. If *nomoi* are both statute laws and constitutional norms or 'conventions' (since there was no written document called *Athenaion politeia*) it is difficult to distinguish political and legal arguments. The rhetoric of the plaintiff aims to show that the *psephisma* is dangerous for the democratic order so '*paranomon*'. A text by Demosthenes that Lanni quotes (n. 12) is a beautiful piece of forensic rhetoric showing that common weal and *paranomia* converge: "Such, men of Athens, are the purposes for which the provisional resolution was moved, in the hope that it would be ratified by a deluded Assembly; and such the reasons why we, desiring to frustrate its ratification, have brought this present indictment. As I have undertaken to prove three propositions,—first that the decree is unconstitutional, secondly that it is injurious to the common weal, and thirdly that the person in whose favor it has been moved is unworthy of such privilege,—it is, perhaps, fair that I should allow you, who are to hear me, to choose what you wish to hear first, and second, and last" (Dem. 23.18).

The distinction between political and legal arguments (see p. 238) seems to be here actually between procedural and substantive *paranomia*; due process is procedural in a substantive sense, so it doesn't help to clarify the distinction.

A final remark concerns the conclusion of Lanni's paper. "Popular constitutionalism" Athenian style may be more democratic/populist but, taken very seriously (something that legal experts like Kramer and Tushnet do not really do!) would imply to dismantle legal expertise and somehow law school, as Mao did during the by antiphrasis 'Cultural' Revolution. Athenian model would be here a plea for primitivism.

A. Lanni: I completely agree that the 'legal' arguments focus on protecting the democracy, and in that sense have substantial political import. But the distinction I make between political and legal arguments is not an anachronism. Rather, it comes directly from the speeches themselves, which often distinguish between the two types of argument.

E. Robinson: You show that concerns about safeguarding the democratic constitution or democratic process predominated among the Athenian legal arguments used to challenge legislation. I'd like to invite you to speculate about why this was. Was it, for example, because there was a common, constant fear in Athens that the democracy was under threat, and orators wished to play upon these (e.g., the kind of fears dramatized by Thucydides at 6.27 and 35-40, or trauma left over from the Thirty)? Or could it have been that (*contra* one of the theses of L. J. Samons, *What's Wrong with Democracy* [Berkeley 2004]) the idea of *demokratia* really was enormously popular with the *demos* at Athens and one could always score rhetorical points by claiming to be *demokratia*'s defender? Or something else entirely?

A. Lanni: It is an excellent question. In my view, a sense that the democracy was always under threat was the primary factor, particularly after the experience of the Thirty. It is inter-

esting that the fear of oligarchic revolution and the trauma caused by the Thirty was such that a prosecutor could tar his opponent by arguing that even though he was too young to have been involved in the Thirty, he "has the character of that government" (Isoc. 20.10-11). Even in the fifth century, we can see evidence of worry about threats to the democracy, the herm scandal of 415 being the most prominent example.

C. Farrar: In the suggestive reflections you offer at the end of your paper, you observe that Athenian 'judicial review' was democratic not only because of its narrow focus on threats to basic democratic procedures, but also because of who decided (large juries of ordinary citizens rather than expert judges) and because those juries could subordinate constitutional "precommitments" to policy considerations. Another distinctive feature of the Athenian constitutional (and legislative) process was the role of ho *boulomenos*, the instigator of *graphai* (as well as assembly decrees). An individual Athenian citizen had to raise the constitutional question — not, as in modern systems, another governmental body nor an individual who has 'standing', i.e. who is directly affected — and on the argument of your paper, *ho boulomenos* challenged the law on behalf of the democracy. Thus the ambiguity of a process that is, as you say, at once political and constitutional is already present at the moment of instigation: one individual challenges another, not simply to resolve the case at hand, but to achieve a political victory, and the challenge is founded not on a violation of his individual rights, but of the rights of the *demos* as a whole. What does this reliance on individual initiative mean for the substance of judicial review, and for how it differs from political debate in the assembly? And what are the implications for the arguments of the "popular constitutionalists" of our own day?

A. Lanni: One rationale for modern standing doctrine is that it insures that the party bringing suit has a stake in the outcome and will vigorously represent its position, which is

particularly important where a constitutional ruling will create a precedent for other similar cases. One criticism of limited standing is that in cases affecting the public interest there may not always be a readily available plaintiff, which is why some countries, such as Canada, have special standing provisions for cases affecting the public interest. As you imply in your question, we can certainly see in the Athenian cases the drawbacks of a generalized standing rule, as the constitutional issue in *graphē paranomōn* cases could be subordinated to the political rivalries of the litigants. But we can also see the system's virtues in the frequency of *graphē paranomōn* challenges, which presumably had some deterrent effect on politicians.

