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ATHENIAN CONSTITUTIONALISM: *NOMOTHESIA* AND THE *GRAPHE NOMON ME EPITEDEION THEINAI*[1]

Abstract: This article investigates whether Athenian *nomothesia* and *graphe nomon me epitedeion theinai* created a system of checks and balances on legislative activity akin to modern 'constitutionalism'. Although Athens did not have a separate written constitution, the Athenians discussed new legislation, engaging with the existing laws as a coherent whole, 'as though there were a constitution' – in doing so they used and enforced constitutional arguments.

Keywords: Athenian *nomothesia*, constitutionalism, judicial review, Demosthenes, legislation

1. Introduction

As I was, in autumn 2016, checking the proofs of my then forthcoming commentary of Demosthenes' *Against Leptines* and writing its preface,[2] I realised that it would come out ten years after my first attempt, as a student in Turin, to come to grips with Athenian *nomothesia*. I also realised that ten years earlier I was at the same time spending a considerable amount of time campaigning for the upcoming Italian constitutional referendum – I was convinced that the constitutional reform enacted by Berlusconi's government was not *epitedeion*. On the 25th and 26th of June 2006 the reform was repealed. Ten years on, and I found myself finalising my commentary on the *Against Leptines* during another Italian referendum campaign, about another constitutional reform, once again campaigning against it, albeit from afar. I found this reform, once again, not *epitedeion*, and it too was rejected.

What struck me then, as I studied Athenian *nomothesia* while living the modern constitutional debates of our time, were the similarities between Athenian concerns

[1] This article is a (preliminary) attempt to answer some questions about Athenian *nomothesia* and constitutionalism that emerged in conversation with Pasquale Pasquino, over a dram at Sandy Bells, in Edinburgh, in January 2017. I thank him for a most pleasant and intellectually productive visit. I also thank the organisers of the Symposion 2017 in Tel Aviv for a very congenial conference, and all the participants for their comments and feedback. Finally, I thank Edward Harris and Alberto Esu for their notes on an early draft of this article. The translations from Dem. 20 and 24 are modified from those by Harris for the Texas Oratory of Classical Greece series.

[2] This is now Canevaro 2016 (preface at pp. VII-VIII).

and our own – different times, institutions and cultures, and yet one and the same commitment to what we normally describe as 'constitutionalism'. The core of constitutionalism, in both the Athenian variety and in our own, can be well represented, following Jon Elster's effective metaphor, with the image of Odysseus binding himself to the mast of his ship and ordering his crew to ignore his orders once they saw the sirens, were he to ask to be freed.[3] Odysseus uses his power and authority – his constituent power – to set limits on his power and authority at a later point – his constituted power. He , and whether or not later considerations of expediency, later desires or later calculations pre-commits to a series of rules and limitations that are to remain valid absolutely suggest otherwise. Likewise, in a constitutional state, popular sovereignty is not absolute, but exercised because of and within a constitutional framework. That constitutional framework finds its legitimacy in popular sovereignty itself, yet popular sovereignty is absolute only in the original constituent moment that gives rise to the constitutional order. It is no longer absolute as long as the constitutional state exists – constituted power is by definition bound by the constitutional order. A vote of the sovereign people – or of its representatives – is not enough, if it goes against the constitution.[4]

Within this analytical framework, the similarities between the Athenian example and modern constitutionalism are striking indeed. First, the Athenians in the fourth century BCE, like us, isolated higher order rules – *nomoi* – to which lower level enactments – *psephismata* – had to conform.[5] One of the laws enacted by the late-fifth-century *nomothetai* after the restoration of democracy stated that 'no decree, neither of the Council nor of the Assembly, is to have more authority than a law' (Andoc. 1.87; Dem. 23.218; 24.30; Hyp. *Ath.* 5.22: ψήφισμα δὲ μηδὲν μήτε βουλῆς μήτε δήμου νόμου κυριώτερον εἶναι).[6] Thus, the sovereign power of the *demos* in the Assembly was limited – bound by a set of higher order rules – and the *demos* could not freely enact anything it wished but was bound by those higher order rules. Second, the Athenians had a public charge that could be brought against a decree – a lower level enactment – that contradicted one of the existing laws: the *graphe paranomon*.[7] The case would be heard by a lawcourt, and whoever brought the charge had to state in the *graphe* – the written indictment – what *nomoi* exactly the *psephisma* contradicted (also appending the texts of the *nomoi* to the

[3] See Elster 1984: 36-111. Elster later criticised and qualified his own approach and the explanatory value of the analogy in Elster 2000: 88-174.

[4] The scholarship on 'constituent power' and 'constituted power' is enormous. See in particular Negri 1992; Loughlin-Walker 2007. See also Spång 2014; Loughlin 2014.

[5] For the distinction between νόμοι and ψηφίσματα see the classic articles Hansen 1978b; 1979; and now also Canevaro 2015.

[6] See Canevaro-Harris 2012: 116-119; Canevaro 2015; 2017: 215-216 for this law.

[7] On the *graphe paranomon* see the foundational studies: Wolff 1971; Hansen 1974. See also Yunis 1988; Sundahl 2000 and now Canevaro 2015 within the wider context of Athenian *nomothesia*.

graphe).[8] Likewise, there existed a further public charge (*graphe nomon me epitedeion theinai*) that could be brought against anyone enacting a *nomos* that was *me epitedeion*, understood as enacted not according to the correct procedures and in contradiction with existing *nomoi* that had not been contextually repealed.[9] We shall discuss this public charge further, but what matters here is that the *demos* could not enact *nomoi* as they pleased but had to conform to rules and procedures that were enforced through judicial review (see below).

Thus, the conformity of lower level rules to higher level ones (as well as the regularity and coherence of newly enacted higher-level rules, *vis-à-vis* the existing laws) was not simply assumed. It was also not just theoretically mandated and vaguely meant to be enforced by the power of informal norms within the Assembly (or the *nomothetai*), as would be the case in the kind of 'political constitutionalism' that is very popular in recent years in constitutional theory, in Britain and elsewhere. Within the 'political constitutionalism' paradigm, constitutional conformity is practiced and self-policed by the legislature itself, as a way to avoid the undemocratic pitfalls of expert judicial review (the so-called the counter-majoritarian difficulty).[10] In Athens, conformity was instead enforced by the courts, in what can only be described as a form of judicial review – a procedure that was intended and designed as such, with oaths binding the judges to assess issues of legality and vote on the matter itself, as defined in the indictment (e.g. Aeschin. 3.6; Antiph. 5.8; Dem. 20.118; Aeschin. 1.154; Dem. 45.50; cf. Aeschin. 1.170), and litigants not to speak *exo tou pragmatos* ([Arist.] *Ath. Pol.* 67; Antiph. 5.11).[11] This consideration, just to be clear, is quite independent from our assessment of the effectiveness of these rules and constraints. The existence of these institutional constraints is evidence that the process was institutionally meant to be a judicial review of new enactments, checking their conformity with the existing *nomoi* – that it was designed as such. There are different views, even in this very volume, on whether they were effective, and therefore whether the review of new enactments in the lawcourts was actually capable of securing their legality as conformity to the existing *nomoi*.[12] We should separate, for the time being, the issue of how

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8 On the *engklema* and the *graphe*, and the requirement to append the contradictory laws, see Harris 2013a: 114-136; 2013b (particularly 121-122 on the *graphe paranomon*); Faraguna 2015; Canevaro 2016b: 50-53.

9 On the *graphe nomon me epitedeion theinai* see now Canevaro 2016a: 12-32; 2016b.

10 Influential statements of 'political constitutionalism' can be found in Tomkins 2005; Bellamy 2007; Gee-Webber 2010; all influenced by Griffith 1979.

11 For the function of these rules and procedures see e.g. Thür 2008, and particularly Harris 2013a, a *summa* of his work on the topic: an analysis of the Athenian legal system as based on the ideal of the rule of law and designed to implement this ideal.

12 On the issue of whether these charges qualify as judicial review see in particular Lanni 2010; Pasquino 2010; Schwartzberg, 2013. Those who deny that they were a form of judicial review rely on a view of Athenian legal procedure which minimises the importance of actual legal considerations and the enforcement of the laws to privilege

institutions and procedures were used from that of the purpose for which they were designed, and of how they were intended to be used – all the more so because even in our modern constitutional states these issues can hardly be conflated into one, and the (alleged) misalignment between the original purpose of constitutional judicial review and its current use is one of the most hotly debated issues in modern constitutional theory and practice.[13]

Ten years ago, I was struck by the undeniable similarities between the Athenian model and the modern concerns of constitutionalism. Ten years on, in this article, I am more preoccupied with, and puzzled by, the differences, worried on the one hand of pigeon-holing Athens as corresponding to a particular variety of modern constitutionalism, obscuring therefore what is distinctive about its 'constitutionalism', and on the other of overemphasizing the differences and missing opportunities for comparison and enhanced understanding.

One key difference is in the very nature of the higher-level rules that are protected (and enforced) through judicial review. In modern constitutionalism these higher-level rules, whether they are written down in a written constitution, as in Italy, Germany or the USA, or are derived from a body of statutory law and legal interpretation that has achieved 'constitutional' status, as in the UK, are a selection of the laws of the land, normally (but not invariably) confined to defining the architecture of the state, the basic rights of the citizens and little more. Constitutional judicial review is concerned with these 'constitutional' rules – with the coherence of whatever is done or enacted within the state with these

ad hoc extra-legal and political considerations. In these interpretations, because the courts were manned by the *demos* and did not strictly-speaking enforce the laws, these procedures were more akin to bicameralism (on these positions see below). As I believe that the institutional role of the courts was very different from that of the Assembly, the Council and the *nomothetai* (which were deliberative bodies, see Canevaro 2014: 279-284 on the Aristotelian distinction, and Harris 2006: 29-40 on the background of that disticntion), and that the courts were (meant to be) concerned with the law, the *graphe paranomon* and the *graphe nomon me epitedeion theinai* qualify for me as forms of judicial review. In the following pages I clarify this position further. A synthesis of my position on the role of the courts can be found in Canevaro 2018c.

