
Popular Constitutionalism, Ancient and Modern

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This Article examines the contemporary controversy over theories of popular constitutionalism through a classical Athenian lens. Theories of popular constitutionalism share in common, to varying degrees, the project of democratizing the practice of judicial review.

Athens invented judicial review, and just as in America, it became essential to its democracy. The classical Athenian practice of judicial review aligned precisely with strong theories of popular constitutionalism, that is, theories that largely would transfer the power of constitutional review from politically insulated courts to the People themselves or to their representatives. The Article shows how strong popular constitutionalism fit the highly participatory, direct democracy of classical Athens, as well as the theoretical underpinnings and institutional design of the classical democracy. The Article argues, however, that because the American institutional design and conception of democracy differ fundamentally from those of the Athenians, theories of strong popular constitutionalism are out of sync with the American system.

The Article also argues that the comparison between Athens and America suggests that moderate theories of popular constitutionalism hold considerably more promise. These theories would keep judicial review in place, and thus respect the institutional design of an independent and professional judiciary as the ultimate protector of individual rights for America's liberal democracy. But these theories also would legitimate

* Copyright © 2012 Keith Werhan. Ashton Phelps Chair in Constitutional Law, Tulane Law School. A revised version of this article will appear in my forthcoming book, tentatively titled, *The Classical Athenian Democracy and the American Constitution*, to be published by Oxford University Press. I would like to thank Adeno Addis, James Gordley, Stephen Griffin, and Johanna Kalb for thoughtful critiques of this Article in draft form. I also would like to thank my colleagues who participated in a faculty workshop on a draft of this Article for their helpful comments. Finally, and by no means least, I would like to thank Jennifer Rigerink (Tulane Law Class of 2012), Scott Foreman-Murray (Tulane Law Class of 2013), and Scott Puckett (Ph.D. Candidate, Tulane Department of Classics) for their valuable research assistance.

public participation in the shaping of the federal judiciary and their constitutional decision-making, and thus, to some extent, would democratize the exercise of judicial review. The Article argues that this balancing between majority rule and the protection of individual rights is true to American constitutionalism, as well as to the founders' instinct of tempering their Madisonian Constitution with enough of a classical Athenian sensibility to launch the American federal government as an authentically democratic enterprise.

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INTRODUCTION

The American dialogue over the legitimacy of judicial review is older than our Constitution.¹ Although this conversation has inspired wide-ranging and rich scholarship, the nub of the controversy resides in what Alexander Bickel memorably described as the “counter-majoritarian difficulty”; that is, the paradox that in America’s democracy, the federal judiciary (the least democratic branch of our government) possesses the constitutional power to invalidate acts of Congress (our most democratic branch).² The intensity of the debate over judicial review has oscillated with the times, depending on the degree to which the Supreme Court has challenged the legislative imperatives of electoral majorities.³

The most prominent contemporary challenge to the traditional practice of judicial review is to be found in the burgeoning literature espousing theories of popular constitutionalism. “Popular constitutionalism” is an elastic concept. Its precise prescriptions vary among its proponents, and often are elusive.⁴ But the essence of popular constitutionalism is clear. It requires that “We the People,” or

¹ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 246 (2004) (stating that the controversy over judicial authority is “a very old conflict: one that started the moment Americans set their sights on creating a republic and that has scarcely ever flagged since then”); see also BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 9 (2009) (“The persistent question throughout history has been whether, and to what extent, . . . [the people] should exercise . . . [their] power [to limit or eliminate judicial review].”).

² See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2d ed. 1962) (discussing “[t]he root difficulty . . . that judicial review is a counter-majoritarian force in our system”); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4-5 (1980) (explaining that “the central problem” of judicial review is that “a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like”). For a critique of the conventional view that judicial review is counter-majoritarian, see Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2603-06 (2003).

³ See Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 673-75 (2004) (discussing the controversies arising from the activism of the New Deal Court, the Warren Court, and the current Court); see also Friedman, *supra* note 2, at 2597-98 (stating that “one’s mood about judicial review often reflects what the judiciary presently is doing”).

⁴ Chemerinsky, *supra* note 3, at 679; Friedman, *supra* note 2, at 2598; see also David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053 (2010) (“It can be difficult to get a firm grip on what people mean by ‘popular constitutionalism.’ . . . [S]cholars invoking the idea typically have done so at a high level of abstraction.”).

at least popularly elected representatives, assume a key role in resolving constitutional disputes.⁵

The contemporary theory and practice of judicial review inevitably has provided the central target of popular constitutionalists.⁶ At its most pungent, the popular constitutionalism project is nothing less than an appeal that the People, or their elected representatives, replace the Court (at least to a substantial degree) as the day-to-day decision-maker regarding the meaning and application of the Constitution.⁷ The proponents of such a democratic takeover of judicial review have not agreed on a replacement strategy, however. Mark Tushnet has advanced the boldest agenda for popular constitutionalism, one that would entirely eliminate judicial review over decisions by the political branches that implicate core constitutional issues.⁸ Jeremy Waldron would deny courts authority to invalidate legislation on constitutional grounds.⁹ Larry Kramer and others would not withdraw the power of

⁵ See Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1616 (2005) (explaining that the propositions that the People make, interpret, and enforce the Constitution “express the core of popular constitutionalism”); Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture*, 93 GEO. L.J. 897, 899 (2005) (showing that popular constitutionalists “argue[] that the People and their elected representatives should — and often do — play a substantial role in the creation, interpretation, evolution, and enforcement of constitutional norms”).

⁶ See Friedman, *supra* note 2, at 2598 (characterizing popular constitutionalism as embracing a “view critical of judicial review”); Nathaniel Persily, *Introduction*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3, 4 (Nathaniel Persily et al. eds., 2008) (showing that those arguing for popular constitutionalism claim that constitutional interpretation should depend not on “authoritative pronouncements from the Supreme Court, but from successful organization and persuasion by political leaders and the mass public”); Raphael Rajendra, “The People” and “The People”: *Disaggregating Citizen Lawmaking from Popular Constitutionalism*, 27 LAW & INEQ. 53, 81 (2009) (explaining that in theories of popular constitutionalism, “judicial review is generally subordinated to a multitude of popular expressions so that the constitution can live among people”).

⁷ See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 14 (1999) (stating that “disagreements over the . . . meaning [of the central aspects of the Constitution] are best conducted by the people, in the ordinary venues for political discussion”); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004) (defining popular constitutionalism as a system in which the People assume “active and ongoing control over the interpretation and enforcement of constitutional law”).

⁸ TUSHNET, *supra* note 7, at 154. Professor Tushnet hedged this position with the disclaimer that he has not concluded that popular constitutionalism “is the only, or even the best, interpretation of the Constitution.” *Id.* at xi.

⁹ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006) (stating that “judicial review of legislation is inappropriate as a mode of final decision-making in a free and democratic society”).

judicial review from the courts, but instead would deny judges the “final say” in constitutional cases.¹⁰ Dean Kramer, for example, seems sympathetic to a “departmental” system enabling the political branches of government to override decisions of the courts concerning the scope of their constitutional authority.¹¹ Richard Parker, as a final example, would popularize constitutional decision-making not by stripping the Supreme Court of judicial review, but by transforming the Court into a People’s Court, consisting entirely of “ordinary people” with “a capacity to speak to the ordinariness in others.”¹² I shall classify theories that significantly would remove the power of judicial review from courts (as we know them) as “strong” theories of popular constitutionalism.¹³

Milder forms of popular constitutionalism generally would leave judicial review in place. Yet they would temper the practice (or at least our understanding of the practice) by designing and legitimating space for the People to participate meaningfully in both shaping the federal judiciary and influencing its constitutional decision-making. For example, Jack Balkin and Sanford Levinson have emphasized the capacity of ordinary citizens to influence constitutional jurisprudence through the political process prescribed by the Constitution for selecting judges.¹⁴ Balkin and Reva Siegel have explored how social

¹⁰ KRAMER, *supra* note 1, at 208, 247; see also Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 374 (1997); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 LAW & CONTEMP. PROBS. 105, 109 (2004).

¹¹ KRAMER, *supra* note 1, at 201, 252. “Departmentalism” refers to a variety of theories that share in common the premise that each of the three branches of government possesses authority to interpret the Constitution independently. For discussions of departmental theories within the context of popular constitutionalism, see Alexander & Solum, *supra* note 5, at 1609-15; Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1031-34 (2004) (arguing that Kramer’s “popular constitutionalism can be understood to entail a stringent form of departmentalism”); Pozen, *supra* note 4, at 2063-64.

¹² RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO 110 (1994).

¹³ My conception of strong popular constitutionalism theories corresponds with Larry Alexander’s and Lawrence Solum’s description of “robust” popular constitutionalism. See Alexander & Solum, *supra* note 5, at 1621 (defining the “most robust version” of popular constitutionalism, short of outright rejection of the Constitution as binding law, as one that “would essentially substitute the people themselves for the Supreme Court as the ultimate interpreter and enforcer of the written text”); see also Pozen, *supra* note 4, at 2061 (defining “robust popular constitutionalism” as insisting that “the interpretive authority of the people trumps that of the judiciary any time the people are sufficiently ready and willing to use it”).

¹⁴ Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*,

movements (such as the civil rights, anti-abortion, and gun-rights movements) more directly have led to constitutional change by shaping the Court's agenda and by ultimately persuading the Justices to embrace their constitutional vision.¹⁵ And as a final example of a modest popular constitutionalist perspective on judicial review, Barry Friedman has discerned "a tacit deal" whereby the American People accept the practice of judicial review on the condition that the courts interpret and apply the Constitution over time in a manner that at least roughly aligns with the views of most citizens.¹⁶ I shall classify such theories as "moderate" theories of popular constitutionalism.¹⁷

Popular constitutionalists of all stripes stake their claims for public participation in constitutional decision-making in the name of democracy and the principle of popular sovereignty upon which democracy rests.¹⁸ But there is a seldom explored, yet crucial, distinction in the conceptions of democracy that animate popular constitutionalism theories. While moderate popular constitutionalists challenge the sharp demarcation between law and politics underlying *Marbury v. Madison*,¹⁹ they nevertheless tend to mount their critique of judicial review within conventional understandings of the liberal, representative democracy and the Madisonian Constitution that we have inherited from the founders. Strong popular constitutionalists, however, evidence deep discomfort with the structural framework of American constitutionalism. They instead evoke (albeit implicitly) the highly participatory, direct democracy of classical Athens, in which ordinary citizens, assembled in large groups, made all governance

87 VA. L. REV. 1045, 1077-78, 1093-94, 1102-03 (2001).

¹⁵ Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK L. REV. 27, 28, 32-33 (2005); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 947-49 (2006).

¹⁶ FRIEDMAN, *supra* note 1, at 4.

¹⁷ My conception of moderate popular constitutionalism theories corresponds with David Pozen's description of "modest" popular constitutionalism. See Pozen, *supra* note 4, at 2060-61 (defining "modest" popular constitutionalism as accepting the power of courts to invalidate statutes and to otherwise override majority preferences but as "insist[ing] that extrajudicial actors play an active, self-conscious role in the articulation, contestation, and codification of constitutional norms").

¹⁸ See, e.g., KRAMER, *supra* note 1, at 241-46 (associating popular constitutionalism with "a democratic constitutional order"); TUSHNET, *supra* note 7, at 31 (stating that "[a] populist constitutional law rests on a commitment to democracy"); Rajendra, *supra* note 6, at 66 ("Because the United States Constitution invokes and is grounded in popular sovereignty, we must give constitutional weight to social or political actions based on their democratic pedigree.").

¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166, 170-71 (1803).

decisions.²⁰ For example, Richard Parker, in a foundational work of the popular constitutionalism movement, described a democratic regime as one “in which offices are open to ordinary citizens and in which ordinary people are allowed, and even expected, to act collectively to influence, and even control, the government.”²¹ Strong popular constitutionalists often enlist classical Athenian democratic norms, such as majoritarianism, to challenge the legitimacy of judicial review and to offer alternatives.²² They also invoke a favorite rhetorical theme of classical Athenian democrats by depicting those who defend the contemporary understanding of judicial review as “today’s aristocrats,” who like the aristocrats of ancient Greece (and aristocrats ever since), distrust “the capacity of their fellow citizens to govern responsibly.”²³

The evocation of classical Athenian democracy by strong popular constitutionalists is altogether apt. The Athenians invented the concept of judicial review, and the Athenian development of the practice aligned perfectly with the theory of strong popular constitutionalism. The classical Athenian experience therefore illuminates the contemporary controversy among proponents of strong popular constitutionalism, moderate popular constitutionalism, and of the traditional *Marbury* understanding of judicial review.

Part I of this article examines how the judicial systems of Athens and America differ and why they differ so dramatically. The Athenians created a system of popular courts (*dikastēria*) that were completely controlled by ordinary citizens. By contrast, the framers of the American Constitution established a professional federal judiciary that was less susceptible to popular control than any other branch of government. The democratic divergence between the Athenian and American judiciaries was hardly coincidental, I argue. The Athenians believed that a fully democratized judiciary was necessary to complete

²⁰ Ellen Meiksins Wood, *Demos versus “We, the People”: Freedom and Democracy Ancient and Modern*, in *DEMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN* 121, 122 (Josiah Ober & Charles Hedrick eds., 1996) [hereinafter Wood, *Demos*].

²¹ PARKER, *supra* note 12, at 4.

²² Chemerinsky, *supra* note 3, at 676; see, e. g., PARKER, *supra* note 12, at 96 (arguing that “the central mission” of constitutional law should be “to promote majority rule”).

²³ KRAMER, *supra* note 1, at 247; see also PARKER, *supra* note 12, 69 (showing that “typical constitutional discourse” includes a theme of “criticism not just of the ‘system’ of majority rule, but also of the majority itself, of ordinary people who are in the majority”); TUSHNET, *supra* note 7, at 70-71 (“The skeptical rejection of populist constitutional law . . . is powerfully antidemocratic.”).

their democracy, while the American framers believed that a professional and politically independent judiciary was necessary to check the inevitable excesses of democracy.

Part II of the article contrasts the Athenian and American practices of judicial review. In Athens, each Athenian citizen had standing to initiate a lawsuit challenging the constitutionality of Assembly decrees (*graphē paranomōn*). Because these lawsuits were decided by mass juries of ordinary citizens in the *dikastēria*, Athens guaranteed that judicial review would proceed as democratically as had any Assembly action subject to review. In the American system, the constitutional design made it natural for the least democratic branch to have the last word on the constitutionality of government action. I argue again that this democratic difference is no accident. It follows from the different understandings of democracy in Athens and in America. The classical Athenian democracy was communal. The principal function of judicial review in Athens was to protect the community from individuals with the audacity to propose state action that violated fundamental law (*nomos*). Mass juries of ordinary citizens were well situated to enforce community norms against such individuals. American democracy, by contrast, is liberal and therefore individualistic in its orientation. The principal function of judicial review in America is to protect individuals against unlawful deprivation of their rights by the community's representatives. Professional and politically independent judges are well situated to enforce such rights against the will of the community.

Part III assesses contemporary theories of popular constitutionalism against the background of the democratic differences in judicial review as practiced in Athens and America. I argue that today's theories of strong popular constitutionalism align with the highly participatory, direct democracy of Athens. But while Athens had an institutional environment that made strong popular constitutionalism a natural fit, the Madisonian, representative democracy established by the American Constitution is less accommodating. I conclude by arguing that moderate popular constitutionalism theories offer far more promise in ameliorating the counter-majoritarian difficulty of judicial review. Infusing the theory and practice of judicial review with a democratic sensibility fits the American framers' project of designing constitutional government that would remain accountable to, while not being directly controlled by, ordinary citizens.

I. AN OVERVIEW OF THE CLASSICAL ATHENIAN AND THE AMERICAN CONSTITUTIONAL JUDICIAL SYSTEMS

The judicial systems of Athens and America reflect the broader constitutional choices that shaped each democracy. Classical Athenian democracy was direct and highly participatory.²⁴ Athens came closer to realizing an identity between the citizens and their government than has any sophisticated society, before or since.²⁵ As Aristotle put it in his account of the Athenian constitution, the People (*dēmos*) “made themselves supreme in all fields.”²⁶

The Athenians systematically designed each of its governing institutions, including the courts, to ensure that ordinary citizens held a virtual monopoly over the exercise of government power.²⁷ Ordinary citizens, assembled in large groups, made all governance decisions.²⁸ Athens had no government in the modern meaning of the term. The Athenian *dēmos* had “a plenary competence,” and it was they who governed.²⁹ According to the central Athenian democratic principle of *isonomia*,³⁰ each full citizen (that is, adult males duly registered as Athenian citizens), regardless of economic status or social station, enjoyed an equal opportunity to participate in the political decisions

²⁴ JOSIAH OBER, MASS AND ELITE IN DEMOCRATIC ATHENS: RHETORIC, IDEOLOGY, AND THE POWER OF THE PEOPLE 8 (1989) [hereinafter OBER, MASS AND ELITE].

²⁵ DAVID STOCKTON, THE CLASSICAL ATHENIAN DEMOCRACY 50 (1990).

²⁶ Aristotle, *The Constitution of Athens* ¶ 41.2, in ARISTOTLE AND XENOPHON ON DEMOCRACY AND OLIGARCHY 147, 183 (J. M. Moore trans., 1975).

²⁷ OBER, *supra* note 24, at 8, 156, 163-65; Wood, *Demos*, *supra* note 20, at 122; see also PHILIP BROOK MANVILLE, THE ORIGINS OF CITIZENSHIP IN ANCIENT ATHENS 20 (1990) (“Everything about the democratic constitution [of Athens] encouraged an ethos of public participation . . .”).

²⁸ Wood, *Demos*, *supra* note 20, at 122.

²⁹ Athanassios Vamvoukos, *Fundamental Freedoms in Athens of the Fifth Century*, 26 *REVUE INTERNATIONALE DES DROITS DE L’ANTIQUITÉ* 89, 95 (1979); see also JOSIAH OBER, THE ATHENIAN REVOLUTION: ESSAYS ON ANCIENT GREEK DEMOCRACY AND POLITICAL THEORY 19 (1996) (establishing that in the classical Athenian democracy, political power was exercised “actively and collectively by the *demos*”).

³⁰ *Isonomia*, which Herodotus praised as “the most beautiful of words,” had a rich and varied meaning for classical Athenians. Vamvoukos, *supra* note 29, at 97 (quoting HERODOTUS, THE HISTORIES 3.80). The principal meaning of *isonomia* was “equality through the law.” M.I. Finley, *The Freedom of the Citizen in the Greek World*, in *ECONOMY AND SOCIETY IN ANCIENT GREECE* 84 (Brent Shaw & Richard Salle eds., 1981). (The prefix *iso-* conveyed “equal,” and *nomos* referred to fundamental “law” or “custom.”) For classical Athenians, “equality through the law” primarily meant political equality, or more precisely, the equal opportunity of all citizens, protected by and promoted through law, to exercise their political rights. See MOGENS HERMAN HANSEN, THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES 81 (J.A. Crook trans., 1991); R.K. SINCLAIR, DEMOCRACY AND PARTICIPATION IN ATHENS 16 (1988).

that guided the state (*polis*).³¹ The principal governing institutions of classical Athens — the Assembly (*ekklēsia*), the Council of 500 (*boulē*), the lawmaking boards (*nomothetai*), and the popular courts (*dikastēria*) — essentially were large assemblies of citizen volunteers (the smallest usually had 500 members, the largest probably around 6,000) who listened to debate and then cast their votes.³² These mass meetings provided the final word on law and policy in Athens.³³

In pointed contrast to Athens, a central project of the framers of the American Constitution was to exclude the People from direct involvement in their governance.³⁴ “The true distinction” between classical Athenian democracy and American representative democracy, wrote James Madison, “lies in the total exclusion of the people, in their collective capacity, from any share in the [American government].”³⁵ American democracy, in Madison’s language, “delegate[s] . . . the government . . . to a small number of citizens elected by the rest.”³⁶ Madison believed that while citizens were capable of electing government officials, they generally lacked the competence to engage in the kind of direct political participation that had characterized the classical Athenian democracy.³⁷

³¹ KURT RAAFLAUB, *THE DISCOVERY OF FREEDOM IN ANCIENT GREECE* 230 (2004); Martin Ostwald, *Shares and Rights: “Citizenship” Greek Style and American Style*, in *DĒMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN*, *supra* note 20, at 49, 54-56. Thucydides had Pericles boast in his *Funeral Oration* that the law of Athens permitted each citizen “to serve the state,” regardless of “the obscurity of his condition.” THUCYDIDES, *THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR* 112 (Robert B. Strassler ed., Richard Crawley trans., 1996).

³² See S.C. TODD, *THE SHAPE OF ATHENIAN LAW* 293 (1993) (“The institutions of Athenian government are few in number, but involved large numbers of people.”).

³³ OBER, *MASS AND ELITE*, *supra* note 24, at 7-8.

³⁴ See EDWARD COUNTRYMAN, *THE AMERICAN REVOLUTION* 199 (1985) (stating that “the Constitution aimed to limit [citizen] involvement, not to encourage it”); JOHN PATRICK DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* 49 (1984) (explaining that “in the *Federalist* the central concern is the distancing of Americans from their government”).

³⁵ THE FEDERALIST NO. 63, at 413 (James Madison) (Modern Library ed., 1941) (emphasis omitted); see also THE FEDERALIST NO. 28, at 173 (Alexander Hamilton) (Modern Library ed., 1941) (arguing that the Constitution placed governmental power “in the hands of the representatives of the people,” but not in the People themselves).

³⁶ THE FEDERALIST NO. 10, *supra* note 35, at 59 (James Madison). Murray Dry, a historian of early America, observed that in *The Federalist*, “representation in America, which is identified with election, is celebrated precisely because, in contrast to Greece and Rome, it excludes the people, in their collective capacity, from government.” Murray P. Dry, *The Case Against Ratification: Anti-Federalist Constitutional Thought*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 271, 277 (Leonard W. Levy & Dennis J. Mahoney eds., 1987).

