Popular Constitutionalism, Ancient and Modern

Keith Werhan

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

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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.

TABLE OF CONTENTS

INTRODUCTION ..................................................................................... 67

I. AN OVERVIEW OF THE CLASSICAL ATHENIAN AND THE
   AMERICAN CONSTITUTIONAL JUDICIAL SYSTEMS ......................... 73
   A. The Athenian Democratic Dikastēria ........................................ 76
   B. America’s Independent and Professional Judiciary ............. 85

II. JUDICIAL REVIEW, ANCIENT AND MODERN ................................. 96
   A. The Graphē Paranomōn .......................................................... 96
   B. American Judicial Review ..................................................... 108

III. POPULAR CONSTITUTIONALISM, ANCIENT AND MODERN ........ 115
   A. Judicial Review as a Measure of the Democratic Distance
      between Athens and America .................................................. 115
   B. Toward a Proper Understanding of the Role of Popular
      Constitutionalism in American Judicial Review ................. 121
      1. The Misalignment Between Strong Popular
         Constitutionalism and the American Constitution ... 121
      2. The Alignment Between Moderate Popular
         Constitutionalism and the American Constitution ... 125

CONCLUSION ....................................................................................... 130
INTRODUCTION

The American dialogue over the legitimacy of judicial review is older than our Constitution. 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). 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.

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. 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”).


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.

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
element, 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:

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.\textsuperscript{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.\textsuperscript{16} I shall classify such theories as “moderate” theories of popular constitutionalism.\textsuperscript{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.\textsuperscript{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 \textit{Marbury v. Madison},\textsuperscript{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

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


\textsuperscript{16} \textsc{Friedman, supra} note 1, at 4.

\textsuperscript{17} My conception of moderate popular constitutionalism theories corresponds with David Pozen’s description of “modest” popular constitutionalism. See Pozen, \textit{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”).

\textsuperscript{18} See, \textit{e.g.}, \textsc{Kramer, supra} note 1, at 241-46 (associating popular constitutionalism with “a democratic constitutional order”); \textsc{Tushnet, supra} note 7, at 31 (stating that “[a] populist constitutional law rests on a commitment to democracy”); Rajendra, \textit{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.”).

\textsuperscript{19} \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 166, 170-71 (1803).
decisions. 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.” Strong popular constitutionalists often enlist classical Athenian democratic norms, such as majoritarianism, to challenge the legitimacy of judicial review and to offer alternatives. 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.”

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

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20 Ellen Meiksins Wood, *Demos versus “We, the People”: Freedom and Democracy Ancient and Modern*, in *DēMOKRATIA: 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 (graphê paranomên). 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. Athens came closer to realizing an identity between the citizens and their government than has any sophisticated society, before or since. As Aristotle put it in his account of the Athenian constitution, the People (dēmos) “made themselves supreme in all fields.”

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. Ordinary citizens, assembled in large groups, made all governance decisions. Athens had no government in the modern meaning of the term. The Athenian dēmos had “a plenary competence,” and it was they who governed. According to the central Athenian democratic principle of isonomia, 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.

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 isonimia 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).\footnote{KURT RAFLAUB, THE DISCOVERY OF FREEDOM IN ANCIENT GREECE 230 (2004); Martin Ostwald, Shares and Rights: “Citizenship” Greek Style and American Style, in DEMOKRATIA: 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).} The principal governing institutions of classical Athens — the Assembly (ekklēśia), 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.\footnote{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.”).} These mass meetings provided the final word on law and policy in Athens.\footnote{BERNARD BAILYN, FACES OF REVOLUTION: PERSONALITIES AND THEMES IN THE}

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.\footnote{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”).} “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].”\footnote{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).} American democracy, in Madison’s language, “delegate[s] . . . the government . . . to a small number of citizens elected by the rest.”\footnote{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).} 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.\footnote{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. The demos instead select representatives, who in turn, govern the community. 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. American citizens participate in the political life of the Nation primarily by voting for their representatives in the federal government. 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 demos for the
choices they make. As Sheldon Wolin observed, America’s representative democracy “is a democracy without the demos as actor. The voice is that of a ventriloquist democracy.”