13 For a useful synthesis of modern debates on the rule of law, see Tamanaha 2004. For contradictions and short-comings5 in the practice of the rule of law (with particular focus on legal certainty) see e.g. MacCormick 2004 and Waldron 2011. On the key difference between the aims of an institution and the way it is used by actors, see e.g. North 1990: 4-5: 'Conceptually, what must be clearly differentiated are the rules from the players. The purpose of the rules is to define the way the game is played. But the objective of the team within that set of rules is to win the game – by a combination of skills, strategy, and coordination; by fair means and sometimes by foul means. Modeling the strategies and skills of the teams as they develop is a separate process from modeling the creation, evolution, and consequences of the rules. […] Separating the analysis of the underlying rules from the strategy of the players is a necessary prerequisite to building a theory of institutions' (cf. Harris 2018b: 53-54 n. 45).

'constitutional' laws. The rest is ordinary law, and the divide between 'constitutional' law and ordinary law is (from a procedural and a substantive point of view) fundamentally starker than that between different kinds enactments, legal interpretations with the force of law, or executive and administrative orders.[14]

Conversely in fourth-century Athens the big divide, as shown some forty years ago by Mogens Hansen in two now classic articles, was between *nomoi* as general permanent rules binding on all, on the one hand, and *psephismata* – decrees enacted for individual persons or for specific situations at a particular time, and valid for a limited time – on the other.[15] All general permanent rules – *nomoi* – were conceptualized as higher-level rules and accordingly enacted through a different procedure (*nomothesia*), composed of several more steps, checks and counterchecks (see below). And all were binding on lower-level enactments (*psephismata*), which, in accordance with the law I quoted earlier, could never have more authority than a *nomos*. Thus, a decree of the Council or of the Assembly was not simply meant to be consistent with a specific body of rules to do with the architecture of the state and the basic rights of the citizens. It was meant to be consistent with every single piece of existing and valid legislation ever enacted in Athens. And a public charge for illegality (*graphe paranomon*) could be brought against anyone proposing a decree that somehow contradicted any clause of any existing *nomos*, regardless of whether that *nomos* laid out the powers and duties of particular magistracies, set out the rights of a citizen or a metic, established the principle of *res iudicata*, or, more trivially, determined the structure of the financial budget of the city (as the *merismos*, and several amendments to it, did), established degrees of *anchisteia* for inheritance purposes, created a particular tax, or regulated a particular sanctuary.[16]

Therefore, although judicial review indeed protected higher-level rules that were written down, it is far from straightforward whether this judicial review was a form of 'constitutional' judicial review, because it is far from straightforward whether these higher-level rules formed a 'constitution' in any meaningful sense. Several scholars have struggled with this issue, many have disagreed substantially, while at the same time independently illuminating several features of the Athenian model. Raphael Sealey famously stated in 1987 that the Athenian *nomoi* served as a *sui generis* constitution, because not only decrees, but also new *nomoi* had to conform to them. Thus, *nomoi* would be at the same time 'ordinary legislation' and 'constitutional law', at least in the sense that they are higher-order rules constraining legislation (which is, however, also meant to provide higher-order

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[14] On the status and contents of constitutional law (and various approaches to defining it) see e.g. Ginsburg-Dixon 2011: 4-5. On the interplay between constitutional law and ordinary law see Michelman 2011. On how 'comprehensive' constitutions are and should be see e.g. Grimm 2012: 105-109.

[15] Hansen 1978; 1979; see now also Canevaro 2015.

[16] Cf. Sealey 1987: 32-34.

rules). Previously, and more perceptively, Hans Julius Wolff, in 1970, in what is still to this day the most illuminating study of these issues and procedures, stressed the importance of arguments from principle in cases of *graphe paranomon* and *graphe nomon me epitedeion theinai*: in this sort of cases the Athenians extracted, by way of legal argument, higher principles from the existing laws, elevating thus through legal argument ordinary law to a higher status akin to that of constitutional law. Arguments from principle were essential for declaring that a *psephisma* was *paranomon*, or that a new *nomos* was not *epitedeios*.[17]

As it will become clear from the rest of my paper, I believe that Wolff was fundamentally correct – arguments from 'constitutional' principles were central. Yet a number of objections have been brought against his arguments over the years. Hansen, only some five years after the publication of Wolff's study, side-lined the issue of *Normenkontrolle* and argued that *graphe paranomon* cases were primarily political trials, in which legal (and 'constitutional') considerations were always secondary. Yunis somewhat arbitrarily drew a line between 'legal' and 'political' arguments (bringing to the fore the issue of 'relevance'). Adriaan Lanni has in recent years drawn attention once again to issues of principle, but in a minimalistic fashion, stressing that *graphe paranomon* and *graphe nomon me epitedeion theinai* trials were mostly about the protection of the fundamental democratic prerogatives in legislation and adjudication. At the other end of the spectrum, Benjamin Straumann has stressed instead the centrality of arguments of detail, about minute contradictions with particular existing laws, in what he has termed 'formal constitutionalism'.[18] Two important articles by Mark Sundahl, both stemming from his unpublished doctoral thesis, represent perhaps the most thoughtful recent contribution to our understanding of these issues.[19] Sundahl has relied on a painstaking collection of all the arguments in cases of *graphe paranomon* and *graphe nomon me epitedeion theinai* based on laws that were actually read out by the *grammateus*, and noted that arguments from principle are considerably less prominent than assumed by Wolff, whereas arguments about procedural infractions or minute contradictions with existing laws are the most widespread. In the first article, he concluded that there was no Athenian 'constitution' in any meaningful sense, and that the indeterminacy of Athenian laws limited substantially the effectiveness of judicial review, so that *graphe paranomon* and *graphe nomon me epitedeion theinai* failed to curtail the power of the *demos* (and therefore can hardly qualify as tools of constitutionalism). In the second article, he gave more weight to arguments from principle, and read these as joined in a virtuous circle with the alleged indeterminacy of Athenian laws to create a 'living constitution', one that

[17] Again, Sealey 1987: 32-34; Wolff 1970.

[18] Hansen 1974; Yunis 1988; Lanni 2010; Straumann 2016: 227-237. See also Schwartzberg 2007; Pasquino 2010; Carugati-Calvert-Weingast 2016.

[19] Sundahl 2003; 2009, both based on Sundahl 2000.

seamlessly updated itself as time went by – a weak but not insignificant constraint on the power of the *demos*.

I owe several insights to these scholars (and to others who have contributed to this debate), at the same time disagreeing with them on various issues. Yet the variety of their approaches means that any attempt on my part to engage systematically with their arguments and reconstructions would make it very difficult for my own argument to emerge. I shall rather present my argument based on a close analysis of the sources and noting important agreements and disagreements with earlier treatments as they occur in my discussion (but by no means exhaustively).

My argument will concentrate on the two extant speeches for *graphe nomon me epitedeion theinai* cases: the *Against Leptines* and the *Against Timocrates*. This choice is justified by another key (and puzzling) difference between the Athenian model and modern constitutionalism, one that has to do not exclusively with what is 'constitutionally' normative in judicial review, but with how the 'constitution' evolves and is amended and updated. In modern constitutional states, to use the typology of forms of legal change provided by Schwartzberg, a constitution can be changed, short of 'constitutional revolution' (a complete overhaul of the constitutional order that normally follows political revolution), in two ways: through 'constitutional amendment' and through 'interpretive change'.[20] Constitutional amendment follows a variety of models in modern constitutional states, but normally involves some form of supermajority vote in the legislature, an extended timescale, and sometimes referenda – the procedures are more complex than those needed to enact or modify normal legislation.[21] Constitutional amendments are rare, because they are difficult to pass – the two constitutional reforms rejected in Italy in the last decade are a good example of this. Interpretive change on the other hand is more common, it is practiced by constitutional courts in the UK, in the US, in Italy, in Germany and elsewhere, and can change the meaning and the implementation of the constitution without formally altering it – through the process of legal interpretation by a constitutional court whose pronouncements become binding and part of the constitution itself (there is much debate, in the US in particular, on this practice, on how democratic it is, and on the latitude that is appropriate in constitutional interpretation, with 'originalist' approaches fighting it off with 'living constitution' approaches).[22] Constitutional amendment and

[20] Schwartzberg 2007: 3-8. Because Schwartzberg is concerned with legal change *tout court* and not with constitutional change only, she adds also the category of 'legislative (statutory) change'.

[21] For a typology of constitutional amendment rules see Elkins-Ginsburg-Melton 2009 and synthetically Dixon 2011.

[22] The literature on constitutional interpretation and constitutional courts is enormous. For summary discussions in comparative perspective see Goldsworthy 2012; Stone Sweet 2012. For the most influential approaches to the issue of the compatibility of

interpretive change do not, however, act concurrently and at the same time. Constitutional judicial review, that is, does not apply to constitutional amendments: a constitutional amendment is by definition a modification of the current constitutional text, which contradicts it somehow (hence the amendment), and therefore, *a fortiori*, its consistency with the constitutional text as it is cannot be a parameter for its acceptance and enactment.

The Athenian model is, in this respect, very distinctive. On the one hand, interpretive change was not *per se* available to the Athenians as a means of constitutional reform, at least, not in the long run – Harris has demonstrated that precedents in Athenian courts were important, widely used, and had strong persuasive power as to the interpretation of statutes, but they did not *per se* have the force of law.[23] On the other hand, the two mechanisms (constitutional amendment and judicial review) appear to have been both integrated in the same procedure for the enactment and modification of the higher-level rules (*nomothesia*) – this involved both a procedure for changing *nomoi* and judicial review of new *nomoi*.

It is the aim of this article to provide a preliminary discussion both of the issue of whether we can talk in any meaningful sense of Athenian 'constitutionalism', and of that of the relation between 'constitutional amendment' and 'constitutional judicial review. In Section 2 I discuss the procedure of *nomothesia* and the function of the *graphe nomon me epitedeion theinai* as it was understood by the Athenians. In the third section I pursue the question of whether the Athenians, in cases of *graphe nomon me epitedeion theinai*, made use of 'constitutional' arguments – whether their cases for or against particular laws were actually 'constitutional'. In the conclusion I turn to the issue of the relation between constitutional judicial review and constitutional amendment within the procedures of *nomothesia*.