³⁷ BERNARD BAILYN, *FACES OF REVOLUTION: PERSONALITIES AND THEMES IN THE*

In the framers' optimal democracy, ordinary citizens themselves do not make the law or set government policy.³⁸ The *dēmos* instead select representatives, who in turn, govern the community.³⁹ The American framers expected these elected representatives, as "trustees" of the People, to exercise their independent judgment of the public good, instead of channeling the will of their constituents.⁴⁰ American citizens participate in the political life of the Nation primarily by voting for their representatives in the federal government.⁴¹ Ordinary citizens do not have a vote in the governing institutions of the United States (Congress, the institutions comprising the executive branch, and the courts), but those who govern in these institutions are ultimately accountable (in widely varying degrees) to the American *dēmos* for the

STRUGGLE FOR AMERICAN INDEPENDENCE 260 (1990); Russell L. Hanson, "Commons" and "Commonwealth" at the American Founding: Democratic Republicanism as the New American Hybrid, in CONCEPTUAL CHANGE AND THE CONSTITUTION 165, 183 (Terence Ball & J.G.A. Pocock eds., 1988); see, e.g., DIGGINS, LOST SOUL OF AMERICAN POLITICS, *supra* note 34, at 6 (stating that *The Federalist* explores "the paradox . . . [of] how to make self-government work with people who may be incapable of governing themselves"); THE FEDERALIST NO. 71, *supra* note 35, at 464-65 (Alexander Hamilton) (emphasis omitted) (showing that although "the people commonly intend the public good," they do not "always reason right about the means of promoting it").

³⁸ See GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 595 (1969) [hereinafter WOOD, CREATION OF THE AMERICAN REPUBLIC]. By contrast, some American states provide a lawmaking role for their citizens through an initiative process. For a leading examination of citizen initiatives, see generally JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY (2004) (drawing on historical and statistical evidence to defend the citizen-initiative process as a sound instrument of direct democracy).

³⁹ Wood, *Demos*, *supra* note 20, at 123-24; see also Vamvoukos, *supra* note 29, at 91 (stating that today's representative democracy is "not participatory; it is a government at a distance, not in the community").

⁴⁰ DAVID HELD, MODELS OF DEMOCRACY 73 (3d ed., 2006); THE FEDERALIST NO. 10, *supra* note 35, at 59 (James Madison) (arguing that the principle of representation should "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial consideration"). Hanna Pitkin has characterized what she describes as the "mandate-independence controversy" as "the central classic controversy in the literature of political representation." HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 145 (1967). For her influential discussion, see *id.* at 144-67.

⁴¹ See James Madison, *Report on the Virginia Resolutions*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 575 (Jonathan Elliot ed., 2d ed. 1836) (stating that "the right of electing the members of the government constitutes . . . the essence of a free and responsible government"); see also Dry, *supra* note 36, at 277 (showing in *The Federalist*, "representation in America . . . is identified with election").

choices they make.⁴² As Sheldon Wolin observed, America's representative democracy "is a democracy without the demos as actor. The voice is that of a ventriloquist democracy."⁴³

Although the founders responsible for drafting the American Constitution were unable (and many proved unwilling) to keep the democratic genie in the bottle, the institutional structure of democratic government that they designed has remained largely intact. Contemporary America is more democratic than many influential founders anticipated;⁴⁴ yet, American democracy remains cabined within the government structure that we have inherited from them.

A. *The Athenian Democratic Dikastēria*

Although the Athenians began installing their democracy at the dawn of the classical era,⁴⁵ they did not complete the installation until after they had fully democratized the judicial system.⁴⁶ This most likely occurred around the middle of the fifth century BCE, when the Athenians assigned the bulk of the judicial power to a system of popular courts they called the *dikastēria*, or "places of justice."⁴⁷ The precise allocation of the judicial power preceding the democratization of the courts is uncertain, but Aristotle's history of the Athenian constitution recounts that a crucial judicial reform gave to the *dikastēria* the role of "guardian of the constitution" (*nomophylakia*). That crucial power traditionally had been held by the Council of the Areopagus, which was a long-standing, life-tenured council of elders

⁴² THE FEDERALIST NO. 63, *supra* note 35, at 409-10 (James Madison); THE FEDERALIST NO. 71, *supra* note 35, at 464 (Alexander Hamilton).

⁴³ Sheldon S. Wolin, *Transgression, Equality, and Voice*, in *DĒMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN*, *supra* note 20, at 63, 87; see also J. PETER EUBEN, *PLATONIC NOISE* 73 (2003) (explaining that "very few of our citizens actively share in the opportunities and responsibilities of power as Athenian citizens did").

⁴⁴ See ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 10 (2001) ("Democratic ideas and institutions as they unfolded in the two centuries after the American Constitutional Convention would go far beyond the conceptions of the Framers . . .").

⁴⁵ Athens began to democratize with a set of reforms that the leader Cleisthenes proposed to the Assembly in 508/507 BCE. OSWYN MURRAY, *EARLY GREECE* 278 (2d ed., 1993); CYNTHIA PATTERSON, *PERICLES' CITIZENSHIP LAW OF 451-50 B.C.* 25 (1981).

⁴⁶ M.I. FINLEY, *THE ANCIENT GREEKS* 76 (1991); OBER, *MASS AND ELITE*, *supra* note 24, at 75-82.

⁴⁷ JAMES L. O'NEIL, *THE ORIGINS AND DEVELOPMENT OF ANCIENT GREEK DEMOCRACY* 64 (1995); MARTIN OSTWALD, *FROM POPULAR SOVEREIGNTY TO THE SOVEREIGNTY OF LAW: LAW, SOCIETY, AND POLITICS IN FIFTH-CENTURY ATHENS* 47-50, 66-67 (1986); Aristotle, *Constitution of Athens* ¶ 25.2-3, *supra* note 26, at 168.

consisting of former top Athenian officials (*arkhontes*, “leaders”) that is faintly suggestive of the American Supreme Court.⁴⁸ The guardianship role had given the Areopagus Council exclusive jurisdiction over the most serious political cases, including charges of official misconduct and crimes against the state.⁴⁹ By defanging the Areopagus,⁵⁰ the judicial reform administered a “death blow” to the last political stronghold of the Athenian aristocracy.⁵¹ The Athenian People became guardians of their constitution. It is perhaps no coincidence that the Greek word for democracy, *dēmokratia*, makes its first appearance in the surviving sources around the time of the judicial reform.⁵²

Modern scholars frequently characterize the *dikastēria* as mass citizen juries, but the analogy between Athenian *dikastai* (“members of a *dikastērion*”) and American jurors is inexact, at best.⁵³ The most important similarity between Athenian *dikastai* and American jurors, and the primary justification for translating *dikastēs* as “juror,” is that Athenian jurors, like their modern counterparts, were ordinary lay

⁴⁸ Aristotle, *Constitution of Athens* ¶ 25.1-3, *supra* note 26, at 168. For an argument that the judicial reforms of the mid-fifth century were far-reaching, see P.J. RHODES, *THE ATHENIAN BOULE* 144-207 (1984). For an argument that Aristotle is an unreliable source for the substance of these reforms, see Eberhard Ruschenbusch, *Ephialtes*, 15 *HISTORIA* 369 (1966).

⁴⁹ O’NEIL, *supra* note 47, at 20; OSTWALD, *supra* note 47, at 12-14; Plutarch, *Solon*, in *PLUTARCH GREEK LIVES: A SELECTION OF NINE GREEK LIVES* 46, 62-63 (Robin Waterfield trans., 1998).

⁵⁰ After the judicial reform, the principal function of the Areopagus was to adjudicate homicide cases. ADRIAAN LANNI, *LAW AND JUSTICE IN THE COURTS OF CLASSICAL ATHENS* 79 (2006); R. Sealey, *Democratic Theory and Practice*, in *THE CAMBRIDGE COMPANION TO THE AGE OF PERICLES* 238, 244 (Loren J. Samons II, ed., 2007) [hereinafter Sealey, *Democratic Theory*]. For a leading discussion of the Areopagus, see generally ROBERT W. WALLACE, *THE AREOPAGUS COUNCIL, TO 307 B.C.* (1989).

⁵¹ Kurt A. Raaflaub, *Equalities and Inequalities in Athenian Democracy*, in *DĒMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN*, *supra* note 20, at 139, 148.

⁵² The first documented appearance of the word *dēmokratia* dates from the middle of the fifth century BCE. HANSEN, *supra* note 30, at 69; RAPHAEL SEALEY, *THE ATHENIAN REPUBLIC: DEMOCRACY OR THE RULE OF LAW?* 102 (1987) [hereinafter SEALEY, *ATHENIAN REPUBLIC*].

⁵³ LANNI, *supra* note 50, at 38; Raphael Sealey, *On the Athenian Concept of Law*, 77 *CLASSICAL J.* 289, 289 (1982) [hereinafter Sealey, *Athenian Concept of Law*]. For general discussions of the *dikastēria*, see HANSEN, *supra* note 30, at 178-224; DOUGLAS M. MACDOWELL, *THE LAW IN CLASSICAL ATHENS* 33-40 (1978); TODD, *supra* note 32, at 82-91; Robert W. Wallace, *Law and Rhetoric: Community Justice in Athenian Courts*, in *A COMPANION TO THE CLASSICAL WORLD* 416, 421-30 (Konrad H. Kinzl ed., 2007) [hereinafter Wallace, *Law and Rhetoric*].

citizens lacking legal credentials or expertise.⁵⁴ The fundamental difference between Athenian *dikastai* and American jurors is that Athenian jurors, unlike their modern counterparts, possessed complete authority to resolve the cases on which they sat.⁵⁵ The *dikastai* exercised the functions of a modern judge and jury, deciding all issues of law and fact, as well as the sentence of those whom they convicted.⁵⁶ In modern parlance, a classical Athenian *dikastēs* was as much a judge as a juror.⁵⁷

The most visible difference between Athenian *dikastēria* and American juries was their size. Dikastic juries varied in size according to the nature, and importance, of the case, but they always were unfathomably large by modern standards. The typical public suit (*graphē*), which is the type of case relevant to this Article, was heard by a jury of at least 500 *dikastai*,⁵⁸ and sometimes the juries were much larger.⁵⁹ The largest jury attested in the surviving sources included 2,500 members.⁶⁰

The outsized jury panels of the *dikastēria* furthered what Americans would describe as due process values by deterring corruption of the judicial process. With a 500-person jury, it would have been a daunting challenge to bribe or to intimidate enough *dikastai* to swing a decision in one's favor.⁶¹ More fundamentally though, the size of the *dikastēria* applied to the courts the classical Athenian democratic principle that public decisions were best made collectively by large groups of ordinary citizens.⁶²

⁵⁴ TODD, *supra* note 32, at 82.

⁵⁵ LANNI, *supra* note 50, at 179; SINCLAIR, *supra* note 30, at 106.

⁵⁶ TODD, *supra* note 32, at 82-83, 90, 133-35; Sealey, *Athenian Concept of Law*, *supra* note 53, at 289. "In Athens," writes classical Athenian legal scholar Stephen Todd, "issues of fact and issues of law were in practice inseparable . . ." TODD, *supra* note 32, at 135.

⁵⁷ LANNI, *supra* note 50, at 38; *see also* TODD, *supra* note 32, at 82 (translating *dikastēs* "with equal accuracy or inaccuracy . . . as 'judge' or as 'juror' . . .").

⁵⁸ HANSEN, *supra* note 30, at 187; SINCLAIR, *supra* note 30, at 70; Aristotle, *Constitution of Athens* ¶ 68.1, *supra* note 26, at 206.

⁵⁹ Aristotle, *Constitution of Athens* ¶ 68.1, *supra* note 26, at 206; *see, e.g.*, MACDOWELL, *supra* note 53, at 40 (citing evidence of juries ranging from 1,000 to 2,500 *dikastai*); *see also* TODD, *supra* note 32, at 83 (stating that courts of multiples of 500 are attested less frequently than are juries of 500, but they nevertheless are firmly attested).

⁶⁰ Sealey, *Athenian Concept of Law*, *supra* note 53, at 298.

⁶¹ TODD, *supra* note 32, at 84; *id.* at 298 n.24.

⁶² CHRISTIAN MEIER, *ATHENS: A PORTRAIT OF THE CITY IN ITS GOLDEN AGE 417-18* (Robert & Rita Kimber trans., 1998); *see supra* notes 27-33 and accompanying text.

As was generally the case with Athenian offices,⁶³ every male citizen who had reached the age of thirty was eligible to serve as a juror.⁶⁴ The Athenians expected “[c]ivic responsibility and fair-minded honesty” from *dikastai*, and they assumed that ordinary citizens generally possessed these qualities sufficiently to exercise the judicial power.⁶⁵ At the beginning of each year, the Athenians convened a jury pool, which most classical historians believe included 6,000 members.⁶⁶ It is not certain how members of the jury pool were selected,⁶⁷ but as with most Athenian offices, they may well have been selected randomly from among those who had volunteered for service.⁶⁸ Each member of the jury pool swore an oath to decide cases according to law, and in the absence of governing law, to reach a decision that accorded with his sense of justice (*gnōmē dikaiotatē*).⁶⁹ Swearing the dikastic oath was meaningful for Athenian jurors, and served to distinguish the

⁶³ HANSEN, *supra* note 30, at 227; TODD, *supra* note 32, at 83, 295.

⁶⁴ HANSEN, *supra* note 30, at 181; TODD, *supra* note 32, at 83, 295; Aristotle, *Constitution of Athens* ¶ 63.1, *supra* note 26, at 202. State debtors and disenfranchised citizens (*atimoi*) were barred from jury service. Aristotle, *Constitution of Athens* ¶ 63.1, *supra* note 26, at 202; see also Robert W. Wallace, *Unconvicted or Potential “Atimoi” in Ancient Athens*, 1 *DIKE* 63, 69 (1998) (describing the trial and execution of a state debtor who served as *dikastēs*).

⁶⁵ M.I. FINLEY, *DEMOCRACY ANCIENT AND MODERN* 118-19 (2d ed., 1985) [hereinafter FINLEY, *DEMOCRACY*]. While the Athenians did not pretend that all citizens were equally talented, they believed that citizens generally were qualified for most forms of public service. Finley, *supra* note 30, at 78; SINCLAIR, *supra* note 30, at 17; see also Raaflaub, *supra* note 51, at 142 (explaining that Athenians believed that all citizens possessed “the basic civil qualities [necessary] for successful communal life”).

⁶⁶ HANSEN, *supra* note 30, at 181; RAPHAEL SEALEY, *A HISTORY OF THE GREEK CITY STATES CA. 700 – 338 B.C.* 259 (1976); Aristotle, *Constitution of Athens* ¶ 24.3, *supra* note 26, at 167. *But see* TODD, *supra* note 32, at 83 (stating “it is not certain whether . . . [the 6,000 figure usually given for the annual jury pool] was real or nominal”). The number 6,000 as the size of the jury pool is attested by fifth-century sources, but there is no source for the size of the jury pool after 415 BCE. MACDOWELL, *supra* note 53, at 36; P.J. Rhodes, *Athenian Democracy after 403 B.C.*, 75 *CLASSICAL J.* 305, 317 (1980).

⁶⁷ OSTWALD, *supra* note 48, at 68; TODD, *supra* note 32, at 83.

⁶⁸ HANSEN, *supra* note 30, at 181; OBER, *MASS AND ELITE*, *supra* note 24, at 142.

⁶⁹ 2 A.R.W. HARRISON, *THE LAW OF ATHENS* 48 (2d ed. 1998); MACDOWELL, *supra* note 53, at 44; see 4 Demosthenes, *Against Boeotus*, I., 39.40, in *DEMOSTHENES* 449, 477 (A.T. Murray trans., 1926) (quoting “in cases which are not covered by the laws, you have sworn that you will decide as in your judgment is most just”); Demosthenes, *Against Leptines* ¶ 118, in *DEMOSTHENES, SPEECHES* 15 (Edward M. Harris trans., 2008) (“[M]en of Athens, . . . you have come here having sworn to judge in accordance with the laws . . . As for matters where there are no laws, you have sworn to follow your most honest judgment.”).

popular courts from other *polis* institutions.⁷⁰ Demosthenes, for example, once argued that decisions of the *dikastēria* carried “greater weight” than Assembly decrees because the *ekklēsiastai* (“members of the *ekklēsia*,” the Assembly) did not swear a similar oath.⁷¹

The *dikastēria* met openly and frequently, perhaps between 150 and 240 days each year, with several courts in session on a typical court day.⁷² As a precaution against jury tampering, trials were completed in only one day.⁷³ The Athenian commitment to popular courts thus obligated thousands of citizens to appear for jury service on somewhere between 42 percent and 68 percent of the days of each year.⁷⁴ Classical Athenian legal scholar Douglas MacDowell writes, “In proportion to their population, the Athenians must have spent more man-hours in judging than any other people in history.”⁷⁵

In a stark departure from American trial practice, Athenian litigants had no say in jury selection.⁷⁶ In the fifth century BCE, each member of the jury pool was assigned to a particular *dikastērion* for the year.⁷⁷ For much of the fourth century, the members of the jury pool gathered on the mornings that the *dikastēria* were in session, and jurors were allocated, individually and randomly, among the various courts.⁷⁸ By keeping litigants in the dark about the composition of their jury until the moment of trial, the fourth-century process of jury selection provided yet another hedge against jury tampering.⁷⁹

⁷⁰ HANSEN, *supra* note 30, at 182-83.

⁷¹ *Id.* at 183 (quoting Demosthenes, *Against Timokrates*, 26.24, in 3 DEMOSTHENES 369, 423 (J.H. Vince trans., 1926)).

⁷² HANSEN, *supra* note 30, at 186; OBER, MASS AND ELITE, *supra* note 24, at 54, 141. The *dikastēria* might resolve between four and forty cases on a given day. LANNI, *supra* note 50, at 33.

⁷³ TODD, *supra* note 32, at 84.

⁷⁴ Classical Athens observed a lunar year of 354 days. HANSEN, *supra* note 30, at 135; MACDOWELL, *supra* note 53, at 40.

⁷⁵ MACDOWELL, *supra* note 53, at 40.

⁷⁶ See LANNI, *supra* note 50, at 39 (“There was no process like our *voir dire*, meant to exclude from the jury those with some knowledge of the litigants or the case. On the contrary, Athenian litigants at times encouraged jurors to base their decision on preexisting knowledge.”).

⁷⁷ MACDOWELL, *supra* note 53, at 36; TODD, *supra* note 32, at 84.

⁷⁸ MACDOWELL, *supra* note 53, at 36-40; TODD, *supra* note 32, at 85-87; see Aristotle, *Constitution of Athens* ¶ 63-67, *supra* note 26, at 202-05 (describing the method of jury-selection near the end of the classical democracy). Members of the jury pool were not obligated to appear for jury service on every day the courts were in session. By the same token, appearing for jury selection did not guarantee one a seat on a *dikastērion* that day. TODD, *supra* note 32, at 83-84, 292.

⁷⁹ MACDOWELL, *supra* note 53, at 38; TODD, *supra* note 32, 84; Rhodes, *supra* note 66, at 318. The fourth-century move to a random, ad hoc selection process may also

It was a central feature of the classical Athenian democracy to entrust the exercise of state power to a random selection of citizens. In the judicial context, random selection promoted due process values of fair decision-making. It also aligned the courts with the principal political institutions of Athens.⁸⁰ For the Athenians, selection by lot was an expression of popular sovereignty.⁸¹ It embodied the egalitarian principle that each citizen commanded an equal claim to the honor (*timē*) of serving his community.⁸² More deeply, random selection reaffirmed the communal identity of Athenian citizens.⁸³

All verdicts in the *dikastēria* were by majority vote of the jurors.⁸⁴ Unlike American jury practice, Athenian jurors did not deliberate collectively. They did not even discuss the case among themselves before reaching a verdict.⁸⁵ Each *dikastēs* decided for himself the just resolution of the case⁸⁶ and then voted by secret ballot (*psēphos*,

have furthered Athenian democratic values by ensuring that jury panels over the course of a year would not develop a group decision-making dynamic dominated by powerful jurors. See Rhodes, *supra* note 66, at 318 (explaining that the fourth-century jury-selection process ensured that no “regular patterns of influence [would] grow up” among the *dikastai*); Sealey, *Democratic Theory*, *supra* note 50, at 245-46 (explaining that the fifth-century system, in which the same jurors sat in a particular court throughout the year, had permitted the jury panels to develop a “group identity,” which the Athenians may have rejected as “undesirable, particularly if it allowed influential individuals to establish a long-term dominance over their fellow *dikastai*”).

⁸⁰ The vast majority of *polis* officials (*archai*), like the *dikastai*, were selected by lot (*klēros*) from among those who had volunteered for office. HANSEN, *supra* note 30, at 230-33; SINCLAIR, *supra* note 30, at 17; Aristotle, *Constitution of Athens* ¶ 43.1, *supra* note 26, at 185.

⁸¹ HANSEN, *supra* note 30, at 236.

⁸² SINCLAIR, *supra* note 30, at 17; Charles W. Hedrick, Jr., *The Zero Degree of Society: Aristotle and the Athenian Citizen*, in *ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY* 289, 312 (J. Peter Euben et al. eds., 1994); see *supra* notes 30-31 and accompanying text. The Athenians also furthered equal opportunity among citizens to serve on juries by paying jurors for their days of service. HANSEN, *supra* note 30, at 184-85, 188-89; SINCLAIR, *supra* note 30, at 71, 129-30; Aristotle, *Constitution of Athens*, ¶ 62.2, *supra* note 26, at 202.

⁸³ See *infra* notes 164-172 and accompanying text.

⁸⁴ LANNI, *supra* note 50, at 39; TODD, *supra* note 32, at 133; Aristotle, *Constitution of Athens* ¶ 69.1, *supra* note 26, at 207. In another departure from American practice, there were no deadlocked juries in Athens: tie vote resulted in acquittal. TODD, *supra* note 32, at 83 n.10, 133; Aristotle, *Constitution of Athens* ¶ 69.1-2, *supra* note 26, at 207.

⁸⁵ LANNI, *supra* note 50, at 39, 120; Sealey, *Athenian Concept of Law*, *supra* note 53, at 289. The Athenians may have discouraged discussion and deliberation among the *dikastai* in order to block powerful and influential citizens on the jury from influencing the votes of others. Wallace, *Law and Rhetoric*, *supra* note 53, at 421-22.

⁸⁶ Wallace, *Law and Rhetoric*, *supra* note 53, at 421.

