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# Once Again on Aristotle and the Identity of the Athenian *Nomothetai*

A Response to Gertrud Dietze-Mager

Mirko Canevaro - Alberto Esu

DOI – <https://doi.org/10.7358/erga-2023-001-caes>

ABSTRACT – This article is a short response to a recent contribution by Dietze-Mager in *Erga-Logoi* 10.2. There, within a larger discussion of the reliability of the Aristotelian *Athenaion Politeia* as a historical source, Dietze-Mager argues against our proposed identification of the Athenian *nomothetai* with a special session of the Assembly. In response, we start with a concise summary of our interpretation of the constitutional stages in the *Athenaion Politeia* in light of the socio-economic methodology of *Politics* IV, and clarify the role of Aristotle’s political theory in our reconstruction. We then provide a close reading of some key evidence about the identity of the Athenian *nomothetai* (particularly Aeschin. III 38-40). We demonstrate that Dietze-Mager’s proposed reading of the relevant passage is linguistically and syntactically problematic, arguing that the only possible interpretation of the relevant procedure as described at Aeschin. III 38-40 involves identifying the *nomothetai* with a special lawmaking session of the Assembly.

KEYWORDS – Aristotle; *Athenaion Politeia*; Classical Athens; lawmaking; *nomothetai* – Aristotele; Atene classica; *Athenaion Politeia*; legislazione; *nomothetai*.

In 2018, we advanced a new interpretation – new yet building on previous work by Bertelli, Accattino and Canevaro – of Aristotle’s methodology to evaluate the constitutional stages outlined in his *Athenaion Politeia*<sup>1</sup>. Our analysis did not focus – as Bertelli’s did, comprehensively and persuasively – on the causes underpinning constitutional change (*metabolē*), but on the Aristotelian normative criteria to assess the stability and ‘health’ of each of the eleven phases of Athenian constitutional history<sup>2</sup>. Our contention was twofold. First, we argued that the Aristotelian *Athenaion Politeia* identifies the function of *nomophylakia* (guardi-

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<sup>1</sup> Canevaro - Esu 2018, building particularly on Accattino 1986; Bertelli 1993; Besso *et al.* 2014 (cf. Canevaro - Esu 2018, 112-114).

<sup>2</sup> Bertelli 1994 and 2018.

anship of the laws), as theorized in Aristotle's *Politics*, as a key criterion for measuring the quality of each constitution<sup>3</sup>. Second, we argued that Aristotle's methodological baseline for his assessment of Athens' various constitutional stages in the *Ath. Pol.* was the socio-economic methodology of the 'parts of the city' that he discusses in *Politics*' book IV, in his two 'anatomies' of the city<sup>4</sup>.

This latter methodological point is important because it provides the framework within which the eleven stages of the Athenian constitution are discussed in the *Ath. Pol.* Here we summarise only very briefly Aristotle's theory and how it is applied to the constitutional account of the *Ath. Pol.* – we refer to the original article for more extensive discussion. In *Politics* IV, chapter 3, Aristotle provides a constitutional taxonomy based on socio-economic criteria. When examining the variety of existing constitutions, he explains that the reason for such variety is to be found in the different parts of the city (*moirai* or *mere tes poleos*). These parts are understood and explicitly characterised in socio-economic terms – they are the poor, the *mesoi* (middle class), and the rich, with the poor corresponding to the *demos* and the rich to the *gnorimoi* (notables, upper classes). In his socio-economic determinism, Aristotle identifies the character of a constitution according to the socio-economic part of city that is most powerful within it. If the poor (being more numerous) are in control, all participate equally in the *politeia* and the constitution is a democracy, while if only the wealthy are in charge, the constitution is an oligarchy.