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; 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, they did not complete the installation until after they had fully democratized the judicial system. 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.” 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 ΔΗΜΟΚΡΑΤΙΑ: 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 73-82.
consisting of former top Athenian officials (arkhontes, “leaders”) that is faintly suggestive of the American Supreme Court.\textsuperscript{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.\textsuperscript{49} By defanging the Areopagus,\textsuperscript{50} the judicial reform administered a “death blow” to the last political stronghold of the Athenian aristocracy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{footnotesize}
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\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{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).
\item \textsuperscript{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.
\item \textsuperscript{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].
\end{itemize}
\end{footnotesize}
citizens lacking legal credentials or expertise. 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. 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. In modern parlance, a classical Athenian dikástēs was as much a judge as a juror.

The most visible difference between Athenian dikástēria 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, and sometimes the juries were much larger. The largest jury attested in the surviving sources included 2,500 members.

The outsized jury panels of the dikástēria 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. More fundamentally though, the size of the dikástēria applied to the courts the classical Athenian democratic principle that public decisions were best made collectively by large groups of ordinary citizens.

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 dikástēs "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.
As was generally the case with Athenian offices, every male citizen who had reached the age of thirty was eligible to serve as a juror. The Athenians expected “civic responsibility and fair-minded honesty” from dikastai, and they assumed that ordinary citizens generally possessed these qualities sufficiently to exercise the judicial power.

At the beginning of each year, the Athenians convened a jury pool, which most classical historians believe included 6,000 members. It is not certain how members of the jury pool were selected, but as with most Athenian offices, they may well have been selected randomly from among those who had volunteered for service. 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). Swearing the dikastic oath was meaningful for Athenian jurors, and served to distinguish the

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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 dikastē).
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 B.C.E. 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. 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.

The dikastēria met openly and frequently, perhaps between 150 and 240 days each year, with several courts in session on a typical court day. As a precaution against jury tampering, trials were completed in only one day. 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. 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.”

In a stark departure from American trial practice, Athenian litigants had no say in jury selection. In the fifth century BCE, each member of the jury pool was assigned to a particular dikastērion for the year. 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. 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.

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.
73 Classical Athens observed a lunar year of 354 days. Hansen, supra note 30, at 135; MacDowell, supra note 53, at 40.
74 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.”).
75 MacDowell, supra note 53, at 36; Todd, supra note 32, at 84.
76 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.
77 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 (τιμή) 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 case\(^86\) and then voted by secret ballot (ψεphis, 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 (κλήροις) 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.
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.87

Additionally, Athenian jurors were not bound by precedent.88 Their decisions essentially were “ad hoc determinations” of where justice lay in each case that came before them.89 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.”90 Nor were Athenian juries required to explain or to justify their verdicts to the δῆμος: they were the δῆμος.91 For the same reason, the verdicts of the δικαστήρια were final.92 Athenian law provided neither a right of appeal93 nor a pardon power.94 In Athens, there was no higher authority than the collective judgment of the δῆμος, and that was precisely what the δικαστήρια symbolized.95

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 δικαστήρια 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 δικαστήρια 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). Adriana 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 δικαστήρια as “the δῆμος 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

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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 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. SEALY, 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. Litigants personally presented their cases to the jury, primarily in the form of a speech. 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. Their speeches typically offered the jury dueling narratives of the events giving rise to the dispute that had landed them in court.

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. Their system of popular courts entrusted the very soul of the state, the administration of justice, entirely to ordinary citizens. A contemporary observer of the classical Athenian democracy put it bluntly: in Athens, he wrote, judicial decisions “depend[ed] solely upon the common people.” 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.

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

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. The members of the founding generation who wrote and defended the Constitution intended to counteract, in the jarring phrase of Elbridge Gerry, the “excess of democracy” that they believed had once plagued Athens and then threatened America. 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.” 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.


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, jealously, avarice, and of other irregular and violent propensities.” 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.

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, and then had exacerbated that power imbalance by making the legislatures too representative. 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. State legislatures, in short, were too democratic. 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. In a “representative republic,” wrote James Madison, “it is against the enterprising ambition of [the legislature] that the people ought to indulge all their jealously and exhaust all their precautions.”

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”).

120 MORGAN, INVENTING THE PEOPLE, supra note 118, at 252; WOOD, CREATION OF THE AMERICAN REPUBLIC, supra note 38, at 410.
122 BANNING, JEFFERSONIAN PERSUASION, supra note 115, at 89; SHALHOOSE, ROOTS OF DEMOCRACY, supra note 115, at 97-98.
123 SHALHOOSE, 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.”