2. *Nomothesia* and *graphe nomon me epitedeion theinai*

In this section I summarise the procedures of *nomothesia* according to my own reconstruction – this provides the background for the rest of the discussion.[24]

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constitutional judicial review with democracy, see e.g. Waldron 2006; Dworkin 1996; Habermas 1996: 238-286. On 'originalism' and 'living constitution' approaches to constitutional interpretation, see Sundahl 2009 (for a discussion with reference to Athens), and e.g. Bennett 2012 for a synthesis of the various positions.

23 Harris 2013a: 246-273. Cf. Rubinstein 2007, who fails however to distinguish between 'legal precedents' and general references to past trials. Lanni's (2004; 2006: 118-128) position that precedents played close-to-no role in Athenian courts is untenable.

24 Canevaro 2013a: 37-76; 2013b; 2016. My reconstruction has been recently challenged in Hansen 2016a, 2016b, which reinstate Hansen's reconstruction as found in Hansen 1985. I have dealt with Hansen's arguments in detail in Canevaro 2018a, also adding further arguments in support of my reconstruction. As I concentrate in this article on a particular step of the procedure, the *graphe nomon me epitedeion theinai*, on which our disagreements are less stark, my argument should stand even were one to agree with Hansen rather than with me.

Afterwards, I discuss specifically the procedure of *graphe nomon me epitedeion theinai*, and the conception of the laws of the city that it reflects. My argument is that the laws of the city were understood as a coherent and rational whole unified by a common *ethos* – by principles that can be understood as 'constitutional'.

2.1 The procedure of *nomothesia*

In fourth-century Athens, to pass a law, the *demos* first acted in the form of the Council of Five Hundred, selected by lot. The Council set the agenda for the Assembly and could be persuaded to put lawmaking (as the production of new laws – general permanent rules) in the agenda of the next Assembly. At that point, the Assembly (composed potentially of the whole *demos*, and in any case very rarely of fewer than 6,000 people) held a preliminary vote not on new law proposals, but on whether laws could be proposed at all. The institutional setup was such that the first vote in the Assembly was not on a particular solution, but on whether the *demos* recognised that there was a problem that needed solving through legislation. If the vote was successful, then volunteers could propose new laws, which had to be widely publicised for a month. At the end of the month, the Assembly would set a date for the meeting of the *nomothetai* to enact new laws. There was however a concern for the coherence of the laws of the city. Thus, before enacting new laws, the proposers had to repeal all existing contradictory laws, arguing that their new laws were more *epitedeion* ('appropriate', 'fit' to be laws of the city, as we shall see) than the ones they were repealing, and this needed to happen not in the Assembly, but in a lawcourt, against advocates of the contradictory laws elected by the Assembly at the end of the 'publicity' month. Once this was done, there would be the session of the *nomothetai*, and the *nomothetai* would finally approve the new law(s). But this was not the end: if it turned out that the proposer had not followed the correct procedure to the letter, had not properly publicised his proposal, or had failed to repeal a contradictory existing law, then anyone could bring a public charge against him (a *graphe nomon me epitedeion theinai*), and he (and his bill) would be judged by another lawcourt, in a form of judicial review.

This procedure is at the same time one for the promulgation of ordinary laws (and for legal change) and, apparently, one of constitutional amendment – if, that is, the laws of Athens formed in some meaningful sense a 'constitution'. It lays down in detail how one can introduce, repeal or modify a higher-level rule (*nomos*). The higher-level rules are not implicitly changed through legal interpretation; they are actively changed through legislation. Yet, at the same time, it contains steps that introduce requirements of judicial review, to check that newly-proposed laws are not contrary (*enantios*: Dem. 24.32, 34) to the existing ones (always in the plural, to mark their totality – Dem. 24.32: πᾶσιν ἐναντίον […] τοῖς οὖσι νόμοις; Dem. 24.34: τοῖς ὑπάρχουσι νόμοις ἐναντίον).

2.2 The meaning of *epitedeion* and the coherence of the laws

The very name of the public action – *graphe nomon me epitedeion theinai* – gives us some guidance as to what the law meant when it stated that a new *nomos* should not be *enantios* to all the existing laws. As Rubinstein noted, the term *epitedeios* had probably *per se* a certain degree of flexibility. Yet, as Harris has shown, despite the reality of 'open texture' in Athenian statutes, the Athenians tended to adhere to a 'standard' meaning of legal terms (when available) and rejected interpretation that strayed too far from those normally accepted. The interpretation of *epitedeios* then depended both on what the widely-understood semantic range and boundaries of the term were in common usage, and on the kind of arguments for its interpretations that were commonly made in Athenian courts, constrained by the kind of procedure and institutional environment involved, and of course by the law that governed the procedure.[25] In this section I give a few examples that can help us define the paradigmatic meaning of the term generically – what it means to be *epitedeios*. I then turn to its usage in Athenian legal discourse to show how it was interpreted in connection with legislation – how it intersected with the requirement of enacting laws that were not *enantioi* to the existing ones. We shall then see (below) that the *Against Timocrates* and the *Against Leptines* show a common and 'standard' understanding of its implications – one that points to the need for 'constitutional' arguments.

But first some words about the origin of the procedure, and of its name. The *graphe nomon me epitedeion theinai* had been created at the end of the fifth century in connection with the new distinction between *nomoi* and *psephismata*, and was reserved to *nomoi* (while the *graphe paranomon*, which predated the reform, was modified and was henceforth reserved for *psephismata*).[26] The different terminology seems to point to different requirements of proof, with the *graphe*

[25] See Rubinstein 2000: 42-43 and n. 48 and Kremmydas 2012: 48-49 on flexibility, and Harris 2013: 175-245 on 'open texture' and possible interpretations of statutes. Rubinstein and Kremmydas probably exaggerate, however, the level of flexibility in the interpretation of the term *epitedeios* – Kremmydas for instance states that a law could be deemed not to be *epitedeios* 'on ethical, ideological, or pragmatic grounds' and that 'this is stretched to encompass allegations of illegality (in form or substance) and expediency'. For this reason, the term was particularly suited to mark the arguments of a *graphe nomon me epitedeion theinai*, between legal and deliberative (here the term overlaps, allegedly, with *sympheron*, see below). See also Yunis 1988: 369 n. 29 and Lanni 2010: 241. What Kremmydas says is correct for the term itself, but this does not mean that it did not acquire a better defined legal colouring and meaning in a legal context (and given the relevant law) – its usage in *graphe nomon me epitedeion theinai* cases is more consistent than has been acknowledged. More generally, Kremmydas (and to some extent Rubinstein) treat the interpretation of the term as constrained almost exclusively by the contextual argumentative strategies (in a given case and speech). I argue here that there was a shared and rather clear understanding of what *epitedeios* implied in cases of *graphe nomon me epitedeion theinai*.

[26] See above nn. 7-8 and Canevaro 2015.

paranomon focusing on *paranomia* ('illegality', 'unlawfulness', 'inconsistency with the existing laws').[27] Accordingly, *nomon me epitedeion theinai* is often translated as 'not to enact a law that is advantageous' or 'expedient' (in addition to the more correct 'suitable'), which elides the centrality of the laws in defining what is or is not *epitedeios*.[28] As shown by Kremmydas (and already noted by Quass), the issue of *paranomia* was in fact central to both procedures – while the term *epitedeios* is rare in *graphe paranomon* speeches, *paranomos* is widespread in both kinds of speeches.[29]

Such translations often attempt to stress the alleged dualism of the requirements of proof of this procedure, between legal and deliberative.[30] Dem. 24.68-70 is in fact the only passage that appears to define *epitedeios* specifically along these lines: a law δεῖν τὸν ὀρθῶς ἔχοντα νόμον καὶ συνοίσειν μέλλοντα τῷ πλήθει.[31] Note however that this definition does not in fact explain just *epitedeios*, but is introduced by: ὡς τοίνυν οὐδ' ἐπιτήδειον νόμον ὑμῖν οὐδὲ συμφέροντ' εἰσενήνοχεν, τοῦτ' ἤδη πειράσομαι νυνὶ δεικνύειν. It appears that ὀρθῶς ἔχοντα applies to *epitedeios*, and συνοίσειν μέλλοντα τῷ πλήθει applies, as one would expect, to *sympheron* (and therefore is not presented by Demosthenes as an explanation of *epitedeios* specifically), and that therefore legal and procedural 'correctness' are particularly associated, even here, with *epitedeios*. This is not to deny that arguments about *to sympheron* were common in this kind of speech – they were (e.g. Dem. 24.77; Dem. 20.1, 163), of course: because the topic was a law that had been enacted, and enacting laws was a key feature of the deliberative function, to do with *to sympheron*,[32] it was inevitable that the actual purpose of the law would enter the equation. But *epitedeios*, specifically, was connected to the requirement that a new law should not be τοῖς ὑπάρχουσι νόμοις ἐναντίον (Dem. 24.34).

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27 Cf. e.g. Sundahl 2000: 86-87; he hastens however to nuance the distinction.

28 E.g. Canfora 2000: 489 and *passim* ('vantaggioso'); Liddel 2007: 150 ('useful'); Harris 2008: 47, 49 ('expedient', 'inexpedient'); Kremmydas 2012: 127, 163 and *passim* ('expedient').

29 Kremmydas (2012: 48-9); cfr. Quass (1971: 27).

30 See also above n. 25. The stress on this alleged dualism (as intrinsic to the requirements of proof of the procedure, and not a by-product of the fact that the topic is still, after all, the enactment of a law, i.e. a deliberative issue addressed from a legal angle) has given rise to a long debate on what was the decisive element, and what was secondary. Wolff 1970: 13-14, 60-64 focused on legal issues and argued that extra-legal arguments (very narrowly understood) were irrelevant; Hansen 1974: 71-72 argued that political arguments were *per se* sufficient to make the case, without any need of dealing with the issue of *paranomia*; Yunis 1988: 364-370 drew a sharp distinction between legal and political arguments, but argued that they were both essential.

31 But see Rubinstein 2000: 42-43 n. 48 on this passage – the orator's interpretation here is instrumental to the argument of the speech: demonstrating that Timocrates' law is unaccaptable and needs to be repealed.