Aristotle's methodology, therefore, leaves little room to institutions as central to defining the nature of democracies and oligarchies. The underpinnings of his constitutional analysis are ultimately socio-economic and his taxonomy of constitutions is determined by his taxonomy of the socio-economic parts of city (with even more minute and precise divisions based on occupation) – whatever 'part' is in charge determines the nature of the constitution. Institutional analysis is only introduced in *Pol.* IV, chapter 12, where Aristotle discusses his second best, achievable constitution: the mixed constitution (cf. also IV 9, 1294b 35: *memeigmene politeia*), i.e. a blend of democracy and oligarchy. In order to have a mixed constitution, one needs to allocate some power to the poor/*demos* and some power to the few/wealthy. At this point, the socio-economic methodology proves insufficient, and, as Accattino convincingly argued, Aristotle presents an alternative institution-based 'anatomy

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<sup>3</sup> See especially Arist. *Pol.* 1287a 2 with Gehrke 1978, 149-193; Bearzot 2007 and 2012.

<sup>4</sup> Canevaro - Esu 2018, 112-119.

of city'<sup>5</sup>. Here, Aristotle talks about the 'parts of all *politeiai*', that is, the deliberative function, the magistrates and the judiciary. Each of these state functions could be organised in a number of different variations, which Aristotle discusses in the last three chapters of book IV, providing advice on how to moderate democracies and oligarchies and create a mixed constitution. This second 'anatomy of the city' is, however, only instrumental to mixing the different socio-economic parts of the city by means of institutional allocation. Checks and balances are possible only through mixing of different socio-economic parts of the city. From Aristotle's perspective, institutions in themselves do not suffice for determining the nature of a constitution; they are only a functional tool for allocating different state functions to different socio-economic parts of the city. Ultimately, his analysis is still governed by the first anatomy and by its socio-economic determinism.

We noted that the account of the eleven *metabolai* at *Ath. Pol.* 1-41 is shaped by the same methodological premises<sup>6</sup>. In our analysis of the Athenian constitutional stages, we argued that the Aristotelian author of the *Athenaion Politeia* evaluates positively those constitutions in which there was socio-economic mixing of the different parts of the city, and especially those in which the *demos* (understood as the lower classes) did not control the institution in charge of *nomophylakia*. This is, for example, the case with the Solonian constitution. Solon duly allocated political offices according to wealth and status, while allowing for the participation of the *demos* in the Assembly and the courts but keeping firmly *nomophylakia* in the hands of the Areopagus (*Ath. Pol.* 5-12). A similarly positive assessment befalls the alleged Areopagitic democracy (*Ath. Pol.* 23, 1-2), a constitutional regime that (according to the author of the *Ath. Pol.*) followed the Persian Wars and tamed the power the *demos* through the power of the Areopagus. The *demos* partook in all political institutions, but the Areopagus was manned by the wealthy few and 'administered everything'. Conversely, those constitutional stages that show no concern for socio-economic mixing by means of institutions are deemed negative because both political decision-making and the guardianship of the laws are performed by the same social class. This is the case with fourth-century Athenian democracy (*metabole* 11) in which a single socio-economic part of the city – the *demos* – 'made himself master of everything'.

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<sup>5</sup> Accattino 1986, 77-78; Canevaro in Besso *et al.* 2014, 279-377.

<sup>6</sup> Canevaro - Esu 2018, 119-127.

One advantage of our reconstruction of the theoretical framework of the *Ath. Pol.* as based on that of the *Politics* (particularly book IV) is that it has allowed us to tackle the problem of the *Ath. Pol.*'s 'silence' about *nomothesia* from a new perspective. Aristotle was clearly aware of fourth-century Athenian *nomothesia*<sup>7</sup>. Yet *nomothesia* does not constitute, we argued, a form of 'mixing' that could satisfy him. Yes, it constitutes 'mixing', yet a purely institutional form which still leaves the *demos* (i.e. one socio-economic 'part' of the city) in control of all relevant political functions, rather than mixing different socio-economic 'parts' by assigning to them different functions so that they may keep each other in check. Aristotle does not believe that the *demos* is capable of keeping itself in check, whatever the institutional arrangement. Thus, in our interpretation, Aristotle (or whichever other orthodox Aristotelian wrote the *Ath. Pol.*)<sup>8</sup> does not really – as has been argued<sup>9</sup> – need to suppress *nomothesia* in the *Ath. Pol.* to save his thesis that the eleventh Athenian regime (fourth-century Athenian democracy) is one where «the *demos* has made itself master of everything, and it administers everything through decrees and the lawcourts, in which the *demos* has the power», thus «continually extending the competences of the masses» (Arist. *Ath. Pol.* 41, 2). *Nomothesia* does not in fact endanger his thesis, because it does not involve any kind of socio-economic mixing – the only viable restraint, in his view, on the power of the *demos*.