The central constitutional challenge for Madison and his fellow reformers was to design an authentically democratic government that would not lapse into popular tyranny. 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.

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. 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.

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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 GERRARD 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-

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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).
133 See supra notes 97-101 and accompanying text.
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.
137 Wood, Empire of Liberty, supra note 132, at 407-08.
tenured judges was a constitutional necessity. 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. The central role of the judiciary, in the reformist vision, was nothing less than to save America’s fledgling democracy from itself.

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.

The classical Athenian dikastēria were “independent” in the sense that they were not subject to the control of any other political institution, 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.

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.” 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, which offered judges more independence than had any state constitution at the time. Article III secured the independence of federal judges primarily by safeguarding their tenure and salary. Article III judges

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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”).
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. Hamilton exalted the good-behavior standard, which carried over its English and state-constitutional meaning of “permanency in office,” as nothing less than the “citadel of the public justice and the public security.” 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.” 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.” 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.

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. The central theme of the Anti-Federalist attack on the proposed plan for the

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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.

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, and thus was a dangerous betrayal of democratic principles. The independence of the federal courts worried Anti-Federalists because they saw it as a threat to liberty, for neither the People nor their representatives would be able to correct judicial abuses of power. 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.

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, which greatly influenced the thinking of the founding generation and launched the liberal constitutional tradition that has dominated American political thought ever since. Locke posited a strict separation between the state and its citizens, 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). American acceptance of

154 STORING, supra note 153, at 50; see supra note 23 and accompanying text.
156 CASPER, supra note 128, at 141-45; CORNELL, supra note 153, at 91.
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.
Lockean liberalism led inexorably to an individualistic constitutional and legal culture. 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. An “independent spirit in the judges” was essential, wrote Hamilton, if courts were to be “the bulwarks of a limited Constitution against legislative encroachments.”

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. In Aristotle’s suggestive language, the ancient Greek polis was “a partnership [koinōnia] of citizens.” The individual citizen was but one part of the whole citizen body. The communal and individual identities of Athenian citizens therefore were reciprocally constituted. A citizen flourished only if his community flourished. And the community flourished only if citizens actively participated in civic life. 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.


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”).
Individual freedom invariably yielded to the needs of the community. In Athens, and throughout classical Greece, the polis took primacy over the individual. 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. 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. Athens therefore did not recognize rights in the Lockean sense. 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. The function of Athenian courts was not to protect

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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 benefited 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 DEMOKRATIA: 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. RAFLAUB, 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 DEMOKRATIA: A CONVERSATION ON DEMOCRACIES, ANCIENT AND MODERN,
the individual from the state, but rather to protect the community from the individual. 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. As the fourth-century orator Antiphon put it, “Anyone who ignores... [the laws] has destroyed the city’s greatest safeguard.”

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. 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. The congressional power of impeachment offers an ex post...
democratic check on the judiciary, at least in cases of extreme abuse of judicial authority. And finally, the People themselves, or their elected representatives, can overrule any constitutional decision of the Supreme Court by amending the Constitution, and they have done so, albeit infrequently. Thus, federal judges, while certainly the least democratically accountable of the national power-holders, nevertheless are at least somewhat tethered to popular consent. Judges are, in Richard Pildes’s phrase, only “semi-autonomous” 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 [t]he 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.

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. 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. 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. As Aristotle wrote in his Constitution of Athens, “when the people have the right to vote in the courts they control the constitution.”

The graphē paranomōn was a criminal indictment lodged in the dikastēria against a citizen for having proposed an unlawful decree (psēphisma) in the Assembly. 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; ÖBER, MASS & ELITE, supra note 24, at 145, 217.
190 LANNI, supra note 50, at 131; ÖBER, MASS & ELITE, supra note 24, at 145.
192 See id., ¶ 59.2, at 199 (discussing “indictments for illegal proposals”). For
Athenian law, the Greek word \textit{paranomón}, which translates literally as “against the law,” evokes the Americans usage of “unconstitutional.”

An Athenian \textit{nomos}, like an American constitutional provision, embodied a rule of general application that was regarded as paramount and permanent, or at least long-lasting.

A \textit{graphē paranomón} 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.