“pebble”).⁸⁷ Because each Athenian juror reasoned toward a verdict on his own terms, it was possible, indeed likely, that the majority of jurors who voted for a particular verdict had been persuaded by different aspects of the case.⁸⁸

Additionally, Athenian jurors were not bound by precedent.⁸⁹ Their decisions essentially were “ad hoc determinations” of where justice lay in each case that came before them.⁹⁰ Classical historian Mogens Hansen explains, “[T]he Athenians held that the right and the power to judge a case rested with the jurors for that case, and that they were not bound by what others, on another day, might have done.”⁹¹ Nor were Athenian juries required to explain or to justify their verdicts to the *dēmos*: they were the *dēmos*.⁹² For the same reason, the verdicts of the *dikastēria* were final.⁹³ Athenian law provided neither a right of appeal⁹⁴ nor a pardon power.⁹⁵ In Athens, there was no higher authority than the collective judgment of the *dēmos*, and that was precisely what the *dikastēria* symbolized.⁹⁶

The commitment of the judicial power largely to randomly selected citizen juries reflected not only the democratic practice of popular decision-making, but also the Athenians’ preference for amateurism in public service. Just as Athens relied on amateur citizen-volunteers (*hoi*

⁸⁷ See HANSEN, *supra* note 30, at 202; SINCLAIR, *supra* note 30, at 211. For a description of the voting procedure in the *dikastēria* in the fourth century BCE, see Alan L. Boegehold, *Toward a Study of Athenian Voting Procedure*, 32 *HESPERIA* 366, 366-68 (1963).

⁸⁸ LANNI, *supra* note 50, at 120; see also TODD, *supra* note 32, at 61 (explaining that “the arguments which convinced one *dikastēs* were not necessarily those which convinced his neighbour [sic]”).

⁸⁹ SINCLAIR, *supra* note 30, at 211; Sealey, *Democratic Theory*, *supra* note 50, at 254. Athenian litigants at times argued from precedent, but mostly for rhetorical effect. ANDREW WOLPERT, REMEMBERING DEFEAT: CIVIL WAR AND CIVIC MEMORY IN ANCIENT ATHENS 160 n.21 (2002). Adriaan Lanni explains, “In most cases, speakers cite past cases not to elucidate the meaning of the law or proper application of the facts in the case at hand, but to provide general examples to the jury to establish that harsh penalties are acceptable and that even men with good reputations and exemplary records can be legitimately punished for crimes they commit.” LANNI, *supra* note 50, at 119. For a discussion of the use of precedent in Athenian legal argument, see *id.* at 118-28.

⁹⁰ LANNI, *supra* note 50, at 116.

⁹¹ HANSEN, *supra* note 30, at 201.

⁹² LANNI, *supra* note 50, at 120; TODD, *supra* note 32, at 61; see OSTWALD, *supra* note 47, at 66 (describing the *dikastēria* as “the *demos* in its judicial capacity”).

⁹³ TODD, *supra* note 32, at 145.

⁹⁴ SINCLAIR, *supra* note 30, at 72; Sealey, *Democratic Theory*, *supra* note 50, at 248.

⁹⁵ SINCLAIR, *supra* note 30, at 211; TODD, *supra* note 32, at 89.

⁹⁶ FINLEY, *DEMOCRACY*, *supra* note 65, at 118; TODD, *supra* note 32, at 89.

boulomenoi, “whoever wishes to do so”) to perform most government functions,⁹⁷ amateurs controlled the disposition of lawsuits, from start to finish.⁹⁸ There were no professional judges or lawyers as we know them in the *dikastēria*.

The judicial magistrate (*arkhē*) who presided over a trial was an ordinary citizen who lacked formal legal training, and who, like most other *polis* officials, had been selected by lot to serve a non-renewable, one-year term.⁹⁹ Athenian judicial magistrates had no semblance of the authority wielded by modern American trial judges to shape jury decisions. They could not rule on the admissibility of evidence or even question the litigants.¹⁰⁰ They lacked authority to sum up the evidence, instruct the jury on the applicable law, or otherwise attempt to influence the jury’s verdict.¹⁰¹ According to classical Athenian ideology, any attempt by a single magistrate to direct a citizen-jury would have been deeply anti-democratic.¹⁰²

⁹⁷ See LANNI, *supra* note 50, at 179 (“As a direct, participatory democracy, Athens rarely placed men with expertise in official positions, preferring to rely on ordinary citizens selected by lot.”); TODD, *supra* note 32, at 291 (“The most important underlying characteristic of Athenian democracy is that it was and remained an amateur system.”).

⁹⁸ FINLEY, *DEMOCRACY*, *supra* note 65, at 117; TODD, *supra* note 32, at 91-92; see also Wallace, *Law and Rhetoric*, *supra* note 53, at 421 (stating that “the Athenians were proud of being amateurs, and suspicious of legal experts”).

⁹⁹ LANNI, *supra* note 50, at 37; TODD, *supra* note 32, at 78.

¹⁰⁰ LANNI, *supra* note 50, at 37; TODD, *supra* note 32, at 68, 79.

¹⁰¹ LANNI, *supra* note 50, at 179; MACDOWELL, *supra* note 53, at 32; OSTWALD, *supra* note 47, at 68; TODD, *supra* note 32, at 79, 82, 132. It was up to the litigants themselves to present the applicable law to the jury, and each *dicastēs* applied his own understanding of the law when casting his vote. LANNI, *supra* note 50, at 37-38; Wallace, *Law and Rhetoric*, *supra* note 53, at 421. It was a crime, punishable by death, for a litigant to present a fabricated law to the jury. MACDOWELL, *supra* note 53, at 242; Wallace, *Law and Rhetoric*, *supra* note 53, at 417.

¹⁰² Athenian procedure provided for a preliminary hearing (*anakrisis*), about which classical historians know little. HANSEN, *supra* note 30, at 196-97; HARRISON, *supra* note 69, at 94; TODD, *supra* note 32, at 99, 126-27. Some historians believe that the magistrate presiding over the preliminary hearing possessed a limited authority to dismiss a case on technical or on jurisdictional grounds, or for failure to state an actionable claim. HANSEN, *supra* note 30, at 196; OSTWALD, *supra* note 47, at 67-68; cf. SEALEY, *ATHENIAN REPUBLIC*, *supra* note 52, at 53 (emphasizing that the evidence for this authority is weak). *But see* LANNI, *supra* note 50, at 36 (explaining that “there is no hint of the winnowing functions served by pretrial procedures in modern courts; the presiding magistrates . . . did not dismiss suits on legal grounds or set out particular issues to be decided at trial”). For an authoritative discussion of what is known about *anakrisis*, see HARRISON, *supra* note 69, at 94-105.

The litigants decided for themselves how to present their cases to the *dikastai*.¹⁰³ They were not represented by lawyers at trial.¹⁰⁴ Litigants personally presented their cases to the jury, primarily in the form of a speech.¹⁰⁵ These speeches differed markedly from the oral arguments one now hears in American courtrooms. Athenian litigants spoke in the language of laymen, often professing their lack of litigation experience and speaking ability.¹⁰⁶ Their speeches typically offered the jury dueling narratives of the events giving rise to the dispute that had landed them in court.¹⁰⁷

The classical Athenians embraced the *dikastēria* as a central decision-making institution of the state, tapping the collective judgment of the *dēmos* to resolve legal disputes according to democratic principles.¹⁰⁸ Their system of popular courts entrusted the very soul of the state, the administration of justice, entirely to ordinary citizens.¹⁰⁹ A contemporary observer of the classical Athenian democracy put it bluntly: in Athens, he wrote, judicial decisions “depend[ed] solely upon the common people.”¹¹⁰ The wide-ranging

¹⁰³ LANNI, *supra* note 50, at 141; *see also* WOLPERT, *supra* note 89, at 57 (explaining that Athenian courts lacked a “mechanism to prevent the litigants from introducing irrelevant or inadmissible arguments”).

¹⁰⁴ Athenian litigants could not be represented by lawyers at trial because it was against the law to speak in an Athenian court for a fee. HANSEN, *supra* note 30, at 194; MACDOWELL, *supra* note 53, at 251; Demosthenes, *Against Stephanus*, II. 46.26, in 5 DEMOSTHENES, *supra* note 69, at 245, 263 (quoting a law making it illegal “while serving as public advocate [*synēgoros*, “fellow speaker”], [to] accept money in any suit”). Although Athenian litigants personally presented their cases to the jury, it was permissible, if frowned upon, for a litigant to hire a professional speechwriter (*logographos*) to draft his jury speech and otherwise to help him prepare the case for trial. HANSEN, *supra* note 30, at 194, 200; TODD, *supra* note 32, at 78, 94-96. A litigant could not let the jury know that his speech had been ghostwritten by a *logographos* and hope to win his case. TODD, *supra* note 32, at 78.

¹⁰⁵ HANSEN, *supra* note 30, at 200; Wallace, *Law and Rhetoric*, *supra* note 53, at 416; *see also* TODD, *supra* note 32, at 37 (explaining that “the [litigant’s] speech itself in an Athenian trial counted for far more than did either documents or even witnesses”). An Athenian litigant who declined to give a jury speech had no hope of prevailing in the litigation. MACDOWELL, *supra* note 53, at 250.

¹⁰⁶ LANNI, *supra* note 50, at 37; *see also* MELISSA SCHWARTZBERG, DEMOCRACY AND LEGAL CHANGE 35 (2007) (“[Athenian] litigants regularly appealed to their amateurism”); Wallace, *Law and Rhetoric*, *supra* note 53, at 424-25 (explaining that Athenian jury speeches were “anti-expert and reflect[ed] the perspectives of ordinary citizens”).

¹⁰⁷ LANNI, *supra* note 50, at 37.

¹⁰⁸ HANSEN, *supra* note 30, at 178; SINCLAIR, *supra* note 30, at 70.

¹⁰⁹ OBER, MASS AND ELITE, *supra* note 24, at 8.

¹¹⁰ [Pseudo] Xenophon, *The Constitution of the Athenians* ¶ 18, in ARISTOTLE AND XENOPHON ON DEMOCRACY AND OLIGARCHY 41 (J.M. Moore trans., 1975).

jurisdiction of the *dikastēria* empowered the *dēmos* to control the disposition of virtually every major legal dispute that arose in classical Athens,¹¹¹ thus fully enabling the citizens of Athens to be their own guardians against injustice.¹¹²

B. *America's Independent and Professional Judiciary*

The American founders were well aware of the thoroughly democratic nature of classical Athenian governance, but for them Athens served as a model to be avoided, not emulated.¹¹³ The members of the founding generation who wrote and defended the Constitution intended to counteract, in the jarring phrase of Elbridge Gerry,¹¹⁴ the “excess of democracy” that they believed had once plagued Athens and then threatened America.¹¹⁵ Alexander Hamilton, for example, sharply questioned the capacity of “popular assemblies,” the institution of choice in classical Athens, to legislate wisely or justly. Hamilton believed that human nature drove people to act more frequently according to “momentary passions, and immediate interests” than to “general or remote considerations of policy, utility, or justice.”¹¹⁶ Popular assemblies fed rather than countered this

¹¹¹ TODD, *supra* note 32, at 82; *see also* LANNI, *supra* note 50, at 2 (“Popular courts tried the vast majority of trials in the Athenian court system . . .”). On the breadth of the jurisdiction of the *dikastēria*, *see* HANSEN, *supra* note 30, at 203; SINCLAIR, *supra* note 30, at 19, 69.

¹¹² MEIER, *supra* note 62, at 419-20. In the fourth century BCE, at least, it was customary for Athenian litigants to appeal to the *dikastai* as “guardians of the laws.” Wallace, *Law and Rhetoric*, *supra* note 53, at 416; *see supra* notes 48-52 and accompanying text.

¹¹³ FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 144 (1985); CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT* 120 (1994); *see also* William A. Galston, *The Use and Abuse of the Classics in American Constitutionalism*, 66 *CHI.-KENT L. REV.* 47, 49 (1990) (stating that “[the] image of Greek republicanism [in *The Federalist*] was almost unbelievably bleak”).

¹¹⁴ 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 48 (Max Farrand ed., 1911).

¹¹⁵ *See* LANCE BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 89 (1978) (writing that constitutional reformers of the 1780s believed that “the early revolutionary constitutions had produced an excess of democracy”) [hereinafter BANNING, *JEFFERSONIAN PERSUASION*]; ROBERT E. SHALHOPE, *THE ROOTS OF DEMOCRACY: AMERICAN THOUGHT AND CULTURE, 1760-1800*, 97-100 (1990) (describing the perceived “[d]emocratic [e]xcesses” of the time) [hereinafter SHALHOPE, *ROOTS OF DEMOCRACY*]; WOOD, *CREATION OF THE AMERICAN REPUBLIC*, *supra* note 38, at 513 (describing the Constitution as “intrinsically an aristocratic document designed to check the democratic tendencies of the period”).

¹¹⁶ *THE FEDERALIST* NO. 6, *supra* note 35, at 30 (Alexander Hamilton); *see also* *THE*

human failing, and thus their decision-making “frequently” reflected nothing more than “impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities.”¹¹⁷ Hamilton’s indictment of assembly democracy for its perceived tendency toward arbitrariness, imprudence, and injustice was widely endorsed by other constitutional reformers of the 1780s.¹¹⁸

These reformers, in turn, indicted the state constitutions of the Revolutionary era for having created governments that reproduced the perils of the assembly democracy of classical Athens on American soil. Reflecting excessive democratic zeal, these original American constitutions, according to the reformist critique, had wrongly concentrated power in legislatures,¹¹⁹ and then had exacerbated that power imbalance by making the legislatures too representative.¹²⁰ The product of these two fundamental and mutually reinforcing design defects was legislatures so powerful and so closely tied to the people that they instantly translated popular mood swings into legislation.¹²¹ State legislatures, in short, were too democratic.¹²² For the reformers, the seemingly impossible had occurred: Their instinctive mistrust of executive power as a seedbed of tyranny had transferred to the legislature, thereby transforming the body housing the people’s representatives into the most feared institution of democratic government.¹²³ In a “representative republic,” wrote James Madison, “it is against the enterprising ambition of [the legislature] that the people ought to indulge all their jealousy and exhaust all their precautions.”¹²⁴

FEDERALIST NO. 15, *supra* note 35, at 92 (Alexander Hamilton) (stating that “the passions of men will not conform to the dictates of reason and justice, without constraint”).

¹¹⁷ THE FEDERALIST NO. 6, *supra* note 35, at 30 (Alexander Hamilton).

¹¹⁸ EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 252-53 (1988) [hereinafter MORGAN, *INVENTING THE PEOPLE*]; WOOD, *CREATION OF THE AMERICAN REPUBLIC*, *supra* note 38, at 431-32, 437.

¹¹⁹ THE FEDERALIST NO. 48, *supra* note 35, at 322 (James Madison), THE FEDERALIST NO. 71, *supra* note 35, at 465-66 (Alexander Hamilton).

¹²⁰ MORGAN, *INVENTING THE PEOPLE*, *supra* note 118, at 252; WOOD, *CREATION OF THE AMERICAN REPUBLIC*, *supra* note 38, at 410.

¹²¹ JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 41 (1996); WOOD, *CREATION OF THE AMERICAN REPUBLIC*, *supra* note 38, at 410.

¹²² BANNING, *JEFFERSONIAN PERSUASION*, *supra* note 115, at 89; SHALHOPE, *ROOTS OF DEMOCRACY*, *supra* note 115, at 97-98.

¹²³ SHALHOPE, *ROOTS OF DEMOCRACY*, *supra* note 115, at 98; WOOD, *CREATION OF THE AMERICAN REPUBLIC*, *supra* note 38, at 409.

¹²⁴ THE FEDERALIST NO. 48, *supra* note 35, at 322-23 (James Madison).

As the reformist critique gained traction, the prevailing course of American democracy, and with it, constitutional strategy, fundamentally shifted. While the preoccupation of the original state constitution-makers had reflected the classical Athenian imperative of linking government action as closely as possible to majority will, the constitutional reformers of the 1780s were determined to add distance between government and the governed. Madison argued, “In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.”¹²⁵ The central constitutional challenge for Madison and his fellow reformers was to design an authentically democratic government that would not lapse into popular tyranny.¹²⁶ By redesigning the institutions of government and recalibrating the balance of power among them, constitutional reformers hoped to moderate American democratic government, and thereby regain the social stability that they believed the original state constitutional arrangements had undermined.¹²⁷

The movement in 1780s America away from the guiding assumptions of Revolutionary constitutionalism, as well as from classical Athenian democracy, was most vivid in the judiciary. The original state constitution-makers were uncertain how to fit the courts into the new democratic framework.¹²⁸ Many Revolutionary Americans, like the classical Athenians, adhered to the tenets of popular constitutionalism. They regarded the People themselves, not a cadre of judges, as the proper guardian of the constitution.¹²⁹

¹²⁵ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 298 (Robert A. Rutland et. al. eds., 1979); see also WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 38, at 412 (stating that “the major constitutional difficulty experienced in the Confederation period [was] the problem of legal tyranny, the usurpation of private rights under constitutional cover”).

¹²⁶ BANNING, JEFFERSONIAN PERSUASION, *supra* note 115, at 89; WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 38, at 404.

¹²⁷ RALPH KETCHAM, FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION 31 (1993); Donald S. Lutz, *The First American Constitutions*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 69, 79; see also WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 38, at 476 (explaining that the reformers “conceived of the Constitution as a political device designed to control the social forces the Revolution had released”).

¹²⁸ GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 135 (1997); RAKOVE, ORIGINAL MEANINGS, *supra* note 121, at 305.

¹²⁹ KRAMER, *supra* note 1, at 39-45; see WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN

Accordingly, every state that adopted a Revolutionary era constitution secured a personal right to trial by jury.¹³⁰ And even though the state constitutions generally followed the English practice of granting judges life tenure (by providing a term of office during “good behavior”),¹³¹ when it came time to assign the judicial power, they essentially reduced judges to the status of “minor magistrates,”¹³² much like the judicial officials of classical Athens.¹³³ Citizen-juries in eighteenth-century America, like the classical Athenian *dikastēria*, exercised virtually complete control over trial-court decisions, issuing general verdicts that resolved every issue, legal as well as factual, arising in a case.¹³⁴ As a final measure of popular control over the judicial power, the typical state constitution at the time provided for legislative supervision of the courts, including the authority to review judicial decisions.¹³⁵

The judiciary was the primary beneficiary of the constitutional reform movement of the 1780s.¹³⁶ Judges suddenly enjoyed equal status with popularly elected representatives.¹³⁷ This remarkable reversal of fortune was the ironic result of the first experience with democratic self-government in the states, which convinced many influential Americans that an independent judiciary controlled by life-

THE REVOLUTIONARY ERA 267 (Rita and Robert Kimber trans., 1980) (arguing that Americans of the Revolutionary era did not regard judges “as a guardian of the constitutional order”).

¹³⁰ LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 227 (1999).

¹³¹ ADAMS, *supra* note 129, at 267-68; CASPER, *SEPARATING POWER*, *supra* note 128, at 136. One of the charges that the Continental Congress leveled in the Declaration of Independence against George III was that he “ha[d] made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.” The Declaration of Independence, July 4, 1776, in *DOCUMENTS OF AMERICAN HISTORY* 100, 101 (Henry Steele Commager ed., 1935).

¹³² GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, 407 (2009) [hereinafter WOOD, *EMPIRE OF LIBERTY*].

¹³³ See *supra* notes 97-101 and accompanying text.

¹³⁴ WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 15-23 (2000); J.R. Pole, *Reflections on American Law and the American Revolution*, 50 *WM. & MARY Q.* 123, 129, 132 (1993).

¹³⁵ DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 105, 157 (1988); RAKOVE, *supra* note 121, at 305. Most of the early state constitutions gave to legislatures the power to appoint judges, and some added the power to remove judges, as well as to control judicial salaries. WOOD, *CREATION OF THE AMERICAN REPUBLIC*, *supra* note 38, at 160-61.

¹³⁶ WOOD, *EMPIRE OF LIBERTY*, *supra* note 132, at 407; Herman Belz, *Constitutionalism and the American Founding*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION*, *supra* note 127, at 333, 340.

¹³⁷ WOOD, *EMPIRE OF LIBERTY*, *supra* note 132, at 407-08.

tenured judges was a constitutional necessity.¹³⁸ These founders promoted the judiciary, in the language of one reformer, as “ ‘the only body of men who will have an effective check’ ” on legislative excess.¹³⁹ The central role of the judiciary, in the reformist vision, was nothing less than to save America’s fledgling democracy from itself.¹⁴⁰ By 1787, Americans generally were prepared to accept a judiciary that was a full and independent partner of the new legislative and executive branches of the federal government.¹⁴¹

The classical Athenian *dikastēria* were “independent” in the sense that they were not subject to the control of any other political institution,¹⁴² but this is only part of the meaning of judicial independence in American constitutionalism. The federal Constitution sketched a judiciary that would be free from the direct control of the citizen body as well. By contrast, the whole point of the institutional design of the classical Athenian *dikastēria* was to bring the judicial power under the direct and complete control of ordinary citizens, the *dēmos*.¹⁴³ As classical legal historian Stephen Todd observed, the American insight that an independent and professional judiciary is indispensable to a properly framed democracy “would have made no sense whatever to a citizen of classical Athens.”¹⁴⁴ The founders’ insight appears to be equally baffling to today’s strong popular constitutionalists.

And yet, the creation of an independent and professional judiciary lies at the heart of the Constitution’s judicial article,¹⁴⁵ which offered judges more independence than had any state constitution at the time.¹⁴⁶ Article III secured the independence of federal judges primarily by safeguarding their tenure and salary. Article III judges

¹³⁸ *Id.* at 408.

¹³⁹ *Id.* at 407 (quoting William Plumer, who would become a U.S. senator and governor of New Hampshire); see also WOOD, CREATION OF THE AMERICAN REPUBLIC, *supra* note 38, at 454 (discussing the belief of constitutional reformers that the role of courts should be to check the legislative power of the People’s representatives).

¹⁴⁰ WOOD, EMPIRE OF LIBERTY, *supra* note 132, at 407; see also FRIEDMAN, *supra* note 1, at 5 (explaining that judicial review “emerg[ed] without plan or design in the period prior to the Constitutional Convention as a means of checking the excesses of democracy”).