The reasons of *nomothesia*'s absence from the *Ath. Pol.* are more pragmatic, to do with the theoretical framework and the methodological architecture of the treatise<sup>10</sup>. *Nomothesia* falls squarely within the remit of Aristotle's deliberative function, which the *Ath. Pol.* discusses at length (43, 2-49) yet very selectively – mainly focusing on the fixed items of the agenda of the Assembly and on the relation between Council and Assembly. Within this framework, we argued, «the 'silence' about *nomothesia* becomes an issue only if *nomothesia* involved a fixed item on the agenda of a particular Assembly, or if it involved a separate body which is neither the Council nor the Assembly» – the kind of features that are in fact discussed in the *Ath. Pol.*<sup>11</sup>. In older scholarly reconstructions,

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<sup>7</sup> See Canevaro - Esu 2018, 110-111 for the evidence behind this statement.

<sup>8</sup> Whether the author of the *Ath. Pol.* is Aristotle or a student of his, it is clear that this is a thoroughly Aristotelian work, and we have argued that Aristotle's *Politics* provides its theoretical underpinning. See also Bertelli 1994 and 2018. On the author of the *Ath. Pol.* it is still worth consulting Rhodes 1981, 56-83.

<sup>9</sup> Mathieu - Hassoullier 1922; Bloch 1940; Rhodes 1981; Sealey 1987.

<sup>10</sup> Rhodes 1981, 32-35; see also Bertelli 2017, 513-549.

<sup>11</sup> Canevaro - Esu 2018, 131.

*nomothesia* presented both of these features, i.e. it was a set item on the agenda of the first Assembly meeting of the year and involved a separate body – the *nomothetai* – composed of those who had sworn the Judicial Oath (but which was not organised as a lawcourt)<sup>12</sup>. Thus, its absence from the *Ath. Pol.* seemed rather striking. Yet both of these features are only attested in a document at Dem. XXIV 20-23, and Canevaro has shown that this document is a later, unreliable forgery<sup>13</sup>. A majority of scholars have agreed with him, and even those, like Carawan, who have proposed alternative reconstructions of *nomothesia* no longer accept that the document should be taken at face value<sup>14</sup>. In other work, Canevaro has used epigraphical and literary evidence to show that *nomothesia* was not a set item on the agenda of a particular meeting, but could be started at any point of the year<sup>15</sup>. In Section 5 of our 2018 article, we tackled the issue of the identity of the *nomothetai*, providing evidence (particularly through a new reading of Aeschin. III 38-40) that they were a special session of the Assembly<sup>16</sup>. We concluded that the *Ath. Pol.* does not mention *nomothesia* not because taking it into account would invalidate its general thesis on the absolute dominance of the *demos*, but because its procedure is in fact subsumed into its treatment of Assembly procedure, and because nothing in its structure and procedure – within the framework of Aristotelian theory – made much difference to its thesis of the absolute power of the *demos*.

In *Erga-Logoi* 10.2, Gertrud Dietze-Mager challenged our interpretation in the context of a wide-ranging article about the distortions found in the *Ath. Pol.*, which stresses Aristotle's conservative outlook and his hostility to Athenian democracy. Dietze-Mager argues that Aristotle's account of the constitutional history of Athens is unreliable and vitiated by his political outlook. After a section about demagogues and the widening of the citizen body, she concentrates on the Areopagus and on

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<sup>12</sup> E.g. MacDowell 1975; Rhodes 1984 and 1987; Hansen 1985, 1991 and 2016.