32 See Canevaro 2016a: 71-76; 2014: 281-284 on the prerogatives of the deliberative function.

To establish the implications of the connection between the term *epitedeios* and this requirement for consistency in the relevant law, I shall now discuss a few telling passages that illustrate the generic meaning of *epitedeios*. The term does not denote generic 'usefulness', but rather 'appropriateness' in reference to a particular defined context or purpose – 'alignment' to something specific. One rather typical example is found at Pl. *Resp*. 390b, where, after a quotation of Hom. *Od*. 9.8-10, we find the rhetorical question: δοκεῖ σοι ἐπιτήδειον εἶναι πρὸς ἐγκράτειαν ἑαυτοῦ ἀκούειν νέῳ; The verses are suited (or not) for a particular purpose: πρὸς ἐγκράτειαν. It is by reference to that criterion that something is here described as *epitedeios* or otherwise (cf. Pl. *Resp.* 390a: οὐ γὰρ οἶμαι εἴς γε σωφροσύνην νέοις ἐπιτήδεια ἀκούειν − here the reference point is εἴς γε σωφροσύνην). In the same way, when Hdt. 6.102 comments that ἦν γὰρ ὁ Μαραθὼν ἐπιτηδεότατον χωρίον τῆς Ἀττικῆς ἐνιππεῦσαι, the notion is that Marathon is particularly 'fit', 'suited' for a particular purpose: riding horses. Likewise, at Hdt. 9.2, the Thebans tell Mardonius that οὐκ εἴη χῶρος ἐπιτηδεότερος ἐνστρατοπεδεύεσθαι than Boeotia (cf. Thuc. 2.20.4: ὁ χῶρος ἐπιτήδειος ἐφαίνετο ἐνστρατοπεδεῦσαι). Once again, the term *epitedeios* acquires its poignancy in connection with a reference purpose or context. The same meaning is conveyed at Hdt. 3.134.5, where Atossa says to Darius of Democedes the physician: ἔχεις δὲ ἄνδρα ἐπιτηδεότατον ἀνδρῶν πάντων δέξαι τε ἕκαστα τῆς Ἑλλάδος καὶ κατηγήσασθαι. The man, once again, is fit for a particular purpose: guiding and instructing Darius about Greece. Thuc. 8.63.4 uses the term in a way that gets closer to its implications in the expression *graphe nomon me epitedeion theinai*: here the Athenian democrats in Samos decide to leave Alcibiades alone, deeming that οὐκ ἐπιτήδειον αὐτὸν εἶναι ἐς ὀλιγαρχίαν ἐλθεῖν. Here the reference point is Alcibiades' character, past and credentials, which made him 'unsuited' to holding oligarchic sympathies, and therefore unlikely to join the oligarchs. This usage resembles examples from Demosthenes' *Against Leptines* (Dem. 20.83) which rely on the alignment of the *ethos* of laws, lawgiver and *politeia* (see below and section 3.1).

Moving on to oratorical texts, [Andoc.] 4.25 highlights how the meaning of *epitedeios* – 'fit', 'suitable', 'appropriate' – made it a possible choice also for referring to dynamics of desert and retribution. We read in that passage: ἐξ αὐτῶν δὲ τούτων ἐπιδείξω αὐτὸν ἐπιτηδειότερον τεθνάναι μᾶλλον ἢ σῴζεσθαι. Here Alcibiades is 'fit for death' – given his behaviour, and in reference to the laws governing the death penalty, death is a suitable penalty for him (cf. [Andoc.] 4.36: οὐ δήπου, ὦ Ἀθηναῖοι, ὀστρακισθῆναι μὲν ἐπιτήδειός εἰμι). Likewise, Lys. 30.24 argues that those who are particularly skilful speakers should particularly be punished for their wrongdoings, and asks: τίς οὖν τῶν ἐν τῇ πόλει ἐπιτηδειότερος Νικομάχου δοῦναι δίκην; Here, once again, *epitedeios* indicates 'suitability' with

reference to a standard – the standard described in the previous sentence governs the 'appropriateness' of Nicomachus' punishment.[33]

The term is rarely found in Attic inscriptions, never with reference to the *graphe nomon me epitedeion theinai*. But the meaning implied by the extant examples is also in line with what I have described so far – the issue is 'appropriateness', 'suitability', 'fitness' for a particular reference context or purpose. The most common usage is found in a series of inscriptions from the second century BCE (e.g. *IG* II^2 977 ll. 17-20; 1006, ll. 48-9; 1011 ll. 72, 81-2): 'the secretary of the prytany' is ordered to 'inscribe this decree on two stone stelai and erect one in the agora and the other where it seems appropriate' (ἀναγράψαι [δὲ τόδε τὸ ψήφισμ]α τὸν γραμματέα τὸν κατὰ πρυτα[νείαν ἐν στήλαις λιθίναις δυσὶν καὶ στῆσαι μ]ίαν μὲν ἐν ἀγορᾶι, τὴν δὲ ἑτέ[ραν οὗ ἂν ἐπιτήδ]ειον εἶναι φαίνηται). Here the meaning is quite literally (and spatially) that the stele should be erected where it 'fits' – the reference context is the inscriptional landscape of second-centruy Athens, with its norms and habits (cf. e.g. IG II3 1, 1281, ll. 2-3, στῆσαι δὲ αὐτοῦ καὶ] εἰκόνα χαλκ[ῆν ἐν Ἀθήναις ὅπου ἂν δόξηι ἐπιτήδειον εἶναι). Particularly telling are the occurrences of the term in the late 'code of the Iobacchoi' (*IG* II^2 1368 ll. 32-7, from the second century CE), and in the decree of Aristoteles which set up the Second Athenian League (*IG* II^2 43 ll. 31-5, from the fourth century BCE). In the later text we read: μηδενὶ ἐξέστω ἰόβακχον εἶναι, ἐὰν μὴ πρῶτον ἀπογράψηται παρὰ τῷ ἱερεῖ τὴν νενομισμένην ἀπογραφὴν καὶ δοκιμασθῇ ὑπὸ τῶν ἰοβάκχων ψήφῳ, εἰ ἄξιος φαίνοιτο καὶ ἐπιτήδειος τῷ Βακχείῳ. To become a new member, one needs to be 'fit' to be a Iobacchos – he needs to show certain characteristics (a certain *ethos*, see below) defined with reference to the existing organisation and its members. In *IG* II^2 43 ll. 31-5 we find instead the term ἀνεπιτήδειοι used of existing στῆλαι in Athens whose provisions are 'not suited' to the terms of the new alliance – they are inappropriate given this new alliance, and therefore need to be destroyed. Here the usage of the term approaches its meaning in the context of the *graphe nomon me epitedeion theinai*: these decrees are ἀνεπιτήδειοι ('unsuitable', 'inappropriate') because they are inconsistent with the terms of the new alliance, in the same way as a new law is not *epitedeion* if it is τοῖς ὑπάρχουσι νόμοις ἐναντίον.[34]

Thus, because something *epitedeios* was understood as something that fit within a reference context – something 'appropriate', 'suitable', 'fitting' to that reference context – a *nomos* which was not epitedeios was defined by the relevant law (cf. Dem. 24.32, 34) as one that did not fit within the reference context of the

[33] The same meaning is found at Xen. *Anab.* 2.3.11, where Clearchus, whenever he thought that a man was shirking his duty, ἐκλεγόμενος τὸν ἐπιτήδειον ἔπαισεν ἄν. The man deserved to be hit with a blow: given his duties and his behaviour, it was 'suitable' for him to be punished.

[34] I thank Michele Faraguna, who pointed out to me how relevant this particular usage is for my interpretation.

laws of the city, and in that sense it was *enantios* to all of them, to the laws in their entirety. The *graphe paranomon* was mostly concerned with securing the hierarchy of *nomoi* and *psephismata* (no *psephisma* can have higher authority than a *nomos*, no *psephisma* can contradict a *nomos*), and therefore could in principle make do with showing that a *psephisma* directly contradicted a higher-level rule (*nomos*). The *graphe nomon me epitedeion theinai*, on the other hand, had to do with higher-level rules only (with no easy hierarchy of enactments to enforce), and with what kind of law was appropriate to be one of the laws of Athens. Thus, higher-level rules were introduced and modified through a complex procedure of legislative amendment, yet new laws still had to be consistent with the existing laws as a whole – they had to be 'fit' to be Athenian laws, which implies the construction of an understanding of what is distinctive about Athenian laws.

This point is made very effectively in Aeschines' *Against Timarchus* (1.5-37), in a long section in which he lists a series of Solonian laws (Solonian because Aeschines explicitly attributes them to Solon) to show that Timarchus' behaviour is against everything the laws of Solon prescribe and hold dear.[35] Significantly, this long list of ancient laws, whose authority is built on the figure of the ancient lawgiver, Solon, ends with a new law, recently proposed. Aeschines starts his discussion (Aeschin. 1.6) stating that 'My belief is that whenever we enact laws, we should be concerned with how to make laws that are good and advantageous for our *politeia*' (Aeschin. 1.6, προσήκειν δὲ ἔγωγε νομίζω, ὅταν μὲν νομοθετῶμεν, τοῦθ' ἡμᾶς σκοπεῖν, ὅπως καλῶς ἔχοντας καὶ συμφέροντας νόμους τῇ πολιτείᾳ θησόμεθα). New laws, to be good laws, need to be consistent with the existing laws, in the sense that they need to align themselves with, and reinforce, the *politeia*. At Aeschin. 1.33-4, after a list of laws attributed to Solon himself, Aeschines mentions a further one which gives a different tribe the task of presiding over the platform at each Assembly meeting and policing decorum, and which, he claims, was proposed because of Timarchus' shameless behaviour at the *bema*. He states that its provisions, spirit and aims are perfectly consistent with those of the laws of Solon discussed in the previous section. Because of this, the new law, according to Aeschines, deserves a place next to the ancient laws he has just discussed, despite having been indicted through a γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι by Timarchus and other speakers of the same sort (it was in fact retained, as we learn from Aeschin. 3.4). The law, that is, was judged to be *epitedeios* by a lawcourt because its provisions, spirit and aims were judged to be perfectly consistent with those of the ancient laws of Solon. Because of this, it was fit to enter among the laws of Athens – because it replicated the *ethos* of the existing laws (on which see below).

[35] Cf. the discussion of Thomas 1994: 123, about this passage and Solon as the blueprint of the laws of Athens; see now also Canevaro 2018b: 288-290.