¹⁴¹ I R.R. PALMER, THE AGE OF THE DEMOCRATIC REVOLUTION: A POLITICAL HISTORY OF EUROPE AND AMERICA, 1760-1800, at 58 (1959); WOOD, EMPIRE OF LIBERTY, *supra* note 132, 408.

¹⁴² Sealey, *Democratic Theory*, *supra* note 50, at 253.

¹⁴³ See *supra* notes 108-112 and accompanying text.

¹⁴⁴ TODD, *supra* note 32, at 6.

¹⁴⁵ CASPER, *supra* note 128, at 138; McDONALD, *supra* note 113, at 253-54.

¹⁴⁶ WOOD, EMPIRE OF LIBERTY, *supra* note 32, at 408.

hold office “during good Behaviour,” and their “[c]ompensation” may not be “diminished” so long as they remain in the judiciary.¹⁴⁷ Hamilton exalted the good-behavior standard, which carried over its English and state-constitutional meaning of “permanency in office,”¹⁴⁸ as nothing less than the “citadel of the public justice and the public security.”¹⁴⁹ For Hamilton, not only did life tenure for judges construct “an excellent barrier to the encroachments and oppressions of the representative body,” but also, and relatedly, it offered “the best expedient . . . to secure a steady, upright, and impartial administration of the laws.”¹⁵⁰ Providing instead for the periodic popular election of judges, the principal mode of political accountability in a representative democracy, warned Hamilton, would yield courts with “too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.”¹⁵¹ The promise of life tenure, Hamilton also argued, would carry the important additional benefit of professionalizing the judiciary, by inducing the most qualified, and honorable, lawyers to become judges.¹⁵²

If judicial independence and professionalism served as the essential institutional design features of Article III, these elements also provided a focal point of opposition for the Anti-Federalists who fought tenaciously against ratification of the Constitution.¹⁵³ The central theme of the Anti-Federalist attack on the proposed plan for the

¹⁴⁷ U.S. CONST., art. III, § 1; see WOOD, EMPIRE OF LIBERTY, *supra* note 132, at 408 (“The delegates agreed rather easily on an appointed judiciary serving for life during good behavior with a guaranteed salary and removal only by impeachment.”).

¹⁴⁸ THE FEDERALIST NO. 78, *supra* note 35, at 505 (Alexander Hamilton); see also MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 83-84 (2d ed., 2000) (describing the good behavior standard as “a term of art” distinguishing between “federal judges with unfixed terms and high-level officials with fixed terms”); cf. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 135 (2006) (stating that “the United States may be unique among political systems in the entire world in defining ‘life tenure’ as really and truly ‘for life’”).

¹⁴⁹ THE FEDERALIST NO. 78, *supra* note 35, at 505 (Alexander Hamilton); see also *id.* at 503 (describing the good-behavior provision as “certainly one of the most valuable of the modern improvements in the practice of government”).

¹⁵⁰ *Id.* at 503.

¹⁵¹ *Id.* at 510.

¹⁵² *Id.* at 510-11.

¹⁵³ SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828, at 31, 90-91 (1999); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION 18-19, 64 (1981).

federal judiciary, like the central theme of the attack by strong popular constitutionalists on the contemporary practice of judicial review, was that it signified a step toward aristocracy,¹⁵⁴ and thus was a dangerous betrayal of democratic principles.¹⁵⁵ The independence of the federal courts worried Anti-Federalists because they saw in it a threat to liberty, for neither the People nor their representatives would be able to correct judicial abuses of power.¹⁵⁶ The Anti-Federalist writer Brutus, in direct opposition to Hamilton but in sync with the strong popular constitutionalists of today, trusted legislators more than life-tenured judges to interpret the Constitution precisely because he expected legislators to remain ever mindful of the next election.¹⁵⁷

When America's founding generation ratified the federal Constitution, and thereby embraced the independent and professional judiciary of Article III, they reversed the fundamental democratic assumptions underlying the classical Athenian democracy and the original state constitutions. This momentous decision nevertheless followed from the social compact theory of John Locke,¹⁵⁸ which greatly influenced the thinking of the founding generation¹⁵⁹ and launched the liberal constitutional tradition that has dominated American political thought ever since.¹⁶⁰ Locke posited a strict separation between the state and its citizens,¹⁶¹ with the primary responsibility of the state being the protection of the rights that the citizens possessed under natural law (which for Locke, fell under the broad categories of life, liberty, and estate).¹⁶² American acceptance of

¹⁵⁴ STORING, *supra* note 153, at 50; see *supra* note 23 and accompanying text.

¹⁵⁵ RAKOVE, *supra* note 121, at 320-25; Ralph A. Rossum, *The Courts and the Judicial Power*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION*, *supra* note 127, at 222, 237.

¹⁵⁶ CASPER, *supra* note 128, at 141-45; CORNELL, *supra* note 153, at 91.

¹⁵⁷ See Brutus, *Essay XV: Mar. 20, 1788*, in *THE COMPLETE ANTI-FEDERALIST*, 437-42 (Herbert J. Storing ed., 1981) (suggesting that legislators subject to re-election would interpret the Constitution "at their peril").

¹⁵⁸ Wallace, *Law and Rhetoric*, *supra* note 53, at 419.

¹⁵⁹ LEVY, *supra* note 130, at 3; WOOD, *CREATION OF THE AMERICAN REPUBLIC*, *supra* note 38, at 282-91.

¹⁶⁰ DIGGINS, *supra* note 34, at 4-5; HELD, *supra* note 40, at 59. For the classic exposition, see generally LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955) (arguing that America since its founding has been a liberal society).

¹⁶¹ WOOD, *CREATION OF THE AMERICAN REPUBLIC*, *supra* note 38, at 283.

¹⁶² John Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government (Second Treatise of Government)*, in *TWO TREATISES OF GOVERNMENT* 265, 330-31 (Peter Laslett ed., 1960); see HELD, *supra* note 40, at 62; LEVY, *supra* note 130, at 3-4.

Lockean liberalism led inexorably to an individualistic constitutional and legal culture.¹⁶³ In this ideological environment, it is hardly surprising that America's federal judiciary acts as a counterweight to the majoritarian orientation of democracy, with the fail-safe function of protecting individual rights from government encroachment.¹⁶⁴ An "independent spirit in the judges" was essential, wrote Hamilton, if courts were to be "the bulwarks of a limited Constitution against legislative encroachments."¹⁶⁵

The Athenian conception of democracy was more communal in nature. In direct opposition to Locke, the Athenians, and the ancient Greeks generally, believed in the essential identity of the state and its citizens.¹⁶⁶ In Aristotle's suggestive language, the ancient Greek *polis* was "a partnership [*koinōnia*] of citizens."¹⁶⁷ The individual citizen was but one part of the whole citizen body.¹⁶⁸ The communal and individual identities of Athenian citizens therefore were reciprocally constituted. A citizen flourished only if his community flourished.¹⁶⁹ And the community flourished only if citizens actively participated in civic life.¹⁷⁰ The Athenians, like their fellow Greeks, held that individuals acted properly only when their actions benefitted the

¹⁶³ See DIGGINS, *LOST SOUL OF AMERICAN POLITICS*, *supra* note 34, at 4-5 (stating that "the American Revolution ushered in . . . [individualism as an] expression[] of liberalism that would dominate American political thought"); HELD, *supra* note 40, at 262 ("Contemporary liberal thinkers have in general tied the goals of liberty and equality to individualist political, economic and ethical doctrines.").

¹⁶⁴ Wallace, *Law and Rhetoric*, *supra* note 53, at 419-20. When arguing for passage of the Bill of Rights, James Madison predicted that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." JAMES MADISON, *AMENDMENTS TO THE CONSTITUTION* (June 8, 1789), *reprinted in* 12 *THE PAPERS OF JAMES MADISON*, *supra* note 125, at 196, 207 (Robert A. Rutland et. al. eds., 1979).

¹⁶⁵ THE FEDERALIST NO. 64, *supra* note 35, at 508 (Alexander Hamilton); *see also* Remarks of Oliver Ellsworth in the Connecticut Convention (Jan. 7, 1788), *in* III *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 241 (Max Farrand ed., 1911) (arguing in the Connecticut ratifying convention that it was imperative for the federal judicial power to be entrusted only to "upright, independent judges" who would be willing to invalidate unconstitutional government action).

¹⁶⁶ MANVILLE, *supra* note 27, at 6; Ostwald, *supra* note 31, at 55.

¹⁶⁷ ARISTOTLE, *THE POLITICS* 89 (Carnes Lord trans., 1984).

¹⁶⁸ *See* Plutarch, *supra* note 49, at 62 (writing that Athenian law encouraged citizens "to regard themselves as so many parts of a single body").

¹⁶⁹ Vamvoukos, *supra* note 29, at 96-97.

¹⁷⁰ *See* MANVILLE, *supra* note 27, at 197 (clarifying that the classical Athenian democracy imposed a "burden of civic responsibility" that made each citizen "more accountable for the welfare of his polis").

community.¹⁷¹ Individual freedom invariably yielded to the needs of the community.¹⁷² In Athens, and throughout classical Greece, the *polis* took primacy over the individual.¹⁷³

While Americans understand rights as individual possessions to be jealously guarded against infringement by the state, the classical Greeks tended to conceptualize rights as existing within the communal context of *polis* citizenship, a context in which individuals, as citizens, derived their identity from membership in the *polis*-community.¹⁷⁴ Thus, while Americans often speak of rights in Lockean terms as individual, inalienable entitlements, the classical Greeks understood their rights as freedoms they shared with other citizens as members of the *polis*-community.¹⁷⁵ Athens therefore did not recognize rights in the Lockean sense.¹⁷⁶ The communal orientation of the Athenian concept of individual rights required that the lawfulness of an individual's exercise of his freedom be evaluated in reference to the interests of the *polis*-community, rather than the individual's sense of entitlement.¹⁷⁷ The function of Athenian courts was not to protect

¹⁷¹ See Wallace, *Law and Rhetoric*, *supra* note 53, at 420 (showing that the Athenians believed that individual ambition (*philotimia*) "was good if directed toward the community, bad if it benefitted only oneself").

¹⁷² OBER, MASS & ELITE, *supra* note 24, at 10; see also Wallace, *Law and Rhetoric*, *supra* note 53, at 430 ("In Athens' courtrooms as elsewhere, the welfare of the community was paramount.").

¹⁷³ Robert W. Wallace, *Private Lives and Public Enemies: Freedom of Thought in Classical Athens*, in ATHENIAN IDENTITY AND CIVIC IDEOLOGY 127, 144 (Alan L. Boegehold & Adele C. Scafuro eds., 1994); see also Philip Brook Manville, *Ancient Greek Democracy and the Modern Knowledge-Based Organization: Reflections on the Ideology of Two Revolutions*, in DĒMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN, *supra* note 20, at 377, 381 (stating that "one's status and prerogatives within the community were ultimately subordinate to the overall interests, judgments, and sovereignty of the multitude"); Wallace, *Law and Rhetoric*, *supra* note 53, at 420 ("[V]irtually no Attic text questions the prior importance of the community over any individual: this was a central tenet of Athenian political ideology.").

¹⁷⁴ Ostwald, *supra* note 31, at 49, 55.

¹⁷⁵ Manville, *supra* note 173, at 381; Ostwald, *supra* note 31, at 57.

¹⁷⁶ Finley, *supra* note 30, at 92; Manville, *supra* note 173, at 381. The personal freedom of Athenians generally resulted from the absence of laws limiting individual choices, rather than from explicit legal protections. ARLENE W. SAXONHOUSE, *FREE SPEECH AND DEMOCRACY IN ANCIENT ATHENS* 48 (2006); cf. RAAFLAUB, *supra* note 31, at 231-32 (arguing that there existed a "rudimentary" development of several "freedom rights" the classical Athenian democracy).

¹⁷⁷ Wallace, *Law and Rhetoric*, *supra* note 53, at 428 (explaining that "violating the community's laws raises the question of the defendant's relations with the polis"); Robert W. Wallace, *Law, Freedom, and the Concept of Citizens' Rights in Democratic Athens*, in DĒMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN,

the individual from the state, but rather to protect the community from the individual.¹⁷⁸ The Athenians designed the *dikastēria* as a thoroughly popular court system in order to enable the *dēmos* to protect themselves from “powerful individuals” who would flaunt the laws and norms of the community for their own benefit.¹⁷⁹ As the fourth-century orator Antiphon put it, “Anyone who ignores . . . [the laws] has destroyed the city’s greatest safeguard.”¹⁸⁰

Although the theme of judicial independence and professionalism dominates Article III, there is a classical Athenian counterpoint that provides for some popular influence of the federal judiciary. For example, the Constitution prescribes a political process for selecting federal judges that activates an *ex ante* democratic check on judicial review.¹⁸¹ Federal judges are selected by politically accountable officials (the president and members of the Senate), who at least have the opportunity to evaluate the character and beliefs of prospective judges.¹⁸² The congressional power of impeachment offers an *ex post*

supra note 20, at 105, 109, 112.

¹⁷⁸ See Wallace, *Law and Rhetoric*, *supra* note 53, at 421 (explaining that the central purpose of law in Athens was “to safeguard the community”).

¹⁷⁹ *Id.* at 419-20; WOLPERT, *supra* note 89, at 137; see, e.g., Andocides, *Against Alcibiades* 4.19, in 1 ANTIPHON & ANDOCIDES 159, 165 (Douglas M. MacDowell trans., 1998) (“It’s bad enough to suffer harm from people who don’t know what is right, but it’s much harder to bear when someone does know what is important and transgresses it, because he’s showing clearly . . . that he doesn’t think that he should conform to the city’s laws, but that you should conform to his inclinations.”); Demosthenes, *Against Aristogeiton*, II, 26.24, in 3 DEMOSTHENES, *supra* note 69, at 579, 591 (stating to the jury that they were “collected together to defend your own interests”); Plato, *Laws*, 856b, in PLATO: COMPLETE WORKS 1318, 1514 (John M. Cooper ed., Trevor J. Saunders, trans., 1997) (showing that Plato’s Athenian advised: “We should treat as the biggest enemy of the entire state the man who makes the laws into slaves, and the state into the servant of a particular interest, by subjecting them to the diktat of mere men.”).

¹⁸⁰ Andocides, *supra* note 179, at 165.

¹⁸¹ See Balkin & Levinson, *supra* note 14, at 1068 (“Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.”); Friedman, *supra* note 2, at 2609-10 (describing the judicial appointment process as a constitutional mechanism that at least partially accounts for the general alignment of Supreme Court decision-making with public opinion).

¹⁸² U.S. CONST., art. II, § 2, cl. 2; see CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 4 (2001) (arguing that Supreme Court justices are selected because of “their political views and their political connections as much as (or more than) . . . their legal skills”); Post & Siegel, *supra* note 11, at 1030 (“Because Article III lodges the composition of the federal judiciary in the political control of the President and the Senate, no judicial interpretation of the Constitution can withstand the mobilized,

democratic check on the judiciary, at least in cases of extreme abuse of judicial authority.¹⁸³ And finally, the People themselves, or their elected representatives, can overrule any constitutional decision of the Supreme Court by amending the Constitution,¹⁸⁴ and they have done so, albeit infrequently.¹⁸⁵ Thus, federal judges, while certainly the least democratically accountable of the national power-holders, nevertheless are at least somewhat tethered to popular consent.¹⁸⁶ Judges are, in Richard Pildes's phrase, only "semi-autonomous"¹⁸⁷ when they are called upon to assess the constitutional legitimacy of actions taken by the more politically representative branches of government.

enduring, and determined opposition of the people.”).

¹⁸³ GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST 134-35* (1981). Congress may remove a federal judge through impeachment only on the grounds of “Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, §4. The key phrase “high Crimes and Misdemeanors” was a term of art taken from English constitutionalism, and included, at least in English practice, “a category of political crimes against the state.” RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 64 (1973); see also GERHARDT, *supra* note 148, at 104 (explaining that “the framers and ratifiers seemed to have shared a common understanding of impeachment as a political proceeding and impeachable offenses as political crimes”); Arthur Bestor, *Impeachment*, 49 WASH. L. REV. 255, 265 (1973) (stating that “[t]he common element in [English impeachment proceedings] was [the] injury done to the state and its constitution”). Only eight federal judges have been removed from office through impeachment. CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* 120 (2006). No Supreme Court justice has been removed from office by impeachment. FRIEDMAN, *supra* note 1, at 5.

¹⁸⁴ Post & Siegel, *supra* note 11, at 1030. The Constitution provides two methods of proposing and ratifying constitutional amendments. An amendment can be proposed either by (1) Congress (by a two-thirds vote in both Houses) or (2) by the application of two-thirds of state legislatures to “call a Convention for proposing Amendments.” A proposed amendment can be ratified either by (1) an affirmative vote by three-fourths of the state legislatures or (2) by conventions in three-fourths of the states. U.S. CONST., art. V.

¹⁸⁵ See KRAMER, *supra* note 1, at 250 (noting that the U.S. Constitution is more difficult to amend than are European constitutions); TUSHNET, *supra* note 7, at 126 (“Scholars have shown that the mechanisms of constitutional amendment in the U.S. Constitution are among the most stringent in the world.”).

¹⁸⁶ See EISGRUBER, *supra* note 182, at 4 (arguing that Supreme Court justices have “a democratic pedigree”). For discussion of this theme, see *infra* notes 356-378 and accompanying text.

¹⁸⁷ Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 154.

II. JUDICIAL REVIEW, ANCIENT AND MODERN

Judicial review (that is, the power of courts to invalidate laws and other government actions if in violation of higher law) was a central practice of the mature classical Athenian democracy, just as it became central to American governance as our democracy matured. The democratic implications of judicial review differ sharply in the two polities, however. Because the popular jury courts of the *dikastēria* had sole authority to rule on the constitutionality of Assembly decrees, judicial review in Athens was a thoroughly democratic practice that fully realized the ideal of strong popular constitutionalism. By contrast, judicial review in the American system is notoriously in tension with democracy. American judicial review permits an elite corps of independent, minimally accountable judges to override the constitutional judgment of the People's representatives. Despite these profound differences, the practice of judicial review in Athens and in America fits the differing democratic assumptions and the distinct institutional design of the two governing systems.

A. *The Graphē Paranomōn*

The classical Athenians, who originated many of the ideas that have shaped Western political thought, invented judicial review.¹⁸⁸ Judicial review in the *dikastēria* symbolized as it served the democracy by providing an institutional perch from which ordinary Athenians could sit in judgment over the public conduct of the political elite.¹⁸⁹ Conversely, judicial review proceedings in the popular courts obligated members of the elite, as litigants, to justify their actions to the satisfaction of the *dēmos*.¹⁹⁰ As Aristotle wrote in his *Constitution of Athens*, “when the people have the right to vote in the courts they control the constitution.”¹⁹¹

The *graphē paranomōn* was a criminal indictment lodged in the *dikastēria* against a citizen for having proposed an unlawful decree (*psēphisma*) in the Assembly.¹⁹² Because *nomos* was the highest form of

¹⁸⁸ Classical scholar Raphael Sealey captured the parallel between the classical Athenian *graphē paranomōn* and American judicial review when he wrote, “The theory implied by the *graphe paranomon* was that the assembly could only pass decrees within the framework set by the laws, and the courts had power to uphold the laws.” Sealey, *Democratic Theory*, *supra* note 50, at 238, 253.

¹⁸⁹ LANNI, *supra* note 50, at 131, 178; OBER, MASS & ELITE, *supra* note 24, at 145, 217.

¹⁹⁰ LANNI, *supra* note 50, at 131; OBER, MASS & ELITE, *supra* note 24, at 145.

¹⁹¹ Aristotle, *Constitution of Athens* ¶ 9.1, *supra* note 26, at 153.

¹⁹² See *id.*, ¶ 59.2, at 199 (discussing “indictments for illegal proposals”). For

Athenian law, the Greek word *paranomōn*, which translates literally as “against the law,” evokes the Americans usage of “unconstitutional.”¹⁹³ An Athenian *nomos*, like an American constitutional provision, embodied a rule of general application that was regarded as paramount and permanent, or at least long-lasting.¹⁹⁴

A *graphē paranomōn* could be grounded on a broad range of specific allegations. It might claim procedural defects in the process of enacting a decree or substantive inconsistency with existing law. It also might assert more generally that a decree violated democratic principles or was somehow undesirable.¹⁹⁵ A decision by a *dikastērion*

discussions of the *graphē paranomōn*, see HANSEN, *supra* note 30, at 205-12; SEALEY, ATHENIAN REPUBLIC, *supra* note 52, at 43-45, 49-50; SINCLAIR, *supra* note 30, at 152-56. Athenian law provided for a second, less common type of judicial review proceeding, the *graphē nomon mē epitēdeion theinai*, an indictment for “having proposed laws against the interests of the state.” Aristotle, *Constitution of Athens* ¶ 59.2, *supra* note 26, at 199; Alan Boegehold, *Resistance to Change in the Law at Athens*, in *DĒMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN* 203, 208, 214 n.14 (Josiah Ober & Charles Hedrick eds., 1996) [hereinafter Boegehold, *Resistance*]; Mogens Herman Hansen, *Nomos and Psephisma in Fourth-Century Athens*, 19 *GREEK ROMAN & BYZANTINE STUDIES* 315, 325-26 (1978). This proceeding was available to challenge an Athenian *nomos* on the ground that it was procedurally improper or substantively in conflict with existing law. SCHWARTZBERG, *supra* note 106, at 58-59. An Athenian who proposed a new law was responsible as well for proposing the repeal of any contradictory law. MACDOWELL, *supra* note 53, at 50; Josiah Ober, *Living Freely as a Slave of the Law: Why Socrates Lives in Athens*, in *ATHENIAN LEGACIES: ESSAYS ON THE POLITICS OF GOING ON TOGETHER* 157, 165 (Josiah Ober ed., 2005). If he failed to do so, any Athenian citizen could bring a *graphē nomon mē epitēdeion theinai* against him. The penalty upon conviction, which included the death penalty, was more severe than the punishment following conviction in *graphai paranomōn*. MACDOWELL, *supra* note 53, at 50; Boegehold, *Resistance*, *supra*, at 208-09.