<sup>13</sup> Canevaro 2013, 94-102.

<sup>14</sup> E.g. Faraguna 2016, 67-69 with further references; cf. also the references in Canevaro 2018, 72 n. 4. For Carawan's approach, see Carawan 2016, 37-60 and 2020, 21-95.

<sup>15</sup> Canevaro 2018 and 2020, also answering to the objections of Hansen 2016 and 2019.

<sup>16</sup> This has now been argued (also with further arguments) in Harris - Esu 2021, 95-100. Cf. also Lambert AIO 819, n. 1 who considers it likely. Carawan 2020, 63-67 somewhat incoherently holds that the *nomothetai* were nominally to be selected from those who had sworn the Judicial Oath (on the basis of a document that he himself considers unreliable) yet they were in fact just a special Assembly meeting. See the reviews of Esu 2021 and Harris 2021.



the identity of the *nomothetai*. She argues, in particular, that Aristotle's treatment of the role of the Areopagus in Athenian history demonstrates his selective presentation in accordance with his anti-democratic agenda.

This is not the place to discuss Dietze-Mager's treatment of the role of the Areopagus in detail, all the more so as she does not argue in this section specifically against our own article<sup>17</sup>. It is worth noting, however, that the idea of the increasing power of the Areopagus during the fourth century – not a new idea by any means – is hardly one that emerges uncontroversially from the evidence, and has in fact long been contested, corrected, qualified, or rejected by many scholars<sup>18</sup>. The very external evidence brought to bear by Dietze-Mager, in fact, fails to confirm that the Areopagus had wide-ranging prerogatives, including the key function of *nomophylakia*, in fourth-century Athens. For example, she cites the Athenian decree for the sacred *orgas* (IG II<sup>3</sup> 292) and comments that in this inscription the Areopagus is in charge of «die Oberaufsicht über alle Heiligtümer». As she cursorily recognizes, however, IG II<sup>3</sup> 292 ll. 17-22 mentions a fairly long series of bodies and magistrates with supervisory duties over the sacred precincts, which includes the Areopagus, yes, but also the general for the countryside, the *peripolarchoi*, the demarchs, the Council of Five Hundred and any Athenian who wishes to do so. The Areopagus does not play a dominant role (let alone one of wide-ranging *nomophylakia*) in this inscription, and the implementation of the decree is assigned to a multiplicity of institutional actors, some high-level (the Council, the general for the countryside), some less so (the *peripolarchoi*, the demarchs), while the only institution which has special powers delegated to it by the decree is in fact the Council of Five Hundred (ll. 85-86), not the Areopagus<sup>19</sup>. Harris has shown that we should distinguish between the prestige surrounding this old court in public discourse and its actual powers. The Areopagus could normally conduct investigations or be instructed to do so by a decree of the assembly<sup>20</sup>. The *apophysis* was a report that the Areopagus presented before the Assembly

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<sup>17</sup> Here extensive (perhaps too extensive) bibliographical references fail to conceal what is too uncritical an approach to very problematic evidence. She dismisses (p. 28 n. 88) Zaccarini 2018 yet without addressing his analysis of the evidence, and moreover fails to engage with the important arguments of Harris 2019 and 2021 (which go in the same direction of Zaccarini's).

<sup>18</sup> Wallace 1989; De Bruyn 1995 challenges many of Wallace's views. The increase of the Areopagus's influence in the late fourth century was recently (unconvincingly) reaffirmed by Rohde 2019.

<sup>19</sup> On the role of the Council vis-à-vis the other boards of officials and the relevant delegated powers see Esu c.d.s.