The same understanding of legislation as governed by a requirement of coherence with something that is distinctive of the laws of Athens is witnessed by a metaphor used both in the *Against Timocrates* and in the *Against Leptines*. The most extended version of the metaphor is found at Dem. 24.213-14, where it is attributed to Solon himself, who is said to have allegedly (and anachronistically) employed it in a speech for a *graphe nomon me epitedeion theinai*.

> Thus if someone debases the currency of the city and introduces a counterfeit coin, the judges ought to despise and punish him much more than if someone debased the currency of private citizens. He added, to prove that corrupting the laws is a worse crime than counterfeiting money, that although many cities clearly using coins mixed with bronze and lead have survived and suffered no harm at all, none of those that use bad laws and allow the destruction of existing laws has ever survived.

The parallel between coinage and legislation (*nomisma* / *nomos*) is interesting on many levels,[36] but for our purpose here it is particularly revealing in that it conceptualises enacting a bad law as introducing an extraneous item (a counterfeit coin, with different metal value) into an otherwise perfectly identical (that is, coherent) series, with the result of ruining the reliability (and therefore the value) of the whole series. The laws of Athens are understood as, in some respect, all the same, perfectly coherent. And new laws are meant to fit seamlessly among the existing ones, sharing whatever it is that is distinctive of the laws of Athens. Otherwise, they are meant to be declared not *epitedeion*.

My argument in the following section is that, because of this way of conceptualising legislation, arguments on whether a law was *epitedeion* did not stick to the level of its consistency with particular statutes (or of the procedural regularity of their enactment), but needed to move to that of its coherence with the laws as a whole, that is, with the *ethos* of the laws, which had to be shared by the lawgiver himself, for him to be able to enact *epitedeioi nomoi*. Thus, at Dem. 20.83, Demosthenes makes the point that, in deciding the case, the Athenians are not just deciding whether the law of Leptines is *epitedeios*, but whether they are *epitedeioi* – whether they are 'fit', 'suited' to receiving services from benefactors who rely on the *ethos* of Athens being maintained, and on the Athenians and their laws coherently sharing it. And, accordingly, at Dem. 20.13-14 he makes the point that Leptines' *ethos* is shown by his law to be very different from that of the *polis*, and that he should align himself to the city's *ethos* rather than, through his law, aligning the *ethos* of the city to his own. In the definition of this *ethos* (and in the need to define it) we can find the 'constitutional' nature of Athenian *nomothesia* and of the *graphe nomon me epitedeion theinai*. We may not be able to identify an Athenian 'constitution' in a way that satisfies our modern notions, but we cannot deny the fact that the Athenians in court argued about new laws *as if there were a*

[36] Cf. for various readings of it Kurke 1999: 317-318; von Reden 2002: 54-55; Keim 2016.

constitution – their arguments rested on the assumption that the laws of the city were unified and made coherent by a fundamental spirit, an *ethos* they had in common.

3. Constitutional arguments in the *Against Leptines* and the *Against Timocrates*

In this section I examine the legal arguments of the speeches *Against Leptines* and *Against Timocrates* to investigate whether they are (primarily or fundamentally) 'constitutional' arguments predicated on the unitary *ethos* of the laws. The *Against Leptines* and *Against Timocrates* were both pronounced as accusation speeches in cases of *graphe nomon me epitedeion theinai*, and in both cases the speaker (in the first, Demosthenes himself, in the second Diodorus) argued for repealing a law as not *epitedeios*. The procedural similarities however end here. The *Against Timocrates* is a *graphe nomon me epitedeion theinai* brought at the very end of a process of *nomothesia*, within a year after the enactment of the new law, to repeal the law as not *epitedeios* and punish its proposer, Timocrates. As I have argued in a recent article, the case against the law of Leptines was on the other hand part of a procedure of *nomothesia* started by Apsephion, Phormion and Demosthenes with the aim of enacting a new law, to replace that of Leptines.[37]

The law of Leptines had been properly enacted (more than one year earlier), had fully become one of the existing laws, and Leptines was no longer personally liable – his participation in the trial followed his election (with others) as *syndikos* of the existing law, while the accusers were attempting to repeal it because repealing contradictory laws was mandated by the *nomothesia* law before enacting a new one. The accusers state that, after repealing this law, they would submit their new law to the *nomothetai* for approval. As a result of the different procedural stage at which the charge was brought, the written indictment that determined what was relevant in court did not contain only a statement of why the law of Leptines was not *epitedeios* (with attached the other existing laws that showed that it was not *epitedeios*), but also the text of the new law, proposed to replace it. Demosthenes therefore does not simply explain why the law of Leptines is not *epitedeios*, but can (and must) also explain why his own law is *epitedeios*, more *epitedeios* than that of Leptines. For these reasons, the argument of the *Against Leptines* is the closest we can get to a positive argument for why a law is *epitedeios* (and for why a new law should be enacted), in the absence of speeches pronounced before the *nomothetai* or of defence speeches in *graphai nomon me epitedeion theinai*. Conversely, the *Against Timocrates* straightforwardly argues that the law of Timocrates is not *epitedeios* because of its contents and because it was enacted without following the

[37] Canevaro 2016a: 12-32; 2016b. For previous attempts to explain the procedure of Dem. 20 see Hansen 1979-80; Hansen 1985; Kremmydas 2012: 24-33.

proper procedures, and attempts to have it repealed.[38] Because of these differences, the two speeches provide us with a good overview of the range of arguments that could be used in *graphe nomon me epitedeion theinai* speeches.

3.1 The *Against Leptines*

Most analyses of the *Against Leptines* have concentrated on particular legal arguments – why this or that law contradicts that of Leptines – missing therefore the overall coherence of Demosthenes' argument.[39] The law of Leptines abolished all exemptions from ordinary liturgies (*choregia*, *hestiasis* and so on), with no exception. It had therefore an effect both on exemptions for those who had earlier performed another liturgy, and honorary exemptions granted to benefactors of the city.[40] We know little of the arguments used by the *syndikoi* of the law, but, judging from Demosthenes refutation, they fell into two broad categories: first (Dem. 20.18-28), the law of Leptines would resolve the chronic problem of the lack of liturgists and ease off the burden for the relatively poorer members of the liturgical class (composed of the richest 4% of the citizens of Athens); second, it is just to abolish honorary exemptions because many *ateleis* do not deserve their exemptions (Dem. 20.1-2, 5-6, 7, 38, 47, 56-7, 98, 104, 113, 132, 137-9, 164).[41]

The vast majority of Demosthenes' arguments in the *Against Leptines* aim to portray, in various ways and through various strategies, the law of Leptines as not *epitedeios*, as inconsistent with the *ethos* of the city, defined first and foremost by the existing laws, to which the ancestors always conformed in their behaviours, and to which any new lawgiver should also conform.[42] The incoherence between the law of Leptines and a particular existing law, as well as with the intent of the

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[38] See now, for a discussion of the arguments of Dem. 24 and notes on the speech, Harris 2018a. See also Canevaro 2013a: 77-180, which, in discussing the legal documents in the speech, also provides an in-depth analysis of many of its legal arguments.

[39] This is a problem with Sundahl 2000, which concentrates on the individual laws read out by the *grammateus* throughout the *corpus* of *graphe paranomon* and *graphe nomon me epitedeion theinai* speeches, and on the individual arguments built around them; and also with Lanni 2010, who concentrates on a handful of arguments. It is also (to a lesser extent) a problem with Kremmydas 2012, which provides a very good commentary on all the specific rhetorical arguments, their workings and implications, but despite analysing the structure of the speech often loses sight of the coherence of the overall argument. I tried to keep this aspect in focus at all points in Canevaro 2016a.

[40] On the law of Leptines and the liturgical system see Canevaro 2016a: 47-63.

[41] Hermogenes of Thasos (*Meth.* 24) discusses the architecture of Phormion's speech, but his reconstruction is based on Demosthenes' words, not on independent evidence, see Schaefer 1885-1887: I, 397-398; Blass 1893: 267-268; Kremmydas 2012: 42-43. Demosthenes' speech must have been the longest, see Kremmydas 2012: 43; *pace* Schaefer 1885-1887: I, 387; Pickard-Cambridge 1914: 117-118.

[42] See Canevaro 2018b on the role of the ancestors in these constitutional arguments, and on the alleged 'conservatism' of *nomothesia* procedures.

lawgiver as revealed by another law on a different topic,[43] as well as procedural irregularities that may have compromised the nomothetic process which underpins the basic coherence of the laws, are all presented as unified features of a single idea of what is or is not *epitedeios*. This idea of *epitedeios* can be summarised as coherence with a legal, political, ethical and rational system first and foremost defined by (and argumentatively derived from) the existing laws (see above). In this sense, the category of *epitedeios* is applied by Demosthenes not only to the laws, but also to the Athenians themselves, when they do not conform in their choices with this system: at Dem. 20.83 Demosthenes goes so far as to state that the point of the trial is not simply to judge whether the law of Leptines is *epitedeios*, but whether the Athenians themselves are *epitedeioi* – 'suited', because of their *ethos*, to receiving benefits (see above section 2.2).

This effect is achieved by emphasising from the beginning of the speech that the law of Leptines contradicts the basic principles underpinning the laws of the city and the *ethos* of Athens. At 20.2-7 Demosthenes shows that the law is undemocratic because it takes away from the *demos* some of its prerogatives (and this is an aspect which Lanni has particularly stressed)[44]. Yet the principle of popular sovereignty, described as fundamental for a law to be *epitedeios*, is only one of the principles highlighted in the speech. At 20.8-17 Demosthenes describes the most important reason for the inappropriateness of Leptines' law: the law deceives past benefactors, it breaks existing links of reciprocity, and makes the Athenians *apistoi*. This is inappropriate (and unacceptable) because key features of the Athenians (basic principles of their 'constitutional' identity) are their trustworthiness and their rejection of deception.[45] These features are defined first and foremost through the reference to a law that forbids lying in the *agora* (Dem. 20.9),[46] from which Demosthenes extrapolates that the *ethos* of the Athenians (as defined by the laws) is hostile to lies and deception, and has a *doxa* of trustworthiness (he uses the expression *ethos poleos*, Dem. 20.13; cf. Dem. 20.64). The centrality of this principle (and of this law, at first sight unconnected to the law of Leptines, but on the basis of which the principle is formulated) is missed by Sundahl and Lanni, because they concentrate on laws read out by the *grammateus* and on particular rather than overarching arguments. And yet Demosthenes builds most of his speech on this principle, extrapolated from this (apparently irrelevant) law, and confirmed through the narrative of episodes of Athenian history and references to other laws. This extrapolation is initially confirmed through a

[43] On the intent of the lawgiver see the discussions in Johnstone 1999: 27-30; Harris 2013a: 175-245 *passim*.