¹⁹³ It is not uncommon for classical historians to translate *paranomōn* as “unconstitutional.” See, e.g., MARK MUNN, *THE SCHOOL OF HISTORY: ATHENS IN THE AGE OF SOCRATES* 102 (2000) (noting that “the *graphē paranomōn* was a written denunciation of a measure as being either in substance or procedurally ‘unconstitutional,’ that is, in violation of existing laws”); JENNIFER TOLBERT ROBERTS, *ATHENS ON TRIAL: THE ANTIDEMOCRATIC TRADITION IN WESTERN THOUGHT* 44 (1994) (describing the *graphē paranomōn* as “the indictment for bringing an unconstitutional motion”); SCHWARTZBERG, *supra* note 106, at 58 (describing the *graphē paranomōn* as a “procedure[] for the charge[] of ‘unconstitutionality’ ”); Hansen, *supra* note 192, at 325 (describing the *graphē paranomōn* as an “indictment against unconstitutional enactments”).

¹⁹⁴ HANSEN, *supra* note 30, at 162, 165-66, 171-73; SINCLAIR, *supra* note 30, at 84; see *Marbury v. Madison*, 5 U.S. 137, 176-77 (1803) (“[Constitutional] principles . . . are designed to be permanent. . . . The constitution is . . . a superior, paramount law . . .”).

¹⁹⁵ HANSEN, *supra* note 30, at 205-207; see also MACDOWELL, *supra* note 53, at 46 (noting that “a speaker in a court would sometimes invoke an ‘unwritten law’, a rule or principle which, it could be maintained, was generally accepted by the community,

that a decree was *paranomōn* resulted in invalidation of the decree, as well as in punishment of the citizen who had proposed the decree.¹⁹⁶

Just as judicial review gradually became a prominent feature of American democracy, the *graphē paranomōn* evolved over the course of the classical era to become an essential democratic practice.¹⁹⁷ The classical Athenians, like Americans today, appreciated that the rule of law was essential for a well-ordered political community.¹⁹⁸ The fourth-century orator Aeschines explained the reciprocity between democracy and the rule of law: “[D]emocratic cities are governed by the established laws. . . . [W]hen the laws are protected for the city, the democracy, too, is preserved.”¹⁹⁹ The *graphē paranomōn*, like American judicial review, secured the stability and inviolability of the community’s highest law.²⁰⁰ It expressed rule-of-law principles that Americans should find familiar, even second nature: the citizen Assembly was obligated to act consistently with higher law, and the courts were obligated to invalidate Assembly action when it conflicted with higher law.²⁰¹

or was ordained by the gods, even though it had never been put down in writing”); OSTWALD, *supra* note 47, at 136 (noting that *nomos* “encompass[ed] not only specific statutes but the entire social order, including . . . religious, moral, and political norms”).

¹⁹⁶ MACDOWELL, *supra* note 53, at 50; Hansen, *supra* note 192, at 325-26. The typical penalty was a substantial fine, HANSEN, *supra* note 30, at 207; SINCLAIR, *supra* note 30, at 154, but on the third conviction for this offense, the *dikastēria* might strip an offender of his citizenship rights (*atimia*), MACDOWELL, *supra* note 53, at 50; SCHWARTZBERG, *supra* note 106, at 59.

¹⁹⁷ HANSEN, *supra* note 30, at 205, 208-09; SINCLAIR, *supra* note 30, at 68. *Graphai paranomōn*, which are attested as early as 415 BCE, MACDOWELL, *supra* note 53, at 50; Hansen, *supra* note 192, at 325, were especially prominent in the fourth century, during which they may have been filed as frequently as once a month. HANSEN, *supra* note 30, at 208-09. On the origin and early history of the *graphē paranomōn*, see Sealey, *Athenian Concept of Law*, *supra* note 53, at 297-301.

¹⁹⁸ See SINCLAIR, *supra* note 30, at 49, 220-21 (the Athenians shared the common, ancient Greek respect for the rule of law, viewing “obedience to the laws as fundamental for the well-being of their polis”); see, e.g., Lysias, *Funeral Speech for those who Assisted the Corinthians*, 2.19, in LYSIAS 27, 31 (S. C. Todd trans., 2000) (stating that the Athenians believed that “they should be ruled by law and taught by reason, and their action should serve both ends”).

¹⁹⁹ Aeschines, *Against Ctesiphon*, in AESCHINES 166, 167-68 (Chris Carey trans., 2000).

²⁰⁰ OSTWALD, *supra* note 47, at 136; Sealey, *Athenian Concept of Law*, *supra* note 53, at 301.

²⁰¹ Sealey, *Democratic Theory*, *supra* note 50, at 253; see also SINCLAIR, *supra* note 30, at 68 (noting that the legitimacy of Assembly decrees hinged on their consistency with the law). This is not to say, of course, that there were no important differences between the Athenian and the American understandings of the rule of law. See

As was true of all public lawsuits (*graphai*),²⁰² every Athenian citizen possessed standing to initiate a *graphē paranomōn*.²⁰³ Many classical historians believe that the Athenians designated as *graphai* those causes of action which they regarded as involving crimes against the state, or otherwise as raising matters of public concern.²⁰⁴ The classical Athenian principle of citizen standing to litigate public lawsuits stands in sharp contrast to the American federal judiciary's emphatic rejection of that principle.²⁰⁵ A practical consideration may help to explain the different standing rules. The *graphē paranomōn*, like all classical Athenian *graphai*, were criminal indictments. Yet Athens had no police force to investigate crimes,²⁰⁶ and no state prosecutor to initiate criminal proceedings.²⁰⁷ The Athenian criminal justice system relied on volunteer-prosecutors (*ho boulomenoi*) to enforce the law by

generally DAVID COHEN, *LAW, VIOLENCE AND COMMUNITY IN CLASSICAL ATHENS* (1995) (examining the similarities in and the differences between the Athenian approach to the rule of law and contemporary approaches).

²⁰² Athens categorized the lawsuits brought to the *dikastēria* as either public (*graphai*) or private (*dikai*) in nature. LANNI, *supra* note 50, at 35. For discussion of the differences between public and private lawsuits in classical Athens, see HANSEN, *supra* note 30, at 191-96; MACDOWELL, *supra* note 53, at 55-61; SEALEY, *ATHENIAN REPUBLIC*, *supra* note 52, at 53-90; TODD, *supra* note 32, at 99-112.

²⁰³ Solon generally is credited with creating the citizen-standing principle as part of the laws he gave Athens in 594/593 BCE. LANNI, *supra* note 50, at 16; MACDOWELL, *supra* note 53, at 57; Aristotle, *Constitution of Athens* ¶ 9.1, *supra* note 26, at 153; Plutarch, *supra* note 49, at 62. For a well-regarded defense of the conventional dating of Solon's archonship as 594, see generally Robert W. Wallace, *The Date of Solon's Reforms*, 8 AM. J. OF ANCIENT HISTORY 81 (1983).

²⁰⁴ See LANNI, *supra* note 50, at 35 ("Although no ancient source explains why some charges were designated as *graphai* and others as *dikai*, *graphai* seem to have to have been cases that were thought to affect the community at large."). It is possible that the distinction between public and private lawsuits (*dikai*) was purely reductionist: The Athenians simply may have regarded all lawsuits that could be initiated by any citizen as *graphai* and all lawsuits that could be initiated only by the injured party (or his family) as *dikai*. TODD, *supra* note 32, at 110; Robin Osborne, *Law in Action in Classical Athens*, 105 J. OF HELLENIC STUD. 40, 40 (1985).

²⁰⁵ *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 472-73, 475, 486-88 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220-21, 227 (1974); *United States v. Richardson*, 418 U.S. 166, 172, 174, 179-80 (1974). For the classic argument supporting adoption of an Athenian-style citizen-standing principle in federal courts, see Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hofeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1043-47 (1968).

²⁰⁶ LANNI, *supra* note 50, at 31; MACDOWELL, *supra* note 53, at 62. The Athenians had a corps of slave-archers who helped to maintain crowd control, but they did not perform the investigatory functions of modern police forces. TODD, *supra* note 32, at 79.

²⁰⁷ OSTWALD, *supra* note 47, at 80; TODD, *supra* note 32, at 68, 92.

investigating crimes and bringing charges.²⁰⁸ In America, of course, as in other modern states, these are law-enforcement responsibilities of the state, acting on behalf of its citizens.

But the difference between modern and ancient criminal justice systems cannot fully account for the diametrically opposed positions on citizen standing in Athens and America. In fact, the U.S. Supreme Court has rejected citizen standing to challenge the constitutionality of government action even where there is no one who would have standing to bring such an action.²⁰⁹ The true source of the disagreement between Athens and America regarding citizen standing lies at the core differences in the roles of law and courts in the direct, egalitarian, and communal democracy of classical Athens and in the representative, liberal, and individualized democracy of America.

The central purpose of law in Athens was “to safeguard the community,” and the essential function of the popular courts of the *dikastēria* was to enable the community to protect itself from individuals with the audacity to transgress communal norms.²¹⁰ According to Plutarch, the principle of citizen standing fostered the communitarian consciousness of Athenians by “conditioning . . . [them] to regard themselves as so many parts of a single body, and so to share one another’s feelings and sufferings.”²¹¹ Citizen standing also enforced the notion that many types of unlawful conduct injured the entire community²¹² and that it was a right (and responsibility) of each Athenian citizen to seek redress for such an injury.²¹³ As Plato’s

²⁰⁸ TODD, *supra* note 32, at 79; *see also* OSTWALD, *supra* note 47, at 81 (showing that “the prosecution of offenses against the state depended to a very large extent on the initiative of private individuals”). Athens apparently provided for a few prosecutions initiated by public officials in their official capacity. MACDOWELL, *supra* note 53, at 61; TODD, *supra* note 32, at 68.

²⁰⁹ *See, e.g., Schlesinger*, 418 U.S. at 227 (“The assumption that if respondents have no standing to sue no one would have standing, is not a reason to find standing.”); *Richardson*, 418 U.S. at 179 (stating that “the absence of any particular individual or class to litigate . . . claims gives support to the argument that the subject matter is committed . . . ultimately to the political process”).

²¹⁰ Wallace, *Law and Rhetoric*, *supra* note 53, at 421; *see supra* notes 174-180 and accompanying text.

²¹¹ Plutarch, *supra* note 49, at 62; *see also* JEAN HATZFELD, *HISTORY OF ANCIENT GREECE* 73 (André Aymard, E.H. Goddard, ed., A.C. Harrison trans., 1968) (describing the citizen-standing principle as “tending to ensure the ascendancy of the state”). *But see* Osborne, *supra* note 204, at 41 (expressing skepticism that citizen standing actually fostered the kind of “social cohesion” that Plutarch ascribed to the reform).

²¹² OSTWALD, *supra* note 47, at 9, 15.

²¹³ *See* Plato, *Laws* 768a, *supra* note 179, at 1442 (noting where the Athenian says, “A wrong done to the state is a wrong done to all citizens”); *see also* MANVILLE, *supra* note 27, at 152 (noting that because of Athens’s reliance on volunteer citizens to

Athenian explained in the *Laws*, someone who actively works to bring wrongdoers to justice is “the great and perfect citizen of his state, winner of the prize for virtue.”²¹⁴

Aristotle believed that the principle of citizen standing provided a critical support of the classical Athenian democracy because it was a means of enabling ordinary people to control their government.²¹⁵ Seen in this light, citizen standing was but one element of a judicial system that was thoroughly committed to amateurism and popular decision-making.²¹⁶ And when the offender was a public official or had exercised a public function, such as having proposed an unconstitutional decree in the Assembly, citizen standing had special bite because it maximized the availability of the popular courts to stand as a “potent check” against official misconduct.²¹⁷ The citizen-standing principle also furthered the classical Athenian sense of democratic justice by enabling any citizen to step in and file suit on behalf of powerless victims.²¹⁸

The rejection of citizen standing in the federal judiciary follows from the prominence of individual rights in the American understanding of liberal democracy, as well as from the role of federal

prosecute public wrongs, “justice belonged to every member of the community who accepted his moral responsibility as a citizen”).

²¹⁴ Plato, *Laws* 730d, *supra* note 179, at 1413; *see also* Aeschines, *Against Timarchus* 1.2, in Aeschines, *supra* note 199, at 23, 24 (stating that “it would be utterly disgraceful not to intervene in defense of the city as a whole, the laws, you, and myself”). Not content to rest entirely on the civic virtue of the citizenry, Athenian law incentivized the filing of several *graphai* by giving successful prosecutors a substantial portion of the property or fine at issue. *See* Osborne, *supra* note 204, at 44-48 (discussing the *graphai* that provided financial incentives for prosecutors). Even so, it appears that *graphai* usually were instituted by the injured party, and not by an altruistic citizen. *Id.* at 52; *see also* Lanni, *supra* note 50, at 35 (stating that “it is unclear how often disinterested parties brought cases for altruistic reasons. In our surviving *graphai* the prosecutor tends to be the primary party in interest, or at least a personal enemy of the defendant with something to gain by his conviction”).

²¹⁵ *See* Aristotle, *supra* note 167, at 83 (“Solon . . . established [rule of] the people by making the courts open to all.”); *see also* Lanni, *supra* note 50, at 179 (noting that “it was not only through the Assembly but also through the popular courts that the people ruled Athens”).

²¹⁶ *See supra* notes 45-112 and accompanying text.

²¹⁷ Ostwald, *supra* note 47, at 80-81. Many *graphai* addressed official misconduct. Todd, *supra* note 32, at 110.

²¹⁸ Lanni, *supra* note 50, at 35; *see* Plutarch, *supra* note 49, at 62 (describing citizen standing as a “provision[] for the weakness of the common people”); *see also* Meier, *supra* note 62, at 65 (noting that if an offender pressured a victim not to prosecute, another citizen could “see to it that justice was done”); Ostwald, *supra* note 47, at 80 (stating that “in many cases . . . [citizen standing] must have been the only resort a lowly victim of injustice could have had against a powerful offender”).

courts as guardian of those rights.²¹⁹ “The very essence of civil liberty” in American constitutionalism, declared the Supreme Court in *Marbury v. Madison*, is “the right of every individual to claim the protection of the laws, whenever he receives an injury.”²²⁰ While the Athenians understood judicial review as an expression of the obligation of ordinary citizens to protect the community from unlawful assaults by individuals, judicial review in America permits individuals to seek the protection of judges from unlawful deprivations of their rights by the community and its representatives.²²¹ Federal courts, unlike the *dikastēria*, do not engage in judicial review primarily to undo unconstitutional action or to bring the perpetrators of official misconduct to justice.²²² These constitutional functions are byproducts (beneficial, yet incidental) of the judiciary’s primary task of redressing “judicially cognizable” injuries suffered by individuals.²²³ In the American constitutional system, judicial review is not an end in itself, but rather a means of deciding a case properly before the court, pure and simple.²²⁴

In order for a case to provide an appropriate occasion for judicial review in the federal judiciary, the plaintiff must satisfy the court of his or her standing to litigate by proving, in pointed contrast to Athenian law, that she or he has “a personal stake in the outcome of the controversy.”²²⁵ The contemporary Supreme Court has underscored the importance of the standing barrier to constitutional adjudication by elaborating an intricate doctrinal inquiry that is designed, at least in part, to ensure that federal judges do not engage

²¹⁹ See *supra* notes 158-165 and accompanying text.

²²⁰ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

²²¹ See *id.* at 170 (stating that it is the role of America’s independent judiciary “to decide on the rights of individuals”).

²²² See, e.g., *Valley Forge Christian Coll. v. Americans United for Separation of Church and State*, 454 U.S. 464, 487 (1982) (“The federal courts were simply not constituted as ombudsmen of the general welfare.”).

²²³ See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 218-19 (1974) (stating that the standing requirement of a “judicially cognizable injury” means that the party seeking judicial review has suffered a “personal” rather than an “abstract” injury).

²²⁴ See *Marbury*, 5 U.S. at 177 (“Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”); see also *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998) (explaining that Article III limits the power of federal courts to decide cases “of the sort traditionally amenable to, and resolved by, the judicial process”); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 543-54 (2008) (tracing the origins of American judicial review to the common law role of judges to expound the law, including constitutional law, when deciding cases).

²²⁵ *Baker v. Carr*, 369 U.S. 186, 204 (1962).

in judicial review unless necessary to protect individual rights.²²⁶ The harm suffered by individuals as citizens when their government acts unconstitutionally, a harm that the Athenians accepted as sufficient for litigant standing, does not register in this framework. It is an “abstract” injury and a “generalized grievance” that is shared in common with every other member of the citizen body, and thus not the kind of distinct, “personal,” and “concrete” injury that is required for standing to litigate in federal court.²²⁷ “The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions” is unacceptable, according to the Supreme Court, because it “has no boundaries.”²²⁸

The Supreme Court’s preoccupation with “boundaries” on the judicial power suggests that rejection of the classical Athenian citizen-standing principle enacts an American constitutional paradox: the basis for the assertion of judicial review (the protection of individual rights) limits as much as it empowers judges. They may exercise this power legitimately only when necessary to protect an individual right.²²⁹ This power paradox, in turn, unveils a deeper, institutional

²²⁶ See *Schlesinger*, 418 U.S. at 221 (stating that “when a court is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury . . . serves the function of insuring that such adjudication does not take place unnecessarily”); see also *Valley Forge*, 454 U.S. at 475 (describing standing requirements as “rigorous”).

²²⁷ *Schlesinger*, 418 U.S. at 217-27; *United States v. Richardson*, 418 U.S. 166, 176-80 (1974); see also *Valley Forge*, 454 U.S. at 482-83 (internal quotations omitted) (“This Court repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law.”); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (“It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.”); *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (stating that one who seeks judicial review in federal court “must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally”).

²²⁸ *Schlesinger*, 418 U.S. at 227; see also *Valley Forge*, 454 U.S. at 473 (internal quotations omitted) (“The federal courts have abjured appeals to their authority which would convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders.”).

²²⁹ See *Valley Forge*, 454 U.S. at 471 (internal quotations omitted) (“The constitutional power of federal courts cannot be defined, and indeed has no substance, without reference to the necessity to adjudicate the legal rights of litigants in actual controversies.”).

paradox: the very political independence that is designed to embolden federal judges to secure individual rights simultaneously cautions them against exercising judicial review except as a “last resort” to protect such rights.²³⁰ From the beginning, federal judges have intuited that ruling on the lawfulness of government action except as necessary to redress judicially cognizable injuries might entrap them in political and policy disputation. Not only would such an overreach tread on the competencies of the more politically accountable branches of government, but also it eventually would drain the capacity of the courts to perform their core function, the safeguarding of individual rights.²³¹

The thoroughly democratic popular courts of Athens had no such qualms. For the Athenians, litigation in general, and especially judicial review, was as much a political as a legal exercise.²³² American judicial

²³⁰ See *id.* at 471 (internal quotations omitted) (“The power to declare the rights of individuals and to measure the authority of governments . . . is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.”); see also *Allen v. Wright*, 468 U.S. 737, 750 (1984) (internal quotations omitted) (stating that the power of “an unelected, unrepresentative judiciary” in a democracy should be limited to the protection of individual rights); *Richardson*, 418 U.S. at 188 (Powell, J., concurring) (“We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.”).

²³¹ The Court established this precedent in 1793, when the justices declined the request of the Washington Administration that they give advisory opinions on a series of legal issues regarding the neutrality of the United States during a war between England and France. See RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 50-52 (6th ed. 2009); see also *Valley Forge*, 454 U.S. at 473 (“While the exercise of . . . [judicial review] is a formidable means of vindicating individual rights, when employed unwisely or unnecessarily it is also the ultimate threat to the continued effectiveness of the federal courts in performing that role.”); *Schlesinger*, 418 U.S. 208, 222 (internal quotations omitted) (“The powers of the federal judiciary will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as the hazards that go with our kind of representative government.”).

²³² See Claire Taylor, *Bribery in Athenian Politics Part II: Ancient Reaction and Perceptions*, 48 *GREECE & ROME* 154, 156 (2001) (“The political and judicial spheres of Athenian life often encroached on each other: there was indeed little distinction between the two.”); TODD, *supra* note 32, at 68 (in Athens, “legal action [was] indistinguishable from political activity”). Athenian politicians routinely used the *graphē paranomōn* as a weapon against their political enemies. SINCLAIR, *supra* note 30, at 153, a practice that citizen standing facilitated; Osborne, *supra* note 204, at 52; see Sealey, *Democratic Theory*, *supra* note 50, at 252 (stating that “the graphe and other types of public action gave rivals the opportunity to sue one another). “Athenian political leaders,” writes classical legal historian Stephen Todd, “seem in the sources to devote an extraordinary energy to trying to get each other executed.” TODD, *supra*

review, by contrast, has always been marked by the self-conscious insistence of judges (admittedly not always realized) that their authority was limited to interpreting and applying law (that is, to deciding questions concerning the constitutional authority of government). This judicial self-limitation endeavored to preserve the responsibility of elected representatives to engage in politics (that is, to decide questions concerning how best to exercise the constitutional authority of government).²³³ Thus, while Athenians who sought judicial enforcement of the law against offenders even though they had suffered no personal injury were model democratic citizens,²³⁴ Americans who file suit in such circumstances may seem anti-democratic.²³⁵

Strong popular constitutionalists advocate transferring the power of constitutional decision-making from professional judges to ordinary citizens in part because it would free up such decisions from the constraints of legal reasoning, as well as from the complexity and formality of constitutional doctrine.²³⁶ The classical Athenian experience provides a cautionary example of such a move. Popular decision-making in the *dikastēria* departed dramatically from the manner in which modern courts decide cases. The *dikastai* did not channel their decision-making, as would a contemporary court, through a process of finding facts, interpreting law, and applying law to fact.²³⁷ In the interest of democracy, each jury member possessed

note 32, at 154.

²³³ See *Marbury v. Madison*, 5 U.S. at 170, 177 (“Questions, in their nature political . . . can never be made in this court . . . It is emphatically the province and duty of the judicial department to say what the law is.”); see also *Richardson*, 418 U.S. at 179 (“The Constitution created a representative Government with the representatives directly responsible to their constituents,” and thus, “[l]ack of standing within the narrow confines of Art. III jurisdiction does not impair the right [of a plaintiff] to assert his views in the political forum or at the polls.”). For further discussion of *Marbury*’s law-politics distinction, see *infra* notes 286-290 and accompanying text.

²³⁴ See *supra* note 213 and accompanying text.