<sup>20</sup> These cases are extensively discussed in Harris 2016, 76-80 and 2019, 389-418.

and its recommendations were always only advisory, falling within the traditional remit of its prerogatives (as in the case of Harpalus when the Assembly appointed prosecutors to bring the indictment; Din. II 6). No solid evidence confirms the idea that it had wider-ranging prerogatives.

The existence of a powerful council of *nomophylakes* taming the popular power exercised by the Council and the Assembly – of a body, that is, along the lines of how Dietze-Mager paints the Areopagus – would indeed be in line with Aristotle's *desiderata*, yet it is dubious (and, in fact, both indemonstrable and rather unlikely) that the Areopagus ever had such powers<sup>21</sup>. Until the end of the Classical democracy, the Areopagus maintained its traditional jurisdiction over cases of intentional homicide and its prestigious status as the oldest Athenian court, while controls of the legality and constitutionality of new enactments were in fact performed by the *demos* in ordinary lawcourts through the *graphe paranomon* and *graphe nomon me epitedeion theinai*. It is not by chance that *nomophylakes* of the kind envisaged by Aristotle were later introduced by Demetrius of Phalerum – in a move away from democracy – to replace these two *graphai*<sup>22</sup>. They were introduced then because no such thing existed beforehand (whatever the attempts to present them as a restoration rather than an anti-democratic innovation)<sup>23</sup>.

Dietze-Mager's arguments about the Areopagus do not take issue specifically with our own reconstruction, so we have chosen to discuss them only summarily. We want to concentrate instead on Section 4 of her article, which deals with the issue of the identity of the *nomothetai*, treated in Section 5 of our original essay, to tie it in with the problem of Aristotle's outlook and the reasons of his silence. She argues against our thesis that the *nomothetai* were a special Assembly meeting with special legislative prerogatives (summoned in the context of the more complex *nomothesia* procedure) and defends the traditional view that they were a separate body (selected from those who had sworn the Judicial Oath)<sup>24</sup>.

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<sup>21</sup> Cf. Arist. *Pol.* 1273b 36 for the Areopagus as the oligarchic element of the Solonian mixed constitution.

<sup>22</sup> Canevaro 2011 and Saldutti 2022.

<sup>23</sup> It is also worth stressing that there is a fundamental incompatibility between *nomothesia*, *graphe paranomon* and *graphe nomon me epitedeion theinai* on the one hand, and a power of *nomophylakia* assigned to the Areopagus, as Dietze-Mager argues there was, on the other. One wonders what was then the role of *graphe paranomon* and *graphe nomon me epitedeion theinai*, if the control of legal consistency was already assigned to the Areopagus. What happened if the two disagreed? Why were there two different bodies performing precisely the same function?

<sup>24</sup> Dietze-Mager 2022. This argument is briefly anticipated in Dietze-Mager 2020, 77 n. 95.

And she argues that Aristotle deliberately suppressed them because their existence ran counter to his thesis of an extreme democracy where the *demos* was in control of everything.

A general point that needs to be made has to do with Dietze-Mager's approach to our own argument. She inconsistently goes back and forth between acknowledging that our aim is simply to explain Aristotle and assuming that in doing so we are somewhat justifying him – defending the reliability of the *Ath. Pol.*'s account and, particularly, his belief that in fourth-century Athens the *demos* governed through decrees and through the lawcourts without restraints<sup>25</sup>. This is a misrepresentation (or perhaps a misunderstanding) of our argument. Our point was not whether Aristotle is right or wrong in his assessment of Athens. Much further work by the both of us shows that we do not in fact share Aristotle's reservations, and we do believe that Aristotle had a strong anti-democratic bias. We also believe that the *demos* was by and large capable of keeping itself in check, and that *nomothesia*, *graphe paranomon* and *graphe nomon me epitedeion theinai* are evidence of a developed form of Athenian constitutionalism, respectful of the rule of law, and secured by forms of constitutional judicial review. Our aim was never to 'defend' the views expressed in the *Ath. Pol.* about fourth-century Athenian democracy, but rather better to explain them in the context of Aristotle's wider political theory and of the Athenian political system which he was discussing. Thus, it is somewhat puzzling to read in Dietze-Mager's essay remarks such as: «Canevaros und Esus Hypothese kann höchstens als Erklärung, nicht aber als Rechtfertigung für Aristoteles' Schweigen gewertet werden»<sup>26</sup>. It is unfortunate that Dietze-Mager's learned contribution spends so much time trying to refute an argument that we never make. Accordingly, we avoid here extensive discussion of the wider issue of Aristotle's bias, of his distortions, and of his approach to Athenian democracy. Our positions on these themes are expressed clearly enough in a long list of publications (and in previous publications by others which are the starting point of our own work), which can be perused by anyone who wishes to read them<sup>27</sup>.