[44] Lanni 2010: 249-252.

[45] This argument, as we shall see, is developed throughout the speech, and amounts to a theory of public honours and euergetism, on which see Canevaro 2016a: 77-97.

[46] On which see Canevaro 2016a: 200-202 with more bibliography and a discussion of the actual scope of this law.

reference to the actions of the ancestors (Dem. 20.11-13) who, once democracy had been restored in 403, decided to repay a loan to the Spartans that the Spartans had granted the Thirty to help their fight against the democrats – so fundamental was the Athenians' concern with trustworthiness and reciprocity that they decided to pay back a debt contracted by the oligarchs to fight the democrats.[47] At Dem. 20.15-17 Demosthenes also argues that this rejection of deception is fundamentally democratic – that's what makes the rewards of democracies more valuable than the gifts of tyrants or oligarchs. Demosthenes concludes this initial construction of the basic 'constitutional' principle to which all laws need to conform by stating that with his law Leptines has shown that his *ethos* is different from the *ethos* of the city (*ethos poleos*), but rather than asking the Athenians to give up their *ethos*, he, as a lawgiver, should conform to the *ethos* of the city (Dem. 20.14; cf. 153).

The whole section 20.29-87, the longest of the speech (often judged, because of the absence of references to particular laws contradicted by that of Leptines, as 'irrelevant' and extra-legal), is in fact an elaboration of the points made in that initial discussion of the *ethos* of the laws. The long discussion of past benefactors highlights the Athenians' obligations towards them, shows how the *ethos* isolated at 20.8-17 worked in the past, and underlines its importance (with obsessive terminological echoes of 20.29-87). The foundation of this long section is the ethical, political and legal principle derived initially from the law on lying in the *agora* cited at 20.9. The law of Leptines is *me epitedeios* because it is incoherent with this principle.

This principle is further stressed in the rest of the speech with references to specific laws that affirm it explicitly, or from which it can be extrapolated: at Dem. 20.95-6 Demosthenes argues that the law of Leptines directly contradicts an existing law that states that 'the rewards granted by the *demos* are to remain valid'. At 20.102-3 the principle is extrapolated, more indirectly, from the Solonian law on wills, whose aim is described by Demosthenes as that of 'making the act of helping each other a competition, giving everyone the chance to gain from it'. This aim of the lawgiver relies on the idea that reciprocity is mandatory and that *pistis* is essential – good deeds need to be rewarded, and the rewards must be stable and reliable. The argument that the law of Leptines expresses an *ethos* and a principle of conduct which is alien from that of this law is strengthened by Demosthenes' claim that Leptines has obviously either not read this law of Solon, or he had not understood it. At Dem. 20.105-19, Demosthenes confirms once again, for the purpose of defining whether a law is *epitedeios*, the centrality of the criterion of the coherence of a law with the ethical-political system as defined by the laws as a whole: he answers to those that use the example of the Thebans and the Spartans as an argument against the practice of rewarding benefactors that the ancestors of the Athenians always granted honours, and that the judges should decide whether a law

[47] On this episode see Canevaro 2016a: 205-206.

is *epitedeios* on the basis of the current laws of the Athenians, and not of those of the Thebans or of the Spartans, which conform to different *politeiai* (and to different *ethe* – here the meaning of *epitedeios* as 'fit', 'appropriate' to a reference context, as argued above, is particularly clear). At Dem. 20.120-138 Demosthenes comes back once again to this overarching theme while replying to some arguments of the *syndikoi*: he cites another existing law that punishes those who deceive the *demos* as further evidence that the *ethos* of the Athenians rejects deception (the same principle had been extrapolated from the law on lying in the *agora* of Dem. 20.9), and points out the hypocrisy of the *demos* if it were to deceive its benefactors while at the same time punishing severely those who deceive the *demos*. Further laws and institutions discussed at Dem. 20.138-45 (on funeral speeches and rewards for victorious athletes) confirm the image of the Athenian *ethos* at the basis of its laws to which the new law should conform: the Athenians reward virtue, they do not deceive those that perform noble deeds. Law after law, more or less directly, by extrapolation or on the basis of the intent of the lawgiver, Demosthenes builds this image of a coherent spirit of the laws and of the city, to which the law of Leptines does not conform – that is what makes it not *epitedeios*.

There is little denying then that the arguments of the *Against Leptines* are built around the assumption of the existence of higher principles, embodied in the laws and to which the laws must conform, which define the *ethos* of the city, of its laws, of the Athenians, and ultimately of their *politeia*. Whether a law is *epitedeios* depends not exclusively on contradictions with this or that statute (although these are important, and even essential, because they are presented as unequivocal instances of wider contradictions), but on its coherence with higher-level principles, worked out of the laws and reinforced by the memory of the behaviour of the ancestors (invariably coherent with these principles). The 'constitutionalism' found in this speech is not 'formal' (to use Straumann's definition)[48] – formal minute contradictions are instances and evidence of wider incoherence. The argument of the speech relies rather on the existence of 'constitutional principles' behind and above the *nomoi*, and on the belief that these constitutional principles can be uncontroversially extracted from the existing laws. It is in this sense that the case of the *Against Leptines* must be understood as one of 'constitutional' judicial review.

3.2 The Against Timocrates

The argument of the *Against Timocrates* is at first sight quite different from that of the *Against Leptines*, with more concentration on minute contradictions between the law of Timocrates and particular existing laws, and a less unitary case for why the law is not *epitedeios*.[49] This is due partially to the procedural differences

[48] Straumann 2016: 227-237.

[49] Part of the discussion in this section draws on Canevaro 2018b, although the argument made here is different (and complementary).

discussed earlier: in the *Against Leptines* the need to prove that the replacement law is more *epitedeios* than that of Leptines forces Demosthenes to specify more clearly the parameters; in the *Against Timocrates* there is no comparandum, and therefore no terms of comparison need to be specified. The argument proceeds by highlighting specific contradictions with specific laws, yet these are represented as important because they are evidence of the more general incoherence of the law of Timocrates with the general constitutional *ethos* of the city. This is always in the background, and the argument repeatedly refers to this 'constitutional' level.

Diodorus goes systematically about the task of demonstrating that the law of Timocrates is not *epitedeios*. This law allowed public debtors condemned to the additional penalty of imprisonment until they paid back their debts to avoid prison if they could provide sureties.[50] Diodorus claims that it was enacted with the specific aim of saving Androtion, Glaucetes and Melanopus from prison.[51] At Dem. 24.15-16 Diodorus anticipates two of the main issues he will discuss: when the law was passed, and the fact that it was enacted avoiding publicity, almost secretively. In the next few paragraphs he goes into more detail about the arrangement of his arguments against the law, and therefore about its illegalities. He announces at Dem. 24.17-18 that he will speak first of the laws that permit *graphai nomon me epitedeion theinai*, that is about the laws setting the rules for passing new legislation, and then he will discuss merits and problems of the law of Timocrates itself. In Diodorus' summary, the law on *nomothesia* provides a precise temporal sequence of required steps for the enactment of new laws, publicity of the bills in front of the monument of the Eponymous Heroes, it prescribes that laws should apply to all citizens equally, and that any existing laws that contradict it must be first repealed. Diodorus mentions that there are also other provisions, but these are the most important ones for the purposes of the case. Timocrates has allegedly proceeded incorrectly in all these respects, and therefore Diodorus will have to proceed systematically and discuss his infractions one by one. First, Timocrates has not respected the correct times to enact legislation, thus his legislation was not enacted according to the correct procedures. Second, he has failed to give his proposal adequate publicity. The next two infractions are substantive: third, the law of Timocrates fails to apply equally to all Athenians, and fourth, it contradicts existing laws that Timocrates has failed to repeal.

At Dem. 24.19 Diodorus announces that he will deal systematically with all these aspects. From Dem. 24.20 to 31 the topic is procedure; from Dem. 24.32 to 38 the law forbidding the enactment of a new law that contradicts existing ones without repealing them first; from Dem. 24.39 to 67, after the speaker has the law of Timocrates read out, we find a series of contradictory statutes read and discussed. Following this long discussion of the grounds on which the law of

[50] On this law see Canevaro 2013a: 113-121, and Harris 2018a: 108-117.

[51] Harris 2018a: 108-117 makes a strong argument that this was not the case.

Timocrates is illegal, Demosthenes argues that it is also harmful for the city. The arrangement of the speech, at least in its first part, follows closely the issues covered by the laws on *nomothesia*: procedures (which distinguish the enactment of laws from that of *psephismata*), publicity and contradictory statutes. The accusation is grounded on a close reading of the relevant laws. Yet Diodorus' legal argument is not drily adherent to the technicalities of the relevant laws, but rather is full of ideologically charged statements that justify the provisions of these laws, and condemn the law of Timocrates.

Diodorus paraphrases the law on *nomothesia* at Dem. 24.24 after the secretary reads it out, and then at 27 he has the decree of Epicrates that summons the *nomothetai* read out to show that it infringes upon all the rules just read and discussed.[52] The list of these infringements at 26 is instructive: proposals for new laws must be published before the monument of the Eponymous Heroes for everyone to see and make up their mind,[53] yet Timocrates has not published his proposal, nor has he allowed the Athenians the chance to consider it. Moreover, he did not respect the 'times' prescribed by the law (τῶν τεταγμένων χρόνων). The main issues with the law of Timocrates, on the procedural side, are the lack of publicity for the proposal, and the failure to enact it following the correct temporal sequence of required steps. These are not just technical objections. The rationale of the relevant provisions is important and stressed by Diodorus. Advance publicity is key because 'if [one] notices anything against your interests, he may point it out and speaks against it at his convenience' (κἂν ἀσύμφορον ὑμῖν κατίδῃ τι, φράσῃ καὶ κατὰ σχολὴν ἀντείπῃ; cf. Dem. 20.94). And respecting the prescribed timescale is key to allow the people enough time to examine the proposals and if necessary to oppose them. In fact, Diodorus (Dem. 24.36-7) lists the advocates of the old laws, the advance publicity of proposals, the time before the enactment and the possibility of bringing *graphai nomon me epitedeion theinai* as the key checks to guarantee that no bad legislation (that is, contradicting other laws) is enacted. A law, in order to be good, must be different from a decree, must undergo multiple checks, must not be enacted on the spur of the moment and in haste, and in order to make sure that this is the case, following the correct procedure is essential. A new law is good if it is enacted following scrupulously the procedure of *nomothesia*, while it is doomed to be bad (and to contradict existing laws and to be alien from the constitutional *ethos* of the city) if enacted in defiance of it.