²³⁵ See, e.g., *Richardson*, 418 U.S. at 188 (Powell, J., concurring) (“Relaxation of standing requirements is directly related to the expansion of judicial power” and thus, “a shift away from a democratic form of government.”).

²³⁶ See, e.g., KRAMER, *supra* note 1, at 248 (stating that the “complexity [of constitutional law] was created by the Court for the Court and is itself a product of judicializing constitutional law”); TUSHNET, *supra* note 7, at 42-53 (arguing that the judicial tendency toward formalism would not be replicated if other actors had responsibility for constitutional interpretation); Waldron, *supra* note 9, at 1382-86 (arguing that legal reasoning in constitutional cases is a distraction from “the real issues at stake”).

²³⁷ See COHEN, *supra* note 201, at 191 (“[Athenian] courts did not reach decisions purely through the interpretation of legal norms and principles and their application

equal power to decide for himself which litigant deserved judgment, based on “whatever reasoning . . . [he] wished to apply.”²³⁸ Citizen jurors endeavored to reach a just resolution of a legal dispute, and Athenian justice lay in balancing the equities of an individual case, rather than in “the regular and predictable application of abstract, standardized rules.”²³⁹ Popular decision-making in the *dikastēria* therefore was highly contextual and largely discretionary.²⁴⁰ The jurors explored the full range of circumstances surrounding a dispute before reaching decision.²⁴¹

The open texture of Athenian law invited the broad decision-making discretion of the popular courts. Athenian law typically focused on procedure rather than on substance.²⁴² Statutes tended not to delineate the elements of the conduct they made illegal.²⁴³ Classical Athenian legal historian Adriaan Lanni has explained the apparent Athenian legislative practice: “In many cases, the primary purpose of the relevant law may have been to set out a procedure for obtaining redress for a broad class of offenses. Once the case came to court, the jury attempted to arrive at a just verdict looking at the individual case as a whole without focusing exclusively on determining whether the defendant’s behavior satisfied the formal criteria of the specific charge

to a particular transaction.”); TODD, *supra* note 32, at 65 (stating that Athenian law was “primarily concerned not with how to formulate and apply legal doctrines, but rather with how to get a dispute satisfactorily settled”); *cf.* LANNI, *supra* note 50, at 70 (noting that “interpretation and application of the law at issue was certainly considered relevant to the jury’s decision, but there is no indication that a litigant was expected to limit himself to or even focus on such questions”).

²³⁸ LANNI, *supra* note 50, at 178.

²³⁹ *Id.* at 25, 42; *see also* TODD, *supra* note 32, at 90 (noting that “the basis of [a jury’s] judgment is the public concept of what is equitable”).

²⁴⁰ LANNI, *supra* note 50, at 2-3, 11. Professor Lanni writes, “[T]he Athenians favored a contextual approach to justice . . . [because] Athens’ political structure as a direct, participatory democracy was paramount. The flexible approach benefited the poor citizens who formed the dominant political constituency of the democracy, and promoted popular decision-making by granting juries maximum discretion in reaching their verdicts.” *Id.* at 12.

²⁴¹ COHEN, *supra* note 201, at 191. The Athenians had an extremely broad conception of relevance, and non-legal as well as legal arguments were customary in the *dikastēria*. LANNI, *supra* note 50, at 7, 70, 74; TODD, *supra* note 32, at 89-90. Limiting litigants to a narrow relevance rule would have compromised the democratic power of popular juries to resolve legal disputes according to their collective sense of justice. LANNI, *supra* note 50, at 173.

²⁴² LANNI, *supra* note 50, at 87; *see* TODD, *supra* note 32, at 16.

²⁴³ LANNI, *supra* note 50, at 67-68, 117; Wallace, *Law and Rhetoric*, *supra* note 53, at 422.

at hand.”²⁴⁴ A famous example of this practice is the Athenian law against impiety (*asebeia*), pursuant to which an Athenian jury tried and convicted Socrates, and sentenced him to death. Although the Athenians regarded the crime of impiety as a serious public offense, the law apparently prescribed no fixed definition of the crime, leaving it to a jury to decide on an ad hoc basis whether an individual’s conduct should be punished as impious.²⁴⁵

Aristotle suggested that the open-textured nature of Athenian law may have reflected a deliberate effort to further democracy by “giv[ing] the people the power of decision.”²⁴⁶ The fully democratized popular courts of Athens, writes classical legal historian Stephen Todd, “made public opinion into a source of law in the fullest possible sense.”²⁴⁷ But the trial and execution of Socrates exhibit the “dark side” of a legal regime that gives full and unchecked force to popular decision-making in the courts.²⁴⁸ Laws whose content are defined on an ad hoc basis by popular juries leave the door open to injustice, at least as defined by a constitutional regime (such as ours) that is committed to the protection of individual rights from majoritarian oppression.

²⁴⁴ LANNI, *supra* note 50, at 68; *see also* DAVID COHEN, LAW, SEXUALITY, AND SOCIETY: THE ENFORCEMENT OF MORALS IN CLASSICAL ATHENS 209 (1991) (stating that “the only applicable definitions of [Athenian] offenses were those residing in the collective consciousness of the community, as manifested through the 500 or more citizens who happened to be sitting on a particular day to hear a particular case”).

²⁴⁵ *See* Wallace, *Law and Rhetoric*, *supra* note 53, at 422 (discussing the trial of Socrates in this context).

²⁴⁶ Aristotle, *Constitution of Athens* ¶ 9.2, *supra* note 26, at 153; *see also* MACDOWELL, *supra* note 53, at 61 (“The vagueness of Athenian laws left much to the discretion of the juries.”); TODD, *supra* note 32, at 62 (“The vagueness of a typical Athenian statute served to increase [the] . . . power [of *dikastai*].”). Aristotle himself preferred to believe that the “obscurity” of Athenian statutes arose from “the impossibility of including the best solution for every instance in a general provision.” Aristotle, *Constitution of Athens* ¶ 9.2, *supra* note 26, at 153. Aristotle’s explanation accords with his view that *ex ante* legal rules cannot prescribe just outcomes in all future cases, ARISTOTLE, ETHICS 1137b, at 199 (rev. ed., J.A.K Thomson trans., 1976); ARISTOTLE, *supra* note 167, at 113-14, but it does not explain why the Athenians typically made no effort at all to define criminal offenses in even the most general terms.

²⁴⁷ TODD, *supra* note 32, at 90.

²⁴⁸ Charles M. Gray, *Response to James Boyd White, Plato’s Crito: The Authority of Law and Philosophy*, in THE GREEKS AND US 133, 139 (Robert B. Loudon & Paul Schollmeier eds., 1996); *see supra* note 245 and accompanying text; *see also* Manville, *supra* note 173, at 381 (stating that “the trial and conviction of Socrates painfully demonstrated” that in Athens individual freedom and equality were “subordinate to the . . . sovereignty of the multitude”).

The ad hoc, contextual decision-making by large and shifting groups of lay citizen-jurors epitomized the classical Athenian ideal of highly participatory direct democracy. But it also imposed substantial costs on the Athenians similar to the costs that some scholars have warned would follow from a system of strong popular constitutionalism in the United States. For example, the style of popular decision-making in the *dikastēria* may have undermined the capacity of the Athenian judicial system to provide predictable and consistent application of Athenian law.²⁴⁹ The indeterminacy of Athenian statutes, the absence of binding precedent, the wide scope of arguments presented by litigants, and the impossibility of ascertaining the basis of a decision reached by at least 500 jurors who decided cases on individual grounds, without discussion or explanation, all conspired to make decisions of the *dikastēria* an unreliable guide to future cases.²⁵⁰ The unpredictability and inconsistency of judicial outcomes, in turn, left Athenians uncertain whether any particular course of conduct was legally safe.²⁵¹ Indeed, Adriaan Lanni has claimed that Athens, because of its democratic commitment to popular decision-making in the *dikastēria*, “had all the disadvantages, but few of the advantages, of a formal legal system.”²⁵²

B. American Judicial Review

It says a great deal about the American understanding of democracy (as well as the democratic distance between Athens and America) that the final, authoritative word on the meaning and application of the federal Constitution (the American *nomos*) is entrusted to the federal judiciary, the least democratic branch of government.²⁵³ Judicial review in Athens, which might be seen as the birth of strong popular constitutionalism, strengthened rather than weakened the power of the *dēmos*.²⁵⁴ The popular courts of the *dikastēria*, no less than the

²⁴⁹ LANNI, *supra* note 50, at 12, 115-16; TODD, *supra* note 32, at 60-61.

²⁵⁰ LANNI, *supra* note 50, at 117, 176; TODD, *supra* note 32, at 31; *see also* Sealey, *Democratic Theory*, *supra* note 50, at 254 (identifying as a defect in the Athenian judicial system the absence of “legal memory; that is, there was no assurance that like cases occurring at different times would be judged alike”).

²⁵¹ LANNI, *supra* note 50, at 116, 131, 176.

²⁵² *Id.* at 136.

²⁵³ Larry Kramer, a strong popular constitutionalist, has described this constitutional paradox as “an embarrassing theoretical problem.” KRAMER, *supra* note 1, at 105.

²⁵⁴ John R. Wallach, *Two Democracies and Virtue*, in *ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY*, *supra* note 82, at 319, 337.

other governing institutions of Athens,²⁵⁵ remained under the complete control of ordinary citizens.²⁵⁶ The first American democracies, those constituted in the states following the Declaration of Independence, similarly followed the dictates of strong popular constitutionalism. They empowered juries over judges and designated elected legislators, rather than appointed judges, as principal interpreters of the original state constitutions.²⁵⁷ Yet in roughly a decade, the framers of the federal Constitution manifested the opposite governing instinct. They tempered American democracy by assigning the judicial power, which soon absorbed the power of judicial review, to politically independent judges rather than to the citizenry or their elected representatives.²⁵⁸

Constitutional legal scholar Larry Kramer rightly has described the demarcation of the judicial role in the American constitutional system as “part of a larger and more fundamental struggle” regarding the nature and degree of control ordinary citizens should wield over the interpretation and enforcement of “their Constitution.”²⁵⁹ Indeed, conflict over the judiciary was part of an even larger and more fundamental struggle over how democratic the new federal government should be. This conflict peaked during the debate in 1787-1788 between Federalists and Anti-Federalists over ratification of the federal Constitution.²⁶⁰ The conflict spiked again during the early national period, as Federalists and Republicans vied for the soul of the Republic.²⁶¹ In one of the curiosities of American constitutional development, the Federalists were able to cement the practice of judicial review into place even as the Republican effort to further democratization gained traction.

In the years leading to the drafting and ratification of the federal Constitution, some reformers began to challenge the central claim of strong popular constitutionalists, then and now, that judicial review is

²⁵⁵ See FINLEY, *DEMOCRACY*, *supra* note 65, at 116-17; OBER, *supra* note 24, at 301-02.

²⁵⁶ HANSEN, *supra* note 30, at 303.

²⁵⁷ WOOD, *CREATION OF THE AMERICAN REPUBLIC*, *supra* note 38, at 274; *see supra* notes 128-135 and accompanying text.

²⁵⁸ *See supra* notes 113-186 and accompanying text.

²⁵⁹ KRAMER, *supra* note 1, at 7; *see also* PARKER, *supra* note 12, at 5 (arguing that “attitudes toward ordinary people as active, energetic participants, collectively and singly, in politics and government operate both to animate and to structure our whole discourse about constitutional law”).

²⁶⁰ *See supra* notes 153-157 and accompanying text.

²⁶¹ *See* WOOD, *EMPIRE OF LIBERTY*, *supra* note 132, at 452 (stating that acceptance of principles underlying judicial review in the 1790s “remained largely partisan — shared by most Federalists but not by most Republicans”).

antithetical to democracy and the principle of popular sovereignty. These reformers advanced the paradoxical position that a well-ordered system of democracy actually demanded that courts refuse to enforce unconstitutional legislation.²⁶² According to the reformers' argument, such legislative acts were a nullity because they exceeded the authority that the sovereign People had given to their legislatures.²⁶³ Because the reformers understood judges to be agents of the People,²⁶⁴ it followed that judicial loyalty was owed more to the Constitution than to legislative acts.²⁶⁵ This re-conceptualization of the courts and their constitutional position informed Alexander Hamilton's characterization of the judiciary exercising judicial review as "an intermediate body between the people and the legislature."²⁶⁶

There was a pragmatic case to be made for judicial review as well: empowering courts to invalidate unconstitutional acts was more effective, and often more desirable, than the traditional forms of public resistance championed by strong popular constitutionalists.²⁶⁷ Popular constitutionalists in early America believed that the People should exercise their power of constitutional interpretation and enforcement not only through the electoral process, but also by resorting to various types of extralegal resistance.²⁶⁸ As Americans accumulated experience with self-government, they increasingly appreciated judicial review as a legitimate and peaceful alternative to popular protest for enforcing constitutional norms.²⁶⁹ The Whig senator John Clayton, speaking in

²⁶² KRAMER, *supra* note 1, at 60; *see also* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *YALE L.J.* 453, 465 (1989) ("Rather than threatening democracy by frustrating the statutory demands of the political elite in Washington, D.C., the courts serve democracy by protecting the hard-won judgments of a mobilized citizenry against fundamental change by political elites.").

²⁶³ KRAMER, *supra* note 1, at 60; *see, e.g.*, THE FEDERALIST NO. 78, *supra* note 35, at 505 (Alexander Hamilton) ("No legislative act . . . contrary to the Constitution can be valid."); THE FEDERALIST NO. 53, *supra* note 35, at 348 (James Madison) (stating that the Constitution is "unalterable by the government" it creates because it was "established by the people").

²⁶⁴ WOOD, EMPIRE OF LIBERTY, *supra* note 132, at 450-52.

²⁶⁵ KRAMER, *supra* note 1, at 61-63.

²⁶⁶ THE FEDERALIST NO. 78, *supra* note 35, at 506 (Alexander Hamilton); *see also* KRAMER, *supra* note 1, at 110 ("Where eighteenth-century constitutionalism had imagined a wholly independent people checking the government from without, republicanism made it easier to think of the people acting in and through the government, with the different branches responding differently to popular pressure depending on their structure and their relationship to the polity.").

²⁶⁷ KRAMER, *supra* note 1, at 63.

²⁶⁸ *Id.* at 58.

²⁶⁹ *See id.* at 110 (noting that "a republican people's ability to act through the government (rather than against it) put pressure on certain traditional forms of

1830, expressed this sentiment when he said, “[W]e have no other direct resource . . . to save us from the horrors of anarchy, than the Supreme Court of the United States.”²⁷⁰

The fundamental shift away from strong popular constitutionalism and toward a chastened democratic mindset compatible with judicial review is strikingly apparent in *Federalist 49*. In this remarkable essay, James Madison explained his objection to Thomas Jefferson’s proposal of popular conventions, a kind of second-best *dikastēria*, to settle constitutional controversies as they inevitably would arise during the administration of the new federal government.²⁷¹ Madison’s essential objection was that, however beguiling theoretically,²⁷² in practice Jefferson’s popular conventions would undermine the nuanced system of balanced government that the Constitution had constructed so carefully. Madison was blunt. Constitutional decision-making in public conventions was undesirable, he warned, because it “could never be expected to turn on the true merits of the question.”²⁷³ Madison believed that ordinary people, sitting in Athenian-style assemblies, would decide constitutional questions according to their “passions,” and not by exercising their “reason.”²⁷⁴ In the *Federalist* theory that informed the drafting and ratification of the Constitution, “We the People,” as the sovereign body, designed the independent federal judiciary to exercise the kind of reasoned judgment that

popular constitutionalism, particularly those associated with the use of extralegal violence”); see also Daniel A. Farber, *Judicial Review and its Alternatives: An American Tale*, 38 WAKE FOREST L. REV. 415, 449 (2003) (stating that “judicial review thrives by default because none of the alternatives are palatable”).

²⁷⁰ KRAMER, *supra* note 1, at 181; see also LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES*, 1958, at 14 (1958) (stating that judicial review is necessary “to prevent the defeat of the venture at hand”).

²⁷¹ See *THE FEDERALIST NO. 49*, *supra* note 35, at 327 (James Madison).

²⁷² As Madison stated the argument for Jefferson’s conventions, the resonance with strong popular constitutionalism is unmistakable:

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory, to recur to the same original authority, not only whenever it may be necessary to enlarge, diminish, or new-model the powers of the government, but also whenever any one of the departments may commit encroachments on the chartered authorities of the others.

Id. at 327-28.

²⁷³ *Id.* at 331. Madison believed that the conventions would be dominated by factional conflict and would be biased toward the legislature, the institution of government closest to the People. See *id.* at 330, 331.

²⁷⁴ *Id.* at 331 (emphasis deleted).

Madison saw as essential to the legitimate settlement of constitutional disputes.

The Constitution that Madison sought to safeguard from Jefferson's strong popular constitutionalist call for dispute resolution by second-best *dikastēria* did not explicitly grant federal courts the power of judicial review.²⁷⁵ Yet the Supreme Court in *Marbury v. Madison* soon found that power to be embedded in the "long and well established" principles of American constitutionalism.²⁷⁶ Chief Justice Marshall's *Marbury* opinion by no means was original. He essentially assembled the arguments favoring judicial review that several of his fellow Federalists (especially those of Hamilton in *Federalist* 78) and a handful of judges had been developing in earnest since the 1780s²⁷⁷ and imported them into the federal judicial power.²⁷⁸ For Marshall, judicial review was inherent in the courts' constitutional responsibility to decide the cases that Article III assigned to them.²⁷⁹ Because the Constitution is "the fundamental and paramount law of the nation,"²⁸⁰ courts were obligated to enforce the Constitution over any conflicting legislative act (or executive action) at play in a case.²⁸¹ And because courts must decide cases according to law, it was "the very essence of judicial duty" to interpret the applicable laws.²⁸² From this confluence

²⁷⁵ State constitutions at the time typically were silent regarding judicial review as well. HAMBURGER, *supra* note 224, at 2.

²⁷⁶ *Marbury v. Madison*, 5 U.S. 137, 176 (1803); see MORGAN, *INVENTING THE PEOPLE*, *supra* note 118, at 260; Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1134 (1987).

²⁷⁷ Before *Marbury*, several decisions by federal circuit courts in which Supreme Court justices participated had asserted a power of judicial review over acts of Congress. For a discussion of these early developments, see KRAMER, *supra* note 1, at 98-104; WOOD, *EMPIRE OF LIBERTY*, *supra* note 132, at 446-47.

²⁷⁸ See KRAMER, *supra* note 1, at 115 ("*Marbury* did not stake out new territory in the theory of judicial review."); William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 460 (2005) (explaining that Marshall's reasoning in *Marbury* "was fully consistent with prior judicial decisions in which courts had invalidated statutes that trespassed on judicial authority and autonomy.").

²⁷⁹ Philip Hamburger has argued similarly that the failure of the federal Constitution and state constitutions at the time to mention judicial review reflected the widespread assumption that such a power was inherent in the authority of courts to adjudicate cases in the common law tradition, and thus that there was no need to make this specific power explicit in the constitutional text. HAMBURGER, *supra* note 224, at 577-605.

²⁸⁰ *Marbury*, 5 U.S. at 177; see also THE FEDERALIST NO. 78, *supra* note 35, at 506 (Alexander Hamilton) ("A constitution is, in fact, and must be regarded by the judges, as a fundamental law.").

²⁸¹ *Marbury*, 5 U.S. at 177.

²⁸² *Id.* at 178; see also THE FEDERALIST NO. 78, *supra* note 35, at 506 (Alexander

of considerations, *Marbury* famously declared, “[i]t is emphatically the province and duty of the judicial department to say what the law is,”²⁸³ including, of course, the Constitution.

Marbury’s assertion of judicial review sought to balance America’s democratic commitments with its commitments to constitutionalism and the rule of law.²⁸⁴ First, and most fundamentally, Chief Justice Marshall grounded the supremacy of the Constitution over ordinary legislation on its superior democratic pedigree: through the ratification process, the Constitution had issued more directly from the People than could any ordinary legislative enactment.²⁸⁵ Second, and more operationally, Chief Justice Marshall emphasized that his case for judicial review was limited to the legality of political action.²⁸⁶ Courts had no constitutional license to second-guess the political or policy wisdom of lawful acts of Congress and the executive.²⁸⁷ This effort to separate law from politics and policy switched American judicial review onto a track diverging from its classical Athenian predecessor, as well as from the hold of popular constitutionalism.²⁸⁸ It also aligned judicial review with the common law ideal that judges decide cases based on disinterested legal judgment rather than on personal preference.²⁸⁹ In the *Marbury* scheme, courts ultimately were

Hamilton) (“It . . . belongs to . . . [the courts] to ascertain . . . [the Constitution’s] meaning, as well as the meaning of any particular act proceeding from the legislative body.”).

²⁸³ *Marbury*, 5 U.S. at 177; see also THE FEDERALIST NO. 78, *supra* note 35, at 506 (Alexander Hamilton) (“The interpretation of the laws is the proper and peculiar province of the courts.”).

²⁸⁴ See *Marbury*, 5 U.S. at 163 (“The government of the United States has been emphatically termed a government of laws, and not of men.”).

²⁸⁵ See *id.* at 176; see also THE FEDERALIST NO. 78, *supra* note 35, at 506 (Alexander Hamilton) (stating that “the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents”); CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 58, 62 (1996) (“The formation of a supreme law as the original and deliberative act of the people was the indispensable basis for a theory of judicial review that was compatible with the principles of popular government.”).

²⁸⁶ *Marbury*, 5 U.S. at 163-73.

²⁸⁷ *Id.*

²⁸⁸ See Rajendra, *supra* note 6, at 60 (“In the popular constitutionalist model, the line between constitutional law and mere political law blurs.”).