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<sup>25</sup> Dietze-Mager 2022, 38-39 and 45-48, following therefore the old view defended by Hansen 2018, 24-25: «a selected body different from the *demos* in the *ekklesia*». Note however that Hansen depends on the document at Dem. XXIV 20-23 to argue for this view. Against his arguments in that article, see Canevaro 2018 and 2020.

<sup>26</sup> Dietze-Mager 2022, 47.

<sup>27</sup> E.g. Canevaro 2013, 2015, 2016a, 2018a, 2018b and 2019; Besso *et al.* 2014; Esu 2020, 2021a, 2021b and c.d.s.; Bertelli - Canevaro 2022. Canevaro 2022, 363-397 has also recently argued – at length – against Aristotle's reliability particularly in connection with the earlier stages of Athenian history.

But an argument that we do make is that about the identity of the *nomothetai*. And Dietze-Mager (relying on a 1971 unpublished Oxford DPhil Thesis by Ronald Knox) brings precise arguments against our thesis. We believe that her arguments do not hold water, and we shall spend the next few pages explaining why. We noted above that the notion that the *nomothetai* were a separate body selected from those who had sworn the Judicial Oath depends fully on a statement found in a document inserted at Dem. XXIV 20-23. Dietze-Mager does not challenge Canevaro's conclusions that this document is unreliable. Rather, she proposes an interpretation of Aeschin. III 38-40 that, if correct, would allegedly confirm that the *nomothetai* were not a special and specially labelled session of the Assembly but a separate body, regardless of the evidence of the document at Dem. XXIV 20-23. Aeschin. III 38-40 is in fact the main extant (and contemporary) evidence for the identity of the *nomothetai*, and the main object both of our detailed analysis in our 2018 article and of Dietze-Mager's criticism in her 2022 article. Because this passage is *prima facie* inconsistent with the information found in the document at Dem. XXIV 20-23, it has been heavily emended by editors and scholars to realign it with the information of the document – a dubious scholarly practice. It is worth quoting it in full as it is found in the *paradosis*, with also a short *apparatus criticus* reporting the main emendations.

[38] ἀλλ' οὐκ ἔχει ταῦθ' οὕτως· μήθ' ὑμεῖς ποτε εἰς τοσαύτην ἀταξίαν τῶν νόμων προβαίητε, οὔτε ἠμέληται περὶ τῶν τοιούτων τῷ τὴν δημοκρατίαν καταστήσαντι, ἀλλὰ διαρρήδη προστέτακται τοῖς θεσμοθέταις καθ' ἕκαστον ἐνιαυτὸν διορθοῦν ἐν τῷ δήμῳ τοὺς νόμους, ἀκριβῶς ἐξετάσαντας καὶ σκεψαμένους εἴ τις ἀναγέγραπται νόμος ἐναντίος ἐτέρῳ νόμῳ, ἢ ἄκυρος ἐν τοῖς κυρίοις ἢ εἴ ποῦ εἰσὶ νόμοι πλείους ἐνὸς ἀναγεγραμμένοι περὶ ἐκάστης πράξεως. [39] κἄν τι τοιοῦτον εὐρίσκωσι, ἀναγεγραφοτάς ἐν σανίσιν ἐκτιθέναι κελεύει πρόσθεν τῶν ἐπωνύμων, **τοὺς δὲ πρυτάνεις ποιεῖν ἐκκλησίαν ἐπιγράφαντας νομοθέτας. τὸν δ' ἐπιστάτην τῶν προέδρων διαχειροτονίαν διδόναι τῷ δήμῳ καὶ τοὺς μὲν ἀναιρεῖν τῶν νόμων, τοὺς δὲ καταλείπειν, ὅπως ἂν εἴς ἢ νόμος καὶ μὴ πλείους ἐκάστης πράξεως.** καὶ μοι λέγε τοὺς νόμους.