P. Schmitt Pantel: La *graphē paranomōn* est, comme vous le montrez, un moyen de protéger la démocratie. Parmi les exemples que vous donnez de cette procédure, je voudrais vous poser une question sur le cas d'Androtion (Dem. 22). Androtion a proposé un décret, dont un de ses ennemis conteste la légalité avec différents types d'arguments. Il avance des arguments juridiques classiques, une loi précédente va à l'encontre de cette proposition et de plus Androtion n'aurait pas obtenu l'accord du Conseil avant de présenter sa proposition devant l'Assemblée. Puis il ajoute deux arguments qui sont d'une autre nature: Androtion serait disqualifié car il est un prostitué et un débiteur de la cité. Ma question porte sur le second type d'arguments: est-il le signe que les manières d'être, les façons de se comporter, les mœurs, les *epitedeumata*, des citoyens entrent en compte dans la construction et la définition de la démocratie? Autrement dit, que les *nomoi* qui protègent la démocratie sont de différente nature?

A. Lanni: I think the primary worry was that statutes proposed by former prostitutes or state debtors were suspect because of concerns about such men's independence, moral status, and self-control. Aeschines mentions the worry that a man who had sold his body was apt to sell out the city as well

(Aeschin. 1.29; also Dem. 22.30-32). The notion that engaging in prostitution or having lost control of one's finances evinced an insatiable appetite for sex or money incompatible with the self-control required of a self-governing citizenry may have also played a role. As you point out, this is a very different approach from that taken by modern process theorists like Ely, who tend to argue that protecting the democratic process entails ensuring 'more' participation, especially by disadvantaged groups and other 'outsiders'.

O. Murray: I was fascinated by your comparison of Athenian and American methods of judicial review. It seems to me that the basic difference is between a system without a written constitution, in which unconstitutionality has to be judged in relation to existing statutes, and a system where the question of constitutionality is essentially determined in relation to a formal written constitution. In this respect the Athenian model seems to be much closer both to the model currently being evolved in the European Union and to the interference by the judiciary in the interpretation of law in the British system; in particular British courts have more and more been using conflict with the Declaration of Human Rights and other European conventions imposed by the European Union, in order to strike down decisions made in relation to English law: that has for instance, for good or ill, severely limited the British government's attempts to protect society against terrorism and to create a viable set of anti-terrorism measures that also respect the rights of individuals. But the same problem arises in the British and European systems as in the American one, that those judging the question of constitutionality are themselves unelected and unaccountable, and often viewed as out of touch with democratic (or at least liberal) opinion. At present this conflict is being used in Britain by nationalists trying to wreck the European Union. In this respect the Athenian system seems clearly superior, and perhaps we should adopt it forthwith in some form or another, as you indeed seem to suggest. Do you

think the European experience is any different in this respect from that in the United States?

A. Lanni: You deftly identify many of the problems with judicial review in its modern form — its incompatibility with popular sovereignty, particularly when (and this is a recent phenomenon) judges rely on non-domestic sources of law in adjudicating domestic disputes. The backlash you describe as occurring in Britain also occurred in recent American history. The Warren court in the United States was freewheeling in its constitutional decisions in the 1960s, and this helped make the U.S. electorate more conservative and anti-elite in the 1970s and 1980s. The Athenians would be horrified by how much power unelected judges wield in our society. On the other hand, we place a higher value on the protection of individual rights than the Athenians did, and since Lord Coke people have believed (correctly) that unelected judges are important in articulating and protecting these rights. To take a recent example, in the United States, the courts acted first to declare that prisoners in Guatanamo might have some rights, and Congress followed later. So you have to choose to some extent between popular sovereignty and protecting the rights of individuals. Like a lot of practicing lawyers in the United States I'm in the middle on this: I'm enough of a lawyer/elitist and a proponent of individual rights to think we should continue to have unelected judges, but I'm enough of a populist to believe that this power should be used by judges with restraint and that judges should only depart significantly from popular views in extreme cases (e.g., to strike down racial segregation). American judges learned this after the 1960s, and it sounds like British judges might be learning it now. One key difference however is that the European electorate, at least, has always shown less antipathy toward its elites than the American electorate, and many countries on the continent have had bad experiences with unrestrained popular sovereignty. The judges in Europe might get away with running things for a long time.