²⁸⁹ HAMBURGER, *supra* note 224, at 618 (stating that “judges were to do their best to exercise judgment rather than will and were to decide in accord with the law of the land”); see also THE FEDERALIST NO. 78, *supra* note 35, at 507 (Alexander Hamilton) (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would . . . be the substitution of their pleasure to that of the legislative body.”).

responsible for defining the constitutional and legal boundaries of political action, but the exercise of political or policy judgment within those boundaries by the more democratically accountable Congress and executive was “only politically examinable.”²⁹⁰

In the two decades after Chief Justice Marshall staked his Court’s claim to the power of judicial review, American courts, state as well as federal, gradually incorporated the practice as an indispensable element of their power to decide cases.²⁹¹ The acceptance of judicial review in the early nineteenth century coincided with the broad ideological entrenchment of *Marbury*’s separation of law and politics, as well as the professionalization of judges and the marginalization of juries.²⁹² The conceptualization of constitutional decision-making (at least when individual rights are at stake)²⁹³ as ultimately requiring the legal judgment of courts, rather than the political preferences of the People’s representatives, accomplished the goal that Madison had expressed in *Federalist 49*.²⁹⁴ As Madison would have it, the practice of judicial review in America channels the constitutional boundary disputes that inevitably arise in the day-to-day operation of democratic government “into a forum where the rules and forms of adjudication . . . mute the overt clash of political wills.”²⁹⁵

This institutional design choice, of course, was diametrically opposed to that of the classical Athenians, as well as of strong popular constitutionalists in early and contemporary America, all of whom have sought to embed constitutional decision-making in popular politics. But American constitutionalism reflects the intuition that judicial review is best entrusted to the independent and professional

²⁹⁰ *Marbury*, 5 U.S. at 166. Matters of law and politics are not as neatly separated in constitutional adjudication as Chief Justice Marshall implied in *Marbury*, and thus, I shall argue, judicial review is compatible with moderate theories of popular constitutionalism. See *infra* notes 350-372 and accompanying text.

²⁹¹ KRAMER, *supra* note 1, at 154; see also Michael J. Klarman, *How Great were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1123 (stating that *Marbury* “declared the power of judicial review, but the early Marshall Court generally was too weak to exercise it”); WOOD, *EMPIRE OF LIBERTY*, *supra* note 132, at 442 (“Although the [*Marbury*] decision did make a major statement about the role of the judiciary in America’s constitutional system, it did not and could not by itself create the practice of judicial review.”).

²⁹² WOOD, *EMPIRE OF LIBERTY*, *supra* note 132, at 452-59.

²⁹³ See *Marbury*, 5 U.S. at 166 (stating that “where a specific duty is assigned by law, and individual rights depend upon the performance of that duty . . . the individual who considers himself injured, has a right to resort to the laws of his country for a remedy”).

²⁹⁴ See *supra* notes 271-274 and accompanying text.

²⁹⁵ RAKOVE, *supra* note 121, at 174-75.

judiciary of Article III. The judiciary's relative insulation from partisan passion makes it the institution best able to serve as "the conscience of the body politic."²⁹⁶ American judicial review promises the opportunity, in Fisher Ames' phrase, of a "sober, second thought"²⁹⁷ to ensure that the enduring values of American constitutionalism are not lost in the political tumult of the moment.²⁹⁸ American judicial review fits the founders' conception of democracy, just as the *graphē paranomōn* fit the classical Athenian conception of democracy.

III. POPULAR CONSTITUTIONALISM, ANCIENT AND MODERN

Athens invented judicial review as a democratic necessity, and over 2,000 years later America re-invented the practice for that very reason. In both systems, judicial review is a fail-safe mechanism, offering a final opportunity (short of constitutional amendment) to align the actions of government with the fundamental norms and values of the political community. In both Athens and America, judicial review provided a means of "protecting the demos from itself."²⁹⁹ And yet, the different understandings of democracy in Athens and America inevitably yielded systems of judicial review with correspondingly different meanings for each democracy.

A. *Judicial Review as a Measure of the Democratic Distance between Athens and America*

The defining difference in the practice, and meaning, of judicial review in the Athenian and American democracies lies in the radically different natures of their court systems. The exercise of judicial review in the mass citizen-juries of the *dikastēria* hard-wired strong popular constitutionalism into the classical Athenian democracy. The Athenian *dikastēria* were completely in the hands of the *dēmos*. The *graphē paranomōn* thus created an opportunity for the Athenian *dēmos* to check their own political decision-making for fidelity to higher law.

²⁹⁶ Daniel Walker Howe, *The Language of Faculty Psychology in The Federalist Papers*, in CONCEPTUAL CHANGE AND THE CONSTITUTION, *supra* note 37, at 107, 121.

²⁹⁷ Michael J. Malbin, *Congress During the Convention and Ratification*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION, *supra* note 36, at 185, 196. Harlan Fiske Stone applied the phrase to judicial review in his article, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).

²⁹⁸ BICKEL, *supra* note 2, at 24-26; Sotirios Barber, *Judicial Review and the Federalist*, 55 U. CHI. L. REV. 836, 846-53 (1988); William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 932-56 (1978).

²⁹⁹ Boegehold, *Resistance*, *supra* note 192, at 208-09.

They did so on political as well as on legal grounds, just as today's strong popular constitutionalists advocate. Judicial review in Athens meant that ordinary citizens often undertook a full-fledged "double consideration" (first in the Assembly, then in the popular courts) of political decisions that implicated their deepest societal commitments.³⁰⁰

The American constitutional structure of judicial review points in the opposite direction. Although Federalist theory conceptualized judicial review as enforcing popular will as expressed in the Constitution over the day-to-day actions by the People's political agents, this constitutional check is not directly controlled by the People themselves. Rather, American judicial review is the responsibility of the governing institution most insulated from the People: the federal judiciary. In operation, the decision by the founders to entrust the judicial power to an independent and professional judiciary inevitably rendered strong popular constitutionalism anachronistic in America.

The institutional alignment of strong popular constitutionalism with Athenian judicial review and the misalignment of that theory with American judicial review track the democratic differences between Athens and America. The basic divide between the classical Athenian democracy and American democracy is that Athens was a direct democracy that maximized the power of ordinary citizens to control every phase of government. On the other hand, America is a representative democracy operating under a Constitution that reflects a strategy of minimizing public participation in government.³⁰¹

A particularly revealing measure of the democratic divide between Athens and America is that the Athenians regarded elections, which are the linchpin of American democracy, as a challenge to their democracy.³⁰² The Athenians feared that elections would be a breeding ground for factionalism and corruption, and therefore a threat to the communal fabric of their democracy.³⁰³ The Athenians also believed that elections inherently favored candidates who were well-known in the community. They therefore regarded elections as a means by

³⁰⁰ See FINLEY, *DEMOCRACY*, *supra* note 65, at 27, 118; HANSEN, *supra* note 30, at 209; OBER, *MASS & ELITE*, *supra* note 24, at 208-09, 301-02.

³⁰¹ See *supra* note 23 and accompanying text.

³⁰² OBER, *MASS AND ELITE*, *supra* note 24, at 7; Ellen Meiksins Wood, *Democracy: An Idea of Ambiguous Ancestry*, in *ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY*, *supra* note 82, at 62 [hereinafter Wood, *Democracy*].

³⁰³ Paul Cartledge, *Comparatively Equal*, in *DEMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN*, *supra* note 20, at 179; HANSEN, *supra* note 30, at 236.

which ordinary citizens relinquished control of the government to members of the elite, which for them was a marker of aristocracy, not democracy.³⁰⁴ By contrast, the most democratic officials in America are those who are elected to office by ordinary citizens, and this relatively small group of political leaders is augmented by a vast government bureaucracy managed by appointed officials.³⁰⁵ Indeed, Madison championed a federal republic grounded on the principle of representation in the hope that it would accomplish what the Athenians had feared most — a community of citizens delegating the powers of government to the best, most worthy few among them.³⁰⁶

Direct democracies necessarily provide the People themselves substantially more control over their governance than any representative democracy could deliver.³⁰⁷ Yet, the inherent divide between direct and representative democracies understates the different attitudes prevailing in classical Athens and in 1780s America regarding popular control of government. Athens probably came closer to completely democratic rule than any other state in Western history, before or since.³⁰⁸ American democracy, at least as conceived

³⁰⁴ OSTWALD, *supra* note 47, at 82; Wood, *Democracy*, *supra* note 302, at 62.

³⁰⁵ See Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 728 (2001) (noting that although “[e]lections provide the means of choosing a small number of representatives,” this group of elected officials is only “partially responsive to the voters” because the “inherent limitations of the . . . administrative process limit voter control over the government”).

³⁰⁶ For Madison, the salutary potential of representation was “to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.” THE FEDERALIST NO. 10, *supra* note 35, at 59 (James Madison); see also Howe, *supra* note 296, at 126 (noting that Madison preferred representative democracy to Athenian-style direct democracy because of “the superior quality of the representatives, as compared with the people as a whole”).

³⁰⁷ In contemporary political theory, the distinction between direct and representative democracy “expresses the degree to which a mass public has the opportunity to participate in decision making directly, or the degree to which selected officials act on their behalf.” JAMES E. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* 42 (1991).

³⁰⁸ See LANNI, *supra* note 50, at 15 (noting that Athenian democracy was “more direct and more radical than any the world has known”); Gregory Vlastos, *The Historical Socrates and Athenian Democracy*, in *SOCRATIC STUDIES*, 87, 104 (Myles Burnyeat ed., 1994) (stating that the Athenian “constitution . . . [of the late fifth century was] the most democratic constitution the mind of man had yet conceived”); see also Terrence E. Cook & Patrick M. Morgan, *An Introduction to Participatory Democracy*, in *PARTICIPATORY DEMOCRACY* 1, 5 (Terrence E. Cook & Patrick M. Morgan eds., 1971) (describing the direct democracy of Athens and other ancient Greek *poleis* as an “extreme form” of self-rule by amateur citizens).

and created in the federal Constitution, finds itself near the opposite endpoint of the democratic spectrum from Athens.³⁰⁹ As I have argued, this was by design.³¹⁰

Classical Athenian democrats tended to value political participation for its own sake to a far greater degree than did the American founders who were responsible for crafting the federal Constitution. Citizenship was the primary source of identity for classical Greeks,³¹¹ and at least for the Athenians, the concepts of citizenship and political participation were inseparable.³¹² Aristotle, although neither an Athenian nor a democrat, nevertheless expressed the powerful meaning of citizenship in classical Athens with his claim that political participation is the means by which individuals fulfill their distinctively human nature (*telos*).³¹³

For James Madison, America's Aristotle, political participation by the citizen body was not intrinsically important.³¹⁴ Madison, like his fellow Federalists, believed that ordinary citizens lacked the competence to participate directly in their government.³¹⁵ Public participation was best limited to electing a governing elite and holding those elected officials accountable in future elections.³¹⁶ While Madison believed that the American constitutional system which he

³⁰⁹ A prominent theme of the Anti-Federalist opposition to the Constitution was that it embodied an unacceptably aristocratic system of government. See CORNELL, *supra* note 153, at 96 (noting that many Anti-Federalists believed that “[t]he fundamental defect of the new Constitution was its aristocratic character”); STORING, *supra* note 153, at 48-52 (discussing the Anti-Federalist critique of the aristocratic tendency of the Constitution).

³¹⁰ See *supra* notes 34-43 and accompanying text.

³¹¹ See Ostwald, *supra* note 31, at 57 (describing citizenship for classical Greeks as “a matter of belonging, of knowing one’s identity, not in terms of one’s personal values but in terms of the community that was both one’s possession and possessor”); *supra* notes 167-173 and accompanying text.

³¹² MANVILLE, *supra* note 27, at 5, 186.

³¹³ ARISTOTLE, *supra* note 167, at 37-38 (stating that “man is by nature a political animal” who is “the best of the animals when completed” by his participation in the *polis*); see FRED D. MILLER, JR., NATURE, JUSTICE, AND RIGHTS IN ARISTOTLE’S POLITICS 36 (1995) (noting that, for Aristotle, “nature endows human beings with the desire for political communities, because life in such communities is necessary for full human self-realization”); JOSIAH OBER, POLITICAL DISSENT IN DEMOCRATIC ATHENS: INTELLECTUAL CRITICS OF POPULAR RULE 297-98 (1998) (noting that, for Aristotle, “it is through engaging in political activity that men are complete”).

³¹⁴ See HELD, *supra* note 40, at 70-75, 231 (showing that Madison was an instrumentalist).

³¹⁵ See *supra* notes 34-37 and accompanying text.

³¹⁶ See *supra* notes 34-43 and accompanying text.

helped to devise legitimately qualified as self-government,³¹⁷ the role of ordinary citizens in America's Madisonian democracy is minimal, at least in comparison with Athens.³¹⁸

Judicial review in Athens reflected the systematic design of governing institutions that guaranteed ordinary citizens a monopoly over the exercise of government power.³¹⁹ Judicial review in America arose from the handiwork of constitutional framers who were determined to exclude ordinary citizens from direct involvement in government. Popular decision-making, they believed, had undermined governance of the states, and for that matter, the classical Athenian democracy.³²⁰ While the framers' basic assumptions about the optimal form of democracy would have been misplaced in classical Athens, they seem to have found enduring traction in American political culture. Political science literature confirms that American citizens, for the most part, are "largely disengaged" from governance and are essentially "passive spectators" of their democracy.³²¹

The commitment to direct popular rule drove the classical Athenians to create a majoritarian democracy; that is, a system in which "majorities get their way."³²² Although the Athenians often designed their governing institutions with impressive subtlety,³²³ they always observed the principle of majority rule: each citizen's vote received equal weight, and the will of the majority always was binding on minority dissenters.³²⁴ Strong popular constitutionalists at times

³¹⁷ See THE FEDERALIST NO. 39, *supra* note 35, at 243-44 (James Madison) (arguing that the Constitution was consistent with the norms of self-government because it created "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior").

³¹⁸ See EUBEN, *supra* note 43, at 73 (noting that the contemporary understanding of democracy is a "minimal notion of democracy" that essentially demands only "a mechanism to ensure some degree of accountability of rulers to the ruled"); HENRY B. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 61 (1960) (observing that the election of policymakers is as close as modern society gets to the direct control of policy exercised by the Athenian Assembly, "which is not very close").

³¹⁹ OBER, MASS AND ELITE, *supra* note 24, at 156, 163-65; see Wood, *Demos*, *supra* note 20, at 122; see also MANVILLE, *supra* note 27, at 20 ("Everything about the democratic constitution [of Athens] encouraged an ethos of public participation . . .").

³²⁰ See *supra* notes 34-43 and accompanying text.

³²¹ Gewirtzman, *supra* note 5, at 930.

³²² FISHKIN, *supra* note 307, at 42.

³²³ See Melissa Schwartzberg, *Athenian Democracy and Legal Change*, 98 AM. POL. SCI. REV. 311, 311 (2004) ("We no longer view Athens as a simple 'direct democracy,' but as a large society with a variety of political institutions and sophisticated legislative procedures.").

³²⁴ Paul Cartledge, *Utopia and the Critique of Politics*, in GREEK THOUGHT: A GUIDE

seem to follow the Athenian tendency to conflate democracy with majority rule, but majoritarianism and democracy are hardly the same thing.³²⁵ The American Constitution is the prototype of a governing system that, while democratic, seems designed to frustrate majority rule at nearly every turn.³²⁶ This is because the American Constitution, unlike the Athenian constitution, structures a liberal democracy that aspires to realizing effective self-government without sacrificing fundamental individual rights.³²⁷ Far from undermining democracy, judicial review by an independent and professional judiciary is conducive to the Madisonian, liberal democracy constituted in the United States. However, American-style judicial review would have been antithetical to the Athenian democracy.³²⁸

TO CLASSICAL KNOWLEDGE 163,173-74 (Jacques Brunschwig & Geoffrey E.R. Lloyd eds., 2000); Claude Mossé, *Inventing Politics*, in GREEK THOUGHT: A GUIDE TO CLASSICAL KNOWLEDGE 147, 154 (Jacques Brunschwig & Geoffrey E.R. Lloyd eds., Elizabeth Rawlings & Jeannine Pucci trans., 2000).

³²⁵ EISGRUBER, *supra* note 182, at 18; *see also* Post & Siegel, *supra* note 11, at 1036 (“Popular constitutionalism and judicial supremacy are mutually exclusive only if we imagine that democracy is at root about brute forms of preference aggregation, of the kind that underlie some crude justifications of majoritarianism.”).

³²⁶ *See* IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 12 (2003) (“Fear of tyranny by majority led Madison and the Federalists to devise a political system composed of multiple vetoes in order to make majority political action difficult . . .”). Constitutional legal scholar Sanford Levinson has developed this theme in his democratic critique of the Constitution. *See generally* LEVINSON, *supra* note 148.

³²⁷ *See* THE FEDERALIST NO. 37, *supra* note 35, at 226-27 (James Madison) (identifying the constitutional goal of “combining the requisite stability and energy in government, with the inviolable attention due to liberty . . .”); *see also* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 146 (1984) (explaining the constitutional goal of safe, yet effective government); Post & Siegel, *supra* note 11, at 1034-37 (observing that the American insistence on judicial enforcement of individual rights demonstrates “a genuine concern for democracy” every bit as much as a commitment to majority rule).

³²⁸ *See* THE FEDERALIST NO. 78, *supra* note 35, at 508-09 (Alexander Hamilton) (stating that “it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community”); Chemerinsky, *supra* note 3, at 690 (stating that “there seems little doubt that over time the judiciary is essential in protecting our most basic rights”); Post & Siegel, *supra* note 11, at 1038 (stating that “to allow the political judgment of the Constitution to dictate constitutional law is to risk undermining the stability and reliability of the very constitutional rights that may express and protect values, including the value of democracy, that are contained in the Constitution”). For a recent examination of the rights implicit in democracy, *see generally* COREY BRETTSCHEIDER, DEMOCRATIC RIGHTS: THE SUBSTANCE OF SELF-GOVERNMENT (2007).

B. *Toward a Proper Understanding of the Role of Popular Constitutionalism in American Judicial Review*

The wide gulf separating the classical Athenian and American constitutional understandings of democracy that underlies the sharply differing democratic character of judicial review in Athens and America exhibits the central concern of popular constitutionalists: the degree to which a government *of* the People and *for* the People also should be *by* the People.³²⁹ The classical Athenians believed that self-government meant government-by-the-people to the maximum degree obtainable, while the Federalists who shaped the American Constitution endeavored to eliminate government-by-the-people as much as self-government would allow.³³⁰ Cast in an Athenian light, it becomes clear how and why the adoption of strong popular constitutionalism (that is, theories that significantly remove the power of judicial review from the federal judiciary) would amount to a “jurisprudential revolution”³³¹ in the United States. These theories are utterly incompatible with the constitutional structure of American democracy that we have inherited from the framers. On the other hand, moderate theories of popular constitutionalism accept the legitimacy of judicial review, yet explore the variety of means by which popular politics legitimately may influence the Court’s constitutional decision-making.³³² These theories hold more promise because they are truer to the nuanced constitutional legacy of America’s founders.

1. *The Misalignment Between Strong Popular Constitutionalism and the American Constitution*

The fundamental disconnect between theories of strong popular constitutionalism and the American constitutional system helps account for the inability of strong popular constitutionalists to explain how their theories can be made to work institutionally in the United

³²⁹ See Chemerinsky, *supra* note 3, at 679 (noting that “[p]opular constitutionalism extols the virtues of the will of the people”); see, e.g., PARKER, *supra* note 12, at 96-97 (arguing that constitutional law should ensure that “‘common’ people, ordinary people . . . are the ones who are entitled to govern our country”).

³³⁰ See *supra* notes 24-43 and accompanying text.

³³¹ Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 825 (2006).

³³² For discussion of my definitions of strong and moderate popular constitutionalism, see *supra* notes 6-13 and accompanying text.

States.³³³ I have argued that the *graphē paranomōn* in the popular courts of the classical Athenian *dikastēria* and the proposal by Thomas Jefferson during the period of the American founding for popular conventions to settle constitutional disputes enact models of strong popular constitutionalism.³³⁴ And yet contemporary proponents of strong popular constitutionalism disclaim any intention of reviving these forms of direct democracy as a replacement for judicial review.³³⁵ Nor have they proposed popular elections of judges as a second-best method of democratizing the federal judiciary, and thus judicial review.³³⁶ Today's strong popular constitutionalists attempt instead to democratize judicial review by re-working the balance of power within the institutions of representative democracy that we have inherited from the founding generation.³³⁷ Their strategy of infusing strong popular constitutionalism into the existing governing structure seems to lead inexorably to a claim of legislative supremacy,³³⁸ or to some form of departmentalism, whereby the members of each branch of government possess sole power to define for themselves the nature of and limits on their constitutional authority.³³⁹

³³³ See Alexander & Solum, *supra* note 5, at 1623 (“The people themselves cannot act with legal authority in a corporate capacity without institutions . . . So the robust form of interpretive popular constitutionalism is just plain impossible given the world as it is.”).

³³⁴ See *supra* notes 189-252, 271-274 and accompanying text.

³³⁵ See, e.g., KRAMER, *supra* note 1, at 245 (noting that the opponents of judicial supremacy “are not dreaming of some pie-in-the-sky model of Athenian direct democracy”).

³³⁶ This theme is explored in Pozen, *supra* note 4. In response to the entrenchment of the practice of judicial review and the professionalization of judges in the early nineteenth century, a number of states in the 1840s and 1850s began to provide for elective judiciaries. JOHN H. LANGBEIN, ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 503-11 (2009). Today, over three-fourths of the states elect their judges. Pozen, *supra* note 4, at 2050.

³³⁷ See, e.g., KRAMER, *supra* note 1, at 245-46 (stating that popular constitutionalists “recognize the need for representation” and that they “do not object to [such] institutional arrangements” as the separation of powers). An exception to the general tendency to shy away from substantial institutional re-design to mimic classical Athenian judicial review is the proposal by Richard Parker to transform the Supreme Court into a mini-*dikastērion* by selecting ordinary citizens rather than professional jurists as its members. See *supra* note 13 and accompanying text; see also LEVINSON, *supra* note 148, at 24, 168-69, 173, 176 (proposing a series of constitutional amendments to democratize further American government).

³³⁸ See, e.g., TUSHNET, *supra* note 7, at 52 (“The position I have developed would make the Constitution what a majority of Congress says it is.”); Waldron, *supra* note 9, at 1348 (stating that “judicial review of legislation is inappropriate as a mode of final decision-making in a free and democratic society”).