Νόμοι

[40] Εἰ τοίνυν, ὃ ἄνδρες Ἀθηναῖοι, ἀληθὴς ἦν ὁ παρὰ τούτων λόγος καὶ ἦσαν δύο κείμενοι νόμοι περὶ κηρυγμάτων, ἐξ ἀνάγκης οἴμαι, τῶν μὲν θεσμοθετῶν ἐξευρόντες τῶν δὲ πρυτάνεων ἀποδιδόντων τοῖς νομοθέταις ἀνήρητ' ἂν ὁ ἕτερος τῶν νόμων, ἥτοι ὁ τὴν ἐξουσίαν δεδωκῶς ἀναιρεῖν ἢ ὁ ἀπαγορεύων.

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ἐπιγράφαντας νομοθέτας codd. : ἐπιγράφαντας, νομοθέταις Dobree Adams Dilts | διδόναι τῷ δήμῳ καὶ τοὺς μὲν codd. : τῷ δήμῳ del. Schöll Adams : καὶ del. Kaibel Adams Dilts

[38] But this is not the situation. May you never get to the point of having so much chaos in your laws! Nor was the lawgiver who established your democracy careless about such matters. On the contrary, it has been explicitly ordered for the *thesmothetai* to revise the laws every year in front of the people (i.e. in the Assembly) after carefully examining and determining if any law has been inscribed contrary to another law, or an invalid law is found among the valid laws, or if there are more than one law inscribed about each action. [39] And if they find any such thing, the law orders them to write [these laws] on boards and place them in front of the Eponymous Heroes, that the *prytaneis* hold a meeting of the Assembly, labelling the meeting 'lawgivers' (*nomothetai*), that the *epistates* of the *proedroi* hold a vote between two alternatives (*diacheirotomia*) in front of the people (i.e. in the Assembly) to annul some laws and to leave others in place so that there is one law and not more about each action.

#### Laws

[40] If then, Athenians, the argument of these men is true, and there were two laws enacted about announcements (in the theatre), I think that once the *thesmothetai* found the laws and the *prytaneis* gave them to the *nomothetai*, one or the other of the laws would have been annulled, either the one giving the right to announce (the award in the theatre) or the one forbidding it. (transl. modified from Harris - Esu)

Our interpretation of the passage reads it as evidence not only that the *nomothetai* voted by show of hand (as an Assembly and not as a panel of judges who had sworn the Judicial Oath) but also that Aeschines takes for granted that they are a special session of the Assembly in which all Athenians can participate. They normally act as *nomothetai* in the final step of a procedure of *nomothesia* which is wider and more complex than normal decree-making, with multiple institutional layers and checks (involving the Council, standard Assembly meetings, publicity in the *agora*, the courts)<sup>28</sup>. They are labelled explicitly as *nomothetai* to mark their special responsibility in that context<sup>29</sup>. Yet they are still a special Assembly meeting – not a lawcourt or a special, selective panel chosen from those who had sworn the Judicial Oath.

This is how we read the passage. The context is that of an argument about the impossibility that two contradictory laws may be both valid at the same time (38). There is, Aeschines explains, a procedure that prevents this possibility – one that was probably added to the standard

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<sup>28</sup> On institutional layering see Canevaro 2019c, 497 and Esu c.d.s.