A decision by a \textit{dikastérion}
that a decree was paranomôn resulted in invalidation of the decree, as well as in punishment of the citizen who had proposed the decree.\textsuperscript{106}

Just as judicial review gradually became a prominent feature of American democracy, the graphê paranomôn evolved over the course of the classical era to become an essential democratic practice.\textsuperscript{197} The classical Athenians, like Americans today, appreciated that the rule of law was essential for a well-ordered political community.\textsuperscript{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.”\textsuperscript{199} The graphê paranomôn, like American judicial review, secured the stability and inviolability of the community’s highest law.\textsuperscript{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.\textsuperscript{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 “encompassed not only specific statutes but the entire social order, including . . . religious, moral, and political norms”).

\textsuperscript{106} 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 dikastêria might strip an offender of his citizenship rights (atimia), MACDOWELL, supra note 53, at 50; SCHWARTZBERG, supra note 106, at 59.

\textsuperscript{197} HANSEN, supra note 30, at 205, 208-09; SINCLAIR, supra note 30, at 68. Graphai paranomôn, 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 graphê paranomôn, see Sealey, Athenian Concept of Law, supra note 53, at 297-301.

\textsuperscript{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”).

\textsuperscript{199} Aeschines, Against Ctesiphon, in AESCHINES 166, 167-68 (Chris Carey trans., 2000).

\textsuperscript{200} OSTWALD, supra note 47, at 136; Sealey, Athenian Concept of Law, supra note 53, at 301.

\textsuperscript{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
2012] Popular Constitutionalism, Ancient and Modern 99

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; SEALY, 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).


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. 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. 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. 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.” Citizen standing also enforced the notion that many types of unlawful conduct injured the entire community and that it was a right (and responsibility) of each Athenian citizen to seek redress for such an injury. As Plato’s

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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.”  

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. Seen in this light, citizen standing was but one element of a judicial system that was thoroughly committed to amateurism and popular decision-making. 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. 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.

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

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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.


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.
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.”).
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).
in judicial review unless necessary to protect individual rights. 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

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 adjudge 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

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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 graphe paranomos 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). Thus, while Athenians who sought judicial enforcement of the law against offenders even though they had suffered no personal injury were model democratic citizens, Americans who file suit in such circumstances may seem antidemocratic.

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. 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. In the interest of democracy, each jury member possessed

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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.”

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.”

Popular decision-making in the dikastēria therefore was highly contextual and largely discretionary. The jurors explored the full range of circumstances surrounding a dispute before reaching decision.

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. Statutes tended not to delineate the elements of the conduct they made illegal. 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.”

Lanni, supra note 50, at 178.

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”).

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.

Lanni, supra note 50, at 87; see Todd, supra note 32, at 16.

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

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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. Louden & 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.\textsuperscript{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.\textsuperscript{263} Because the reformers understood judges to be agents of the People,\textsuperscript{264} it followed that judicial loyalty was owed more to the Constitution than to legislative acts.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{269} The Whig senator John Clayton, speaking in

\textsuperscript{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.”).

\textsuperscript{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.”).

\textsuperscript{264} Wood, Empire of Liberty, supra note 132, at 450-52.

\textsuperscript{265} Kramer, supra note 1, at 61-63.

\textsuperscript{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.”).

\textsuperscript{267} Kramer, supra note 1, at 63.

\textsuperscript{268} Id. at 58.

\textsuperscript{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.”

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. Madison’s essential objection was that, however beguiling theoretically, 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.” Madison believed that ordinary people, sitting in Athenian-style assemblies, would decide constitutional questions according to their “passions,” and not by exercising their “reason.”

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”).

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.

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.

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 δικαστεία did not explicitly grant federal courts the power of judicial review. 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. 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 1780s and imported them into the federal judicial power. For Marshall, judicial review was inherent in the courts’ constitutional responsibility to decide the cases that Article III assigned to them. Because the Constitution is “the fundamental and paramount law of the nation,” courts were obligated to enforce the Constitution over any conflicting legislative act (or executive action) at play in a case. And because courts must decide cases according to law, it was “the very essence of judicial duty” to interpret the applicable laws. From this confluence

275 State constitutions at the time typically were silent regarding judicial review as well. HAMBURGER, supra note 224, at 2.
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 113 (“Marbury did not stake out new territory in the theory of judicial review.”); William Michael Treanor, Judicial Review Before Marbury, 58 STAN. L. REV. 453, 460 (2005) (explaining that Marshall’s reasoning in Marbury “was fully consistent with prior judicial decisions in which courts had invalidated statutes that trenched 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 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

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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.”