³³⁹ Larry Kramer, a leading strong popular constitutionalist, has extolled

But as the comparison with Athens makes vivid, legislative supremacy and departmentalism are hollow expressions of strong popular constitutionalism. The democratic shortcoming of each theory is that the People and their representatives are distinct. Even though members of Congress and a first-term president ultimately are electorally accountable for their decision-making, this accountability, the classical Athenians and the American framers well knew, is far from true popular decision-making.³⁴⁰ The transfer of constitutional interpretive authority from the Court to Congress and the president simply would shift power from a judicial elite to political elites.³⁴¹ To be sure, Dean Kramer places great faith in elections as “critical moments for expressing the people’s active, ongoing sovereignty.”³⁴² But elections choose representatives. They do not decide constitutional issues. The People’s vote for or against an incumbent would not necessarily express popular approval or disapproval of the myriad constitutional judgments of legislators or presidents in a strongly popular constitutionalist regime.³⁴³

Yet strong popular constitutionalists might plausibly argue that legislative supremacy or departmentalism remain preferable to judicial review because they are more democratic.³⁴⁴ But this position reflects the tendency of strong popular constitutionalists to conflate

departmentalism as an expression of popular constitutionalism. See KRAMER, *supra* note 1, at 106-11, 114, 124, 130-31, 143-44, 152, 171, 211-13; see also Post & Siegel, *supra* note 11, at 1032 (“Kramer writes that popular constitutionalism would establish a departmental world . . .”). Nathaniel Persily writes, “Curiously absent from the literature on popular constitutionalism . . . is any evaluation of what ‘the people themselves’ actually think about the issues the Supreme Court has considered. . . . For the most part, popular constitutionalists look to legislation, executive enforcement, and official acts of obstruction . . .” Persily, *supra* note 6, at 3, 5.

³⁴⁰ See Frank I. Michelman, *Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 75 (1986) (“Congress is not us. The President is not us . . . ‘We’ are not ‘in’ those bodies. Their determinations are not our self-government. Judges overriding those determinations do not, therefore, necessarily subtract anything from our freedom, although the judges also, obviously, are not us.”); *supra* notes 302-306, 310 and accompanying text. Strong popular constitutionalist Larry Kramer has conceded this obvious point. KRAMER, *supra* note 1, at 58; see also Alexander & Solum, *supra* note 5, at 1600-01 (noting that in Kramer’s understanding of popular constitutionalism, “it is institutions and not ‘We the People’ who are acting”).

³⁴¹ Gewirtzman, *supra* note 5, at 911.

³⁴² KRAMER, *supra* note 1, at 197.

³⁴³ See Gewirtzman, *supra* note 5, at 916 (noting that “it is difficult to use one’s vote to send a specific message beyond a preference for one candidate over another”).

³⁴⁴ See, e.g., Waldron, *supra* note 9, at 1388 (arguing that the outcomes of legislative decision-making are “a reasonable approximation” of the preferences of the citizen body).

democracy with majoritarianism.³⁴⁵ Although Athenian democracy endorsed the identity of democracy and majority rule by subjecting all government decision-making to the voting preferences of ordinary citizens, America's Madisonian, liberal Constitution tempers democracy by limiting majority rule.³⁴⁶ Such limitations would have been antithetical to the classical Athenian democracy, where the community always took precedence over the individual, and the will of the majority always trumped minority interests. But these very limitations are a constitutional necessity in America's Lockean liberal democracy, where the fundamental, inalienable rights of individuals may not be dispensed with by majority vote.³⁴⁷ As American constitutional legal scholar Erwin Chemerinsky wrote, "The assumption that civil liberties and civil rights will be equally well protected through the political process as in the courts has no basis in U.S. history or contemporary culture."³⁴⁸

Strong popular constitutionalists might yet defend legislative supremacy or departmentalism on the claim that political actors may be expected to reach better (or at least more legitimate) constitutional decisions than judges because constitutional decision-making is a seamless weave of law and politics.³⁴⁹ It is incontestable that matters of law and politics are not as neatly separated in constitutional adjudication as Chief Justice Marshall implied in *Marbury*.³⁵⁰ As was true of Athenian law, the key provisions of the Constitution that consistently generate litigation over the years tend to be open-textured, and therefore subject to disagreement on political as well as on legal grounds.³⁵¹ But the undeniable intermixture of law and

³⁴⁵ See *supra* notes 322-328 and accompanying text.

³⁴⁶ See EISGRUBER, *supra* note 182, at 11 (noting that the American Constitution implements "non-majoritarian[] conceptions of democracy").

³⁴⁷ See William H. Goetzmann, *Two Hundred Years of Liberal Democracy: A Beginning in Revolution and Independence*, in A PROSPECT OF LIBERAL DEMOCRACY 18, 19-20 (William S. Livingston ed., 1979) (stating that "liberal democracy" describes a system that protects "the people against concentrated power wherever it looms as a threat to liberty").

³⁴⁸ Chemerinsky, *supra* note 3, at 690.

³⁴⁹ See, e.g., KRAMER, *supra* note 1, at 24 (describing the method of constitutional analysis traditionally prescribed by strong popular constitutionalism as "political-legal"); Waldron, *supra* note 9, at 1367 (stating that disagreements over the meaning and application of individual rights involve "moral and political" choices); see *supra* note 230 and accompanying text; see also TUSHNET, *supra* note 7, at 157 ("Populist constitutional law rests on the idea that we all ought to participate in creating constitutional law through our actions in politics").

³⁵⁰ See *supra* notes 280-295 and accompanying text.

³⁵¹ See Mattias Kumm, *Constitutional Rights as Principles: On the Structure and*

politics in constitutional adjudication, even in combination with the inevitability of judicial missteps beyond the law-politics boundary, hardly necessitate the conclusion that an unabashedly political process of constitutional decision-making is preferable to judicial review.³⁵²

Perhaps more to the point, in light of the claims that strong popular constitutionalists make on behalf of the American people, there is every reason to believe that the People themselves prefer judicial review over a political process of constitutional decision-making.³⁵³ Polling data indicate that the People have far more confidence in the judiciary than in Congress.³⁵⁴ Additionally, the political science literature suggests that the People themselves have no desire to assume the responsibility and burden of taking over the task of case-by-case interpretation of the Constitution.³⁵⁵ They prefer that judges retain their traditional responsibility for this essential and delicate government function.³⁵⁶

2. The Alignment Between Moderate Popular Constitutionalism and the American Constitution

The strong popular constitutionalist project of eliminating judicial review, while maintaining the institutional structure of the Constitution, is self-defeating. Judicial review is an essential element of American constitutionalism. But it remains possible (and desirable) to enhance the democratic quality of judicial review while remaining faithful to the American constitutional system. Notwithstanding the concerted effort by the Federalists of the founding era to distance

Domain of Constitutional Justice, 2 INT'L J. CONST. L. 574, 574 (2004) (stating that constitutional rights adjudication is at the “center of legal and political battles” in part because constitutional rights provisions are “comparatively indeterminate” and “more open to judicial interpretation than most statutes, administrative regulations, or ordinances”); Waldron, *supra* note 9, at 1366-69 (arguing that there are good-faith disagreements over the meaning and application of constitutional rights).

³⁵² See Friedman, *supra* note 2, at 2601 (“Surely the Constitution cannot mean whatever the present majority happens to think it should mean, for then constitutionalism would bleed entirely into ‘normal politics.’”); Gewirtzman, *supra* note 5, at 925-26 (noting that “interpretative outcomes produced by judicial ‘experts,’ particularly when combined with perceptions that the process is fair and insulated from self-interest, may achieve greater legitimacy than an interpretative process with greater popular accountability”).

³⁵³ Jamal Greene, *Giving the Constitution to the Courts*, 117 YALE L.J. 886, 910-11 (2008); Pozen, *supra* note 4, at 2059; see also FRIEDMAN, *supra* note 1, at 9 (“We have the Court we do because the American people have willed it to be so.”).

³⁵⁴ Gewirtzman, *supra* note 5, at 922.

³⁵⁵ See *id.*

³⁵⁶ See *id.* at 920-22.

American democracy from the classical Athenian original, America, precisely because of its enduring commitment to self-government, has never separated completely from Athens. In many ways, the vibrancy of American democracy can be traced, at least in part, to its incorporation of classical Athenian ideals and principles.³⁵⁷ The overall strategy of the American Constitution was to offset (but not extinguish) the classical Athenian commitment to majority rule with the Madisonian imperative of separating government power in order to slow down decision-making processes. Slow-cooking government decision-making, the founders believed, fostered deliberation, balance, and moderation.³⁵⁸ It also fit well with the liberal project of protecting fundamental individual rights.³⁵⁹ Although the American practice of judicial review arose organically from the institutional power allocations that resulted from these offsetting commitments,³⁶⁰ our continuing obsession over the “counter-majoritarian difficulty” in judicial review is the product of the very same constitutional cross-considerations. Indeed, this obsession is hard-wired into American constitutionalism along with our commitment to judicial review.³⁶¹

Because of the American instinct to draw on Athenian democratic principles to temper its Madisonian system, as well as the inevitable interaction of law and politics in constitutional adjudication, the federal Constitution creates various opportunities for popular influences on the independent judiciary, and ultimately, on the exercise of judicial review. As referenced earlier, the Constitution hedges the independence of the federal judiciary by providing for a series of democratic tethers on Article III judges. Federal judges are selected through a political process in which the People and their representatives can weigh in on their judicial philosophy and character. And in extreme cases, judges who engage in misconduct

³⁵⁷ I have explored this theme in Keith Werhan, *The Classical Athenian Ancestry of American Freedom of Speech*, 2008 SUP. CT. REV. 293.

³⁵⁸ LUTZ, *supra* note 135, at 85, 162-66; *see also* KETCHAM, *supra* note 127, at 62 (describing the eighteenth-century view that balancing power in government was optimal for maintaining liberty); PETER B. KNUPFER, *THE UNION AS IT IS: CONSTITUTIONAL UNIONISM AND SECTIONAL COMPROMISE, 1787-1861*, at 40-41 (articulating Federalists’ argument that the Constitution “contained institutional restraints that . . . encouraged moderate conduct”).

³⁵⁹ *See* BERNARD CRICK, *DEMOCRACY: A VERY SHORT INTRODUCTION* 13 (2002) (stating that American democracy, and “modern democracy” in general, is “a fusion (but quite often a confusion) of the [classical Athenian] idea of power of the people and the idea of legally guaranteed individual rights”).

³⁶⁰ *See supra* notes 253-298 and accompanying text.

³⁶¹ *See* Post & Siegel, *supra* note 11, at 1037 (stating that “[j]udicially enforceable rights circumscribe the domain of collective self-governance”).

may be removed through the political process of impeachment.³⁶² Constitutional decisions also always are subject to popular reversal through the political process of constitutional amendment.³⁶³ Short of the drastic (and therefore seldom invoked) powers of impeachment and constitutional amendment, the Constitution clears space for “political responses to an overly assertive Court.”³⁶⁴ Although judicial judgments are final in a particular case,³⁶⁵ judicial interpretations of the Constitution remain open to popular challenge through a variety of political processes.³⁶⁶

The totality of these constitutionally licensed sources of public influence on the exercise of judicial review falls well short of the kind of ongoing popular control of constitutional decision-making championed by strong popular constitutionalists. But this, again, is by

³⁶² See *supra* notes 181-183 and accompanying text. The Athenians established elaborate systems to ensure the public accountability of *polis* officials. Before assuming office, each office holder underwent a public examination (*dokimasia*) to ensure that he satisfied the requirements for office and was loyal to the democracy. HANSEN, *supra* note 30, at 218-20, 239; SINCLAIR, *supra* note 30, at 77-78; Aristotle, *Constitution of Athens* ¶ 55, *supra* note 26, at 195-96. When an official left office after a one-year term, he was required to render his accounts (*euthynai*), which involved an arduous sequence of public examinations of his entire conduct in office. HANSEN, *supra* note 30, at 222-24; OSTWALD, *supra* note 47, at 55-57. Moreover, Athenian officials were subject to constant review from a variety of sources during their term, HANSEN, *supra* note 30, at 220; SINCLAIR, *supra* note 30, at 79-80, and any citizen, at any time, could initiate impeachment proceedings (*eisangelia*, “denunciation”) for wrongdoing or for any action deemed detrimental to the *polis*. HANSEN, *supra* note 30, at 212-18; SINCLAIR, *supra* note 30, at 79, 156-60; Aristotle, *Constitution of Athens* ¶ 45.2, *supra* note 26, at 187.

³⁶³ See *supra* notes 184-185 and accompanying text.

³⁶⁴ KRAMER, *supra* note 1, at 249 (delineating the measures); see also WILLS, *supra* note 183, at 128 (listing “the variety of weapons” at the disposal of Congress to check the judiciary); Friedman, *supra* note 2, at 2634 (explaining that “political actors . . . have direct power over the Court”).

³⁶⁵ See Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993) (“There is widespread agreement that the executive has a legal duty to enforce valid final judgments rendered by the courts, regardless of whether the executive agrees with the legal analysis that forms the basis for the judgment.”). See generally *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (holding that Congress cannot require federal courts to reopen final judgments).

³⁶⁶ See TUSHNET, *supra* note 7, at 42 (stating that “in an important sense, all constitutional provisions are up for grabs at all times”); Persily, *supra* note 6, at 8 (demonstrating that most of the political science literature on the connection between Supreme Court decisions and public opinion has found that “the effect of public opinion on Court decisions exists as a complex process in which public moods get incorporated through the appointment of new justices or through responses by the other branches of government”); see also Friedman, *supra* note 2, at 2611 (stating that “judges . . . need popular opinion to see that their decisions are enforced”).

design. The framers, after all, established an independent and professional judiciary because they believed that such an institution was essential to America's understanding of sound democratic government.³⁶⁷ In order to remain consistent with the framer's Constitution, political influences on judicial decision-making should temper, rather than overwhelm, judicial review.³⁶⁸

Moderate theories of popular constitutionalism are true to the nuanced democratic system that we have inherited from the founders. These theories are appealing because they leave judicial review in place, yet seek to revise our understanding of the practice by designing and legitimating opportunities for the People and their representatives to participate meaningfully in the constitutional decision-making of judges. In addition to the various means of political influence on the federal judiciary prescribed in the Constitution, moderate popular constitutionalists emphasize that the litigation process itself has served as a means of public influence on the formulation and evolution of constitutional jurisprudence. For example, the judicial tradition of justifying decisions by reasoning expressed in written opinions exposes the Court's decision-making to popular, as well as to professional, critique.³⁶⁹ And although the independence of the courts forecloses direct popular control over judicial outcomes, the ordinary operation of the litigation process obligates Supreme Court justices to engage in a "continuous dialogue with the constitutional beliefs and values of nonjudicial actors."³⁷⁰ The scholarship of Reva Siegal and Jack Balkin, for example, has emphasized how the sustained constitutional arguments of successful social movements have migrated over time into the constitutional doctrines made by Supreme Court justices.³⁷¹ Two leading moderate constitutionalists, Robert Post

³⁶⁷ See *supra* notes 113-152 and accompanying text.

³⁶⁸ See Friedman, *supra* note 2, at 2613 (2003) (arguing that America has a "mediated" system of popular constitutionalism).

³⁶⁹ See EISGRUBER, *supra* note 182, at 60 ("[F]ederal judges are publicly accountable for their decisions [T]hey must quite literally give a public account of their reasoning."); DANIEL A. FARBER & SUSANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 44-45 (2009) (discussing "[t]he importance of reasoned elaboration" as a check on judicial decision-making).

³⁷⁰ Robert C. Post, *The Supreme Court, 2002 Term: Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 41 (2003).

³⁷¹ See, e.g., Balkin, *supra* note 15, at 27 (arguing that "constitutional law . . . change[s] in response to social movement protest"); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 312-13 (2001) ("Claims on the text of the Constitution made by mobilized groups of Americans outside the courthouse helped bring into being the understandings that judges then read into the text of the Constitution."); see also William N. Eskridge, Jr.,

and Reva Siegel, comment that the continuing constitutional conversation between the People and their Court structured by the norms of litigation has created a “delicate equilibrium.” In this equilibrium, “the fundamental constitutional beliefs of the American people are informed and sustained by the constitutional law announced by courts, just as that law is informed and sustained by the fundamental constitutional beliefs of Americans.”³⁷² Judicial review stimulates, rather than stifles, public deliberation over constitutional norms.³⁷³

By identifying roles for meaningful yet limited public participation in judicial review, theories espousing moderate popular constitutionalism align with the American constitutional system. True to the spirit of the founders, moderate popular constitutionalists adapt Athenian democratic values and principles as counterpoint to the dominant American theme of Madisonian, liberal democracy. In doing so, they demonstrate that the central complaint by strong popular constitutionalists that judicial review undermines majority rule is “radically overstated.”³⁷⁴ History has shown that the Justices and the People, while sometimes out of step,³⁷⁵ are always in dialogue, and ultimately move in the same direction.³⁷⁶ Only rarely has the Court been able to maintain constitutional interpretations in the face of sustained political opposition over the long term.³⁷⁷ Constitutional

Channeling: Identity-Based Social Movements and Public Law, 150 U. PA. L. REV. 419, 422 (2001) (arguing that the political progress of a minority group may lead to a change in constitutional norms).

³⁷² Post & Siegel, *supra* note 11, at 1038.

³⁷³ EISGRUBER, *supra* note 182, at 96-99.

³⁷⁴ FRIEDMAN, *supra* note 1, at 9; *see also* Rajendra, *supra* note 6, at 67-68 (“Social contest creates a framework for judicial decision-making that renders either moot or overstated the countermajoritarian difficulty . . .”).

³⁷⁵ *See* Friedman, *supra* note 2, at 2608 (noting that “there is not perfect congruence between public opinion and judicial decisions”); Pildes, *supra* note 187, at 115-16 (“That over broad-enough swaths of time, the Court’s decisions eventually reflect . . . [the] larger political and cultural context does not entail the quite different claim that individual Court decisions are destined to reflect current ‘majoritarian’ views.”).

³⁷⁶ FRIEDMAN, *supra* note 1, at 14-15; *see also* ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 225 (2d ed. 1994) (stating that an explanation “for the judiciary’s exalted status in this country . . . [is] that the Court seldom strayed very far from the mainstreams of American life and seldom overestimated its own power resources”); Pildes, *supra* note 187, at 115-16 (changes in constitutional doctrine over time “reflect shifts in cultural understandings and political values” that enter the Supreme Court’s decision-making primarily through the appointments process).

³⁷⁷ *See* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a Notional Policy-Maker*, 6 J. PUB. L. 279, 282 (1957); *see also* Friedman, *supra* note 2, at

decisions by the Court on important issues generally become entrenched only to the extent that the People, acting through politics, accept them.³⁷⁸

American judicial review and a moderate approach to popular constitutionalism are hardly irreconcilable. Indeed, some accommodation between judicial review and popular constitutionalism is inevitable in the American system.³⁷⁹ While strong popular constitutionalism can claim the purest democratic pedigree, its purity is incompatible with the systematic blending of government power prescribed by America's Madisonian Constitution. Moderate popular constitutionalism cedes the power of constitutional review to the independent and professional judiciary, while subjecting the exercise of that power to a variety of meaningful opportunities for public influence. This nuanced understanding of judicial review is truer to an American constitutional order that subjects majority rule to the overriding imperatives of dispersing government power and safeguarding individual rights.

CONCLUSION

Contemporary theories of popular constitutionalism challenge traditional, court-centered models of judicial review, and thereby require that we yet again confront the counter-majoritarian nature of that practice. This is an altogether salutary effect, because the counter-majoritarian nature of judicial review is the linchpin of American constitutionalism, balancing our commitment to the democratic principle of majority rule with the liberal imperative of safeguarding individual rights. A proper resolution of the counter-majoritarian difficulty must respect each side of this balance.

The classical Athenians avoided the counter-majoritarian difficulty of judicial review by fully democratizing their courts. In Athens, the People themselves sat in judgment of the constitutionality of public

2602 ("Judicial decisions need not be instantly popular or accepted," but "the judiciary's veto necessarily must fall within a range acceptable to popular judgment over time.").

³⁷⁸ See Friedman, *supra* note 2, at 2596, 2605 (stating that "[j]udges who strike down popular laws ultimately will run into trouble"). For a helpful antidote to the temptation to overemphasize the majoritarian responsiveness of the Court's constitutional decision-making, see generally Pildes, *supra* note 187.

³⁷⁹ See Post & Siegel, *supra* note 11, at 1029 ("judicial supremacy and popular constitutionalism . . . are in fact dialectically interconnected and have long coexisted"); Rajendra, *supra* note 6, at 80 (arguing that there must be some form of compromise between popular constitutionalism and judicial review).

and official conduct. American scholars who have advocated strong theories of popular constitutionalism evoke the classical Athenian conception of democracy by their call for political resolution of constitutional disputes by the People or their elected representatives. These theories would resolve the counter-majoritarian difficulty in an Athenian spirit. They largely would withdraw the power of judicial review from the independent and professional federal judiciary and enhance the principle of majority rule by disabling the institution that the framers designed to serve as the final safeguard for our fundamental individual rights. One purpose of this Article is to demonstrate (through a comparative analysis of Athenian and American conception of democracy, judicial systems, and judicial review) that strong popular constitutionalism was at home in Athens, but is out of sync with the constitutional system that we have inherited from America's founders.

A second purpose of this Article is to demonstrate that theories of moderate popular constitutionalism hold considerable promise for improving America's response to the counter-majoritarian difficulty created by judicial review. These theories respect the framers' institutional design of the federal courts as ultimate protector of individual rights by leaving in place the power of judicial review. Yet these theories also would somewhat democratize judicial review by creating and legitimating various forms of public participation in both shaping the federal judiciary and its constitutional decision-making. The result of these forms of political participation is a continuing dialogue among the People, their representatives, and their courts, ensuring that judicial decision-making remains independent and authoritative, yet also broadly consistent with majority will over time.

Moderate theories of popular constitutionalism would not have satisfied the Athenians, and they do not satisfy today's strong popular constitutionalists. But these moderate theories align with our Madisonian Constitution, with its divisions of authority and blending of powers in the interest of fostering deliberation, balance, and moderation in governance. Theories of moderate popular constitutionalism also remain true to the spirit of American constitutionalism by addressing the counter-majoritarian difficulty of judicial review without unduly sacrificing either majority rule or judicial authority and independence. Finally, and most broadly, moderate theories of popular constitutionalism reflect the founders' instinct of tempering their Madisonian Constitution with enough of a classical Athenian sensibility to launch the American federal government as an authentically democratic enterprise.