Once he has dealt with the procedural infractions, Diodorus turns to the issue of the law's coherence with the existing laws, the topic of the whole section Dem. 24.32-67. Diodorus states that in addition to not respecting the set times and not

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[52] For the law on *nomothesia* and Demosthenes' paraphrase see above section 2 and n. 24. For the decree of Epicrates see Canevaro 2013a: 104-112 (the document preserved in the speech is a forgery).

[53] On the use and significance of the expression 'for everyone to see', which usually (like in this case) refers to publicity of temporary records, see Hedrick 2000: 331-333.

giving advance publicity to his proposal, Timocrates committed another crime: he introduced his law in violation of all the existing laws. At 24.33 the relevant law, prescribing that one must repeal all contradictory laws before enacting a new one and threatening a *graphe nomon me epitedeion theinai* if one fails to do so, is read out.[54] At Dem. 24.39 Diodorus has the law of Timocrates read out, and then discusses a series of seven laws that allegedly contradict it yet have not been repealed by Timocrates.[55] The section is interspersed with statements about how inconsistent Timocrates' law is with these statutes: 'Consider then how much the law that this man enacted is contrary to this law' (24.44, τούτῳ μέντοι τῷ νόμῳ σκέψασθ' ὡς ἐναντίος ἐστὶν ὃν οὗτος τέθηκεν), 'Timocrates immediately begins his law by contradicting this rule' (Dem. 24.55, Τιμοκράτης τοίνυν […] εὐθὺς ἀρχόμενος τοῦ νόμου τἀναντί' ἔθηκε τούτοις), 'Anyone could cite many excellent laws, all of which the law enacted by this man contradicts' (Dem. 24.61, πολλοὺς δ' ἄν τις ἔχοι νόμους ἔτι καὶ καλῶς ἔχοντας δεικνύναι, οἷς πᾶσιν ἐναντίος ἐστὶν ὃν οὗτος τέθηκεν). Many of the laws presented by Demosthenes as contradictory in fact are not, and the minute arguments of Diodorus are often unacceptable. To give only one example, the law at Dem. 24.50 forbids convicted wrongdoers from making any supplication in the Council or the Assembly, and anyone else to make supplications on their behalf. Diodorus explains the alleged intent of the lawgiver: as the Athenians are too humane (*philanthropoi*) and would be moved by the misfortunes of convicted wrongdoers to accept their supplications and cancel their debts, the lawgiver passed a law that forbade such supplications. As begging, that is, making a supplication, is better than giving orders, and enacting a law equates to giving orders, then *a fortiori* Timocrates has ordered through his law to save Androtion, a convicted wrongdoer, when the law would not even allow begging on his behalf. The argument is specious, because the law is concerned specifically with supplications, not with enacting new laws.[56] On the other hand, some of the other laws discussed do contradict Timocrates': at 24.63 Diodorus quotes another law of Timocrates that prescribes that if someone, following an *eisangelia*, is convicted to pay a fine, he must stay in prison until the fine is paid. The law of Timocrates indicted by Diodorus allows instead anyone to escape prison if he offers sureties for his debt. These laws are not only contradictory, but they have both been enacted by Timocrates, who has therefore contradicted himself.[57]

It is very striking here that Demosthenes should choose to mention a series of seven statutes as contradictory, despite the fact that many of his arguments can be proven to be incorrect, while he could have as easily stuck to one or two that are actually inconsistent, and this would have sufficed (if a minute formal contradiction was actually deemed to be enough) to prove that Timocrates had failed to repeal

54 On this law see Canevaro 2013b: 156-160; 2016; *pace* Hansen 2016b.
55 See on this section of the speech Canevaro 2013a: 113-156.
56 For this argument see Canevaro 2013a: 133-135.
57 For this argument see Canevaro 2013a: 152.

some contradictory laws. The reason for such a list is that the Athenians understood the importance of the coherence of the laws on two levels: one level is that of actual contradictory provisions with specific statutes, the other, that of the coherence with the overall aims and spirit of the laws, that is with an understanding of the laws as coherently adherent to overall constitutional principles that define the *ethos* of the city and that of the laws.

Because of this, proving that the indicted law contradicts specific provisions of other laws is important but not sufficient. These minute contradictions are consistently presented as evidence that the law of Timocrates contradicts and virtually invalidates all the laws of the city, and their spirit and overall aims. The speech makes this claim repeatedly. At Dem. 24.1 Diodorus states that Timocrates has enacted a law παρὰ πάντας τοὺς νόμους. At Dem. 24.5 that the judges have to decide 'whether all the other laws that you have enacted against men who harm the state are to be repealed while this one is to remain valid, or this one is to be repealed while the others are to remain valid' (πότερον δεῖ τοὺς μὲν ἄλλους νόμους, οὓς ἐπὶ τοῖς ἀδικοῦσι τὴν πόλιν ὑμεῖς ἀνεγράψατε, ἀκύρους εἶναι, τόνδε δὲ κύριον, ἢ τοὐναντίον τοῦτον μὲν λῦσαι, κατὰ χώραν δὲ μένειν τοὺς ἄλλους ἐᾶν). At Dem. 24.38, just before the law of Timocrates is read out and contrasted with the seven allegedly contradictory statutes, Diodorus states: '[Timocrates] has introduced a law that contradicts, one might say, all those now valid. He did not read out anything, repeal anything…' (νόμον εἰσήνεγκεν ἅπασιν ἐναντίον, ὡς ἔπος εἰπεῖν, τοῖς οὖσιν, οὐ παραναγνούς, οὐ λύσας…). At Dem. 24.61 he reiterates that 'Anyone could cite many excellent laws, all of which the law enacted by this man contradicts' […] it is liable to the charge even if it violates just one of the existing laws' (πολλοὺς δ' ἄν τις ἔχοι νόμους ἔτι καὶ καλῶς ἔχοντας δεικνύναι, οἷς πᾶσιν ἐναντίος ἐστὶν ὃν οὗτος τέθηκεν […] ὑμῖν δ' ὁμοίως ἔνοχος φανεῖται τῇ γραφῇ, καὶ εἰ ἑνὶ τῶν ὄντων νόμων ἐναντίος ἐστίν). Demosthenes is aware that some of his examples are weak, and stresses that one single contradictory statute would be enough, but the impression he is seeking to achieve is clear: all the laws are at odds with Timocrates' law – Timocrates' law is not *epitedeios* because it is at odds with everything the laws of Athens share – their constitutional *ethos*. At 24.66 Diodorus summarizes this point: 'I think it is clear to all of you that he has enacted his law in violation both of these laws and of those discussed earlier, in fact, I could almost say in violation of all the laws of the city' (ὅτι μὲν τοίνυν καὶ παρὰ τούτους τοὺς νόμους καὶ παρὰ τοὺς προειρημένους, καὶ μικροῦ δέω παρὰ πάντας εἰπεῖν τοὺς ὄντας ἐν τῇ πόλει, τέθηκε τὸν νόμον, οἶμαι δῆλον ἅπασιν ὑμῖν εἶναι).

These passages show very clearly that the *graphe nomon me epitedeion theinai* is not exclusively or primarily concerned with securing the correctness of democratic procedure, as argued for instance by Lanni.[58] The implication is rather that a bad law substantively contradicts the overall *ethos* of all the laws of the city,

[58] Lanni 2010.

and this must be shown by pointing to contradictions with individual statutes. The correctness of democratic procedure is definitely a factor in the overall equation, but only as one of the constitutional principles protected through safeguarding the integrity of the laws of the city.

As a bad law is one that contradicts all the laws, it can destroy the city and its entire *politeia*. This is why Diodorus, later in the speech, after all the contradictions have been pointed out, can ask the judges whether the law of Timocrates is in fact a law or ἀνομία, that is the absence of laws (Dem. 24.152).[59] He also states that 'the law subverts the entire *politeia*, destroys political activity and deprives the city of many incentives for *philotimia*' (Dem. 24.91, ὅλην συγχεῖ τὴν πολιτείαν καὶ καταλύει πάντα τὰ πράγμαθ' ὁ νόμος, καὶ πολλὰς φιλοτιμίας περιαιρεῖται τῆς πόλεως). Diodorus goes so far as to represent at Dem. 24.155-6 the very enactment of the law of Timocrates as a ruse to destroy all the existing laws. The comparison of a bad *nomos* to a counterfeit coin that undermines the trustworthiness and value of the entire coinage of the city, which we have discussed earlier, comes into play at this point.

The evidence of minute contradictions with specific statutes takes centre stage in the *Against Timocrates* (although, as I hope to have shown, it is elevated to 'constitutional' status by stressing the impact of these contradictions on the laws as a whole – the focus is never on the minute contradiction itself). But even here it is only one strategy among many to bring home the point that the law to be repealed is incoherent with the constitutional *ethos* of the city and of the laws. We equally find, as in the *Against Leptines*, arguments from the spirit of the laws, and from the intent of the lawgiver. This strategy is only sparsely used in the *Against Timocrates*, but at the end of the speech (Dem. 24.211) Diodorus points out that Draco's and Solon's greatest contribution to the greatness of Athens is that they συμφέροντας ἔθηκαν καὶ καλῶς ἔχοντας νόμους. Is it not just therefore that the judges should vote serious punishments τοῖς ὑπεναντίως τιθεῖσιν ἐκείνοις? And elsewhere, at Dem. 24.103 and 106, Diodorus laments that Timocrates is a lawgiver very much unlike Solon. Once again, the focus is on the constitutional *ethos*, coherent in all the laws and identical with that of Solon as the original lawgiver. For a new law to be *epitedeios* (for its *ethos*, that is, to be coherent with that of the existing laws and of the city), its proposer must be *epitedeios* – his *ethos* must be aligned with that of Solon, which is represented as foundational of that of the city.