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. 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. The conceptualization of constitutional decision-making (at least when individual rights are at stake) 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. 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.”

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

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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.”

American judicial review promises the opportunity, in Fisher Ames’ phrase, of a “sober, second thought” to ensure that the enduring values of American constitutionalism are not lost in the political tumult of the moment. American judicial review fits the founders’ conception of democracy, just as the graphē paranomēn 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.” 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 dēnos. The graphē paranomēn thus created an opportunity for the Athenian dēnos to check their own political decision-making for fidelity to higher law.
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.


\(^{303}\) Paul Cartledge, Comparatively Equal, in Dēmokratía: 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. 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. 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.

Direct democracies necessarily provide the People themselves substantially more control over their governance than any representative democracy could deliver. 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. American democracy, at least as conceived

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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. As I have argued, this was by design.

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, and at least for the Athenians, the concepts of citizenship and political participation were inseparable. 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).

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

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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. The role of ordinary citizens in America’s Madisonian democracy is minimal, at least in comparison with Athens.

Judicial review in Athens reflected the systematic design of governing institutions that guaranteed ordinary citizens a monopoly over the exercise of government power. 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. 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.

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.” Although the Athenians often designed their governing institutions with impressive subtlety, 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. 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 See 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. The American Constitution is the prototype of a governing system that, while democratic, seems designed to frustrate majority rule at nearly every turn. 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. 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.

325 "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 BREITSCHEIDER, 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. 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. 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” 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. 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.


332 For discussion of my definitions of strong and moderate popular constitutionalism, see supra notes 6-13 and accompanying text.
States. And yet contemporary proponents of strong popular constitutionalism disclaim any intention of reviving these forms of direct democracy as a replacement for judicial review. Nor have they proposed popular elections of judges as a second-best method of democratizing the federal judiciary, and thus judicial review. 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. Their strategy of infusing strong popular constitutionalism into the existing governing structure seems to lead inexorably to a claim of legislative supremacy, 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.

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-dikastēria 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. 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. To be sure, Dean Kramer places great faith in elections as “critical moments for expressing the people’s active, ongoing sovereignty.” 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.

Yet strong popular constitutionalists might plausibly argue that legislative supremacy or departmentalism remain preferable to judicial review because they are more democratic. 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. 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”).

Gewirtzman, supra note 5, at 911.

Kramer, supra note 1, at 197.

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”).

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.445 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.446 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.447 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.”448

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.449 It is incontestable that matters of law and politics are not as neatly separated in constitutional adjudication as Chief Justice Marshall implied in Marbury.450 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.451 But the undeniable intermixture of law and

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445 See supra notes 322-328 and accompanying text.
446 See Eisgruber, supra note 182, at 11 (noting that the American Constitution implements “non-majoritarian[] conceptions of democracy”).
447 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”).
448 Chemerinsky, supra note 3, at 690.
449 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.”).
450 See supra notes 280-295 and accompanying text.
451 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...
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. 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. It also fit well with the liberal project of protecting fundamental individual rights. Although the American practice of judicial review arose organically from the institutional power allocations that resulted from these offsetting commitments, 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.

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. Constitutional decisions also always are subject to popular reversal through the political process of constitutional amendment. 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.” Although judicial judgments are final in a particular case, judicial interpretations of the Constitution remain open to popular challenge through a variety of political processes.

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

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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; 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”).
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. In order to remain consistent with the framers’ Constitution, political influences on judicial decision-making should temper, rather than overwhelm, judicial review.

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. 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.”

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. Two leading moderate constitutionalists, Robert Post

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367 See supra notes 113-152 and accompanying text.
368 See Friedman, supra note 2, at 2013 (2003) (arguing that America has a “mediated” system of popular constitutionalism).
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.”

Judicial review stimulates, rather than stifles, public deliberation over constitutional norms.

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.” History has shown that the Justices and the People, while sometimes out of step, are always in dialogue, and ultimately move in the same direction. Only rarely has the Court been able to maintain constitutional interpretations in the face of sustained political opposition over the long term.

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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 swathes 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.