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[59] *Pace* Wohl 2010: 292-301, who reads the reference to *anomia* as a hidden admission that the *nomothesia* procedure is intrinsically unstable and that any change to the laws can endanger the unity and coherence of the laws. It is only the introduction of a bad law, without following the correct procedures, that endangers the system, cf. Canevaro 2012: 442-443.

4. Conclusions

In the light of this summary analysis of the kind of constitutional arguments that we find in *graphe nomon me epitedeion theinai* speeches, and of their importance for proving that a law is not *epitedeios*, I conclude with a few wider considerations about the overall procedure of *nomothesia* and the place of *graphe nomon me epitedeion theinai* within it, which will also provide provisional answers to the two key issues that I identified in the introduction of this article.

The first issue was that of the existence and nature of an Athenian 'constitution', which cannot be identical with the *nomoi per se*. The (provisional) result of my close reading and analysis of the two *graphe nomon me epitedeion theinai* is that the Athenians did indeed argue about whether new laws were suitable *as if* there were a constitution. They assessed, that is, not only the minute consistency of the law under scrutiny with particular existing laws, but also its coherence with the overall *ethos* of the laws of the city, which was understood and predicated as unitary, coherent and rational. This second aspect – the coherence with wider principles extrapolated from the laws and understood as underpinning the laws as a whole – was in fact construed in the speeches as the most important, to the extent that even when the orator (like in Dem. 24) concentrated on specific statutes, there was an argumentative effort to give the impression that the new law contradicted all existing laws, of which the ones cited were presented only as examples. Minute contradictions were construed as evidence of a wider incoherence with the 'constitutional' *ethos* of the laws. This is striking, because, as far as we can tell from the summary of the relevant law on *nomothesia* at Dem. 24.32 and 34, the law itself that governed the *graphe nomon me epitedeion theinai* simply stated that no law could be proposed which was *enantios* to the existing laws. Although the repeated use of the plural (at Dem. 24.32 we even read πᾶσιν ἐναντίον […] τοῖς οὖσι νόμοις) is likely to have underpinned the concentration on the laws as a whole, as unitary, and therefore a 'constitutional' understanding of the argumentative requirements of the *graphe nomon me epitedeion theinai*, the text of the law itself could also be read as pointing simply to minute contradictions. Yet this is not how the Athenians thought the arguments should go: the institution of the *graphe nomon me epitedeion theinai* was governed not only by the formal rules contained in the law on *nomothesia*, but by recognised and equally normative entrenched argumentative practices and parameters built on those rules, and in turn reinforced by narratives of the Solonian origin of the laws (which were therefore understood as the expression of one legislative action, with a unitary intent, one rationality, and absolute 'constitutional' coherence). The result was a procedure – the *graphe nomon me epitedeion theinai* – of constitutional judicial review.[60]

[60] This understanding of institutions as composed of rules, (formal and informal) practices, and ideas, discursive parameters and 'stories' underpinning both – all together conditioning individual and collective behaviour within them, relies on much literature in the New Institutionalism. For a synthesis of the approaches that lead to this

I stated that the Athenians argued about new laws *as if* there were a constitution. This was not just a fiction: the very fact that the arguments had to be conducted in that way forced the Athenians to reflect on the principles behind their *nomoi*. The act of enacting a new law institutionally required such a reflection, and this was practiced repeatedly throughout the year – Dem. 24.142 states that the Athenians legislated (that is, activated the *nomothesia* process) in almost each prytany (the passage may be overstating the frequency of the process, but cannot be stating something absurd – we can halve the figure, and we still have five occasions per year).[61] Each occasion involved multiple law proposals, and multiple *graphai* against existing laws that contradicted the new ones, with discussion of whether the old statute or the new one were more *epitedeios* (quite like in Dem. 20), and therefore of the principles that made a law *epitedeios*. The result of this is an ongoing conversation, in the lawcourts and outside, on the Athenian 'constitution'.

The question is, of course, how solid that constitution actually was, as a result of this ongoing conversation. One's answer to this question will depend, at least partially, on where one stands on the spectrum between (to use the most prominent examples) Harris' and Lanni's understandings of the Attic trial, of the level of consistency and predictability that was involved, and whether Athenian judicial procedure conformed to the reqirements of the rule of law.[62] If one believes that hardly any predictability was the case, and that the existing statutes did little to guide the range of possible legal interpretations and arguments, then what we have is an extremely fluid 'living constitution' which changed constantly (through 'interpretive change') but nonetheless kept new legislation in check by enforcing its assessment not only in the light of expediency and the need of the moment, but also in the light of the Athenians' understanding (however fluid) of the *ethos* behind

understanding of institutions see e.g. Lowndes-Roberts 2010: ch. 3; see also March-Olsen 1989; Peters 2005.

61 See Canevaro 2018a for a comprehensive argument against the notion that *nomothesia* occurred once a year.

62 Scholars such as Harris (2006; 2013; 2018b) in particular, as well as (with different approaches and nuances) Ostwald (1986), Sealey (1987), Rubinstein (2000), Rhodes (2004), Herman (2006), Sickinger (2008), Gowder (2014; 2016: 78-97), Canevaro (2013; 2015; 2017; forthcoming), Pelloso (forthcoming) have argued that by and large the Athenian legal system conformed both to emic and to modern notions of the rule of law (and that its institutions and rules, by-and-large, worked!). Others, such as Osborne (1985), Ober (1989), Todd (1993), Cohen (1995), Christ (1998), Lanni (2006; 2016) have faulted the Athenian judicial system for (allegedly) privileging notions of personal standing, vengeance and extra-legal considerations of justice as opposed to lawfulness. For studies that approach related problems from the point of view of New Institutional Economics, rational choice theory and game theory, see Carugati 2014, Carugati-Hadfield-Weingast 2015, Carugati-Calvert-Weingast 2016. It should be noted, however, that unlike Hansen and Ostwald, Harris does not argue that the concern with the rule of law was an innovation of the fourth century BCE, to temper the 'extreme' democracy of the fifth (see in particular Harris 2016).

their laws, their identity and their *politeia*. If one believes – and I place myself in this second category – that the Athenians did pay attention to their laws and were guided by them in their judgements,[63] that they prized consistency and predictability and achieved them to a significant extent, then what we have is still a somewhat fluid constitution, which could change through 'interpretive change', and yet one whose fluidity was reduced, first, by the need to argue from principles believably extrapolated from the existing laws – the existing laws limited the range of constitutional arguments possible or, better, potentially effective. Second, by the institutional memory (exploited or not by the speakers themselves) of the judges, who had a rather clear and solid sense of the range of 'constitutional' principles normally understood as underpinning the *nomoi*. Here one may note that, despite the difference in the topics of the relevant laws, there is significant overlap in the 'constitutional' principles evoked in Dem. 24 and Dem. 20, even to the extent that in Dem. 24 we find an argument predicated on the Athenians' 'constitutional' commitment to *charis* and *pistis*, the core of Dem. 20's argument.

Wherever one stands on this, there are some distinctive features of Athenian 'constitutionalism' that emerge from the analysis. Even on the most fluid understanding of this constitutionalism, the Athenian model avoids a charge that is often levelled nowadays against those that advocate the need for a 'living constitution' that evolves with society: critics of the 'living constitution' model often observe that this model of constitutional interpretation ends up ultimately doing away with the constitution itself, that is with the authority and legitimacy enshrined in it, which are however essential because they are foundational of the constitutional order.[64] The constitutional order becomes fragile because it ends up being understood as new and illegitimate. The Athenian model (in the fourth century) is impermeable to this line of criticism, because the very possibility of constitutional interpretation (and therefore of interpretive change) is predicated in Athens on the figure of Solon, the original lawgiver, whose *ethos* and rationality the laws reflect. In the fourth century, there is no Athenian constitution which is not a Solonian constitution. Therefore, however outlandish an instance of constitutional interpretation (which would result in 'interpretive change') may be, it can never be justified in Athens on the basis of the present – it needs to be justified entirely on the basis of Solonian principles understood as original. There is a significant level of self-delusion involved in this model – in the notion of a Solonian *ethos* retained over centuries despite changes, interpretive or otherwise – but the advantages are undeniable: the constitution may well change fluidly, but the source of its *ethos* and its antiquity are never questioned, and therefore its authority and legitimacy are also

63 See Harris 2018b on how the Athenians represented the outcomes of trials: as succesful attempts to enforce the substantive rules of the laws.

64 For a recent example of 'originalist' arguments and criticism of 'living constitution' approaches, see Duncan 2016, focusing particularly on the work of the late US Supreme Court Justice Antonin Scalia.

never questioned. On the other hand, even on the most 'solid' understanding of this constitutionalism, what we have is still a constitution that is effectively legitimised yet not fossilised by its original father (as is the case in many 'originalist' theories of constitutionalism) – a constitution that is kept alive by an ongoing institutional conversation on its principles, whose *ethos* is kept reasonably stable, but whose implications are worked out over and over again whenever the Athenians legislate.

I conclude by offering a provisional solution to the second issue that I isolated in the introduction of this article: the coexistence in *nomothesia* of 'constitutional amendment' and constitutional judicial review – how can they make sense together, how can a constitutional amendment, which by definition is inconsistent with the constitution as is, be subjected to judicial review to check it for coherence with the constitution? My provisional answer is that, from the point of view of institutional design and the logic of the procedure, *nomothesia* was not understood as a procedure of 'constitutional amendment' at all. It was a procedure for creating new *nomoi* or modifying existing ones, but, as we have discussed, *nomoi* are not the same as 'constitutional laws'. The 'constitutional' level is reached by reading into the existing *nomoi* higher principles and a coherent *ethos* that characterises the *politeia*. The *nomothesia* procedure provided a means for the *demos* to change the *nomoi*, while at the same time making sure that no 'constitutional' change could occur as a result of that change. The *nomoi* could be changed and supplemented but they needed to remain *epitedeioi* – they needed to remain coherent among themselves and with the overall *ethos* of the laws, of the Athenians and of the *politeia*. *Nomothesia* should be understood as a procedure whose main interlocking aims were to make legislative change possible while making 'constitutional' change impossible.

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