<sup>29</sup> As clear also from the epigraphical evidence for fourth-century Athenian laws: SEG 26.72; Stroud 1998; Richardson 2021 (with Harris 2022, 67-69); IG II<sup>2</sup> 140; IG II<sup>3</sup> 1 320, 429, 445, 447.

*nomothesia* procedure introduced after the restoration of democracy in 403<sup>30</sup>. This annual procedure has the *thesmothetai* check the laws for contradictions and inconsistencies and post the problematic laws in front of the monument of the Eponymous Heroes (39). Once this is done, the *prytaneis* call an Assembly ἐπιγράψαντας νομοθέτας, where the *epistates* of the *proedroi* (as in standard Assembly procedure)<sup>31</sup> calls a *diacheirotomia* (two votes by show of hand about two alternative possibilities)<sup>32</sup> for the *demos* and one set of laws is retained and the other repealed, so that there may be only one law on any given matter. The *paradosis* makes it clear that this *diacheirotomia* is held before the *demos* and at 38 Aeschines had already stated that the 'correction' of the laws occurs in the Assembly (διορθοῦν ἐν τῷ δήμῳ τοὺς νόμους)<sup>33</sup>. The text shows that the retention and repeal of the laws which gets rid of all contradictions must have been immediate following the *diacheirotomia* of the *demos*, and this in itself makes clear that this vote of the *demos* is in fact the vote of the *nomothetai*, because normal Assemblies could not, in any circumstance, change the laws. This is why Schöll and Adams both chose to delete τῷ δήμῳ at 39: because they could not accept that the *nomothetai* may in fact be the *demos* (because the document at Dem. XXIV 20-23 states that they are a panel selected from those who have sworn the Judicial Oath)<sup>34</sup>. Yet τῷ δήμῳ is present in all manuscripts and there is no reason to delete it<sup>35</sup>. This passage (39) comes before the secretary of the lawcourt reads out the relevant law (not preserved in the manuscripts) and so anticipates its contents. After the law is read out, Aeschines (40) retrospectively summarises the contents of the law, to underline the importance of the procedure for his current argument, and states that «once the *thesmothetai* found the laws and the *prytaneis* gave them to the *nomothetai*, one or the other of the laws would have been annulled». What at 39 was described as τοὺς δὲ πρυτάνεις ποιεῖν ἐκκλησίαν ἐπιγράψαντας νομοθέτας, τὸν δ' ἐπιστάτην τῶν προέδρων διαχειροτονίαν διδόναι τῷ δήμῳ is summarised at 40 as τῶν δὲ πρυτάνεων ἀποδιδόντων τοῖς νομοθέταις, and in both cases the result is that some laws are retained and some are repealed, and only one remains on any given matter. Thus, the *diacheirotomia* of the *demos* of 39 is explicitly described at 40 as a vote of the *nomothetai*, showing that the two are

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<sup>30</sup> See e.g. Canevaro 2018, 26-30.

<sup>31</sup> Canevaro 2019b, 345-356.

<sup>32</sup> Hansen 1987, 91; Canevaro 2019b, 352.

<sup>33</sup> See Harris - Esu 2021, 96.

<sup>34</sup> On this document see Canevaro 2013, 94-102.

<sup>35</sup> Thus also Knox 1975, 151; Harris - Esu 2021, 96-97; Dietze-Mager 2022, 40 n. 136.

one and the same<sup>36</sup>. There can be no doubt that the formulation of 40 is meant to parallel that of 39, because both formulations rework the wording of the same law, read by the secretary in between the two passages, yet Dietze-Mager comments (without elaborating) that our interpretation here «wenig überzeugend klingt»<sup>37</sup>. It has in fact sounded convincing enough to Harris, who builds on it in a 2021 article, and to Carawan himself, who proposes a very different interpretation of *nomothesia* yet does not doubt that the vote on the laws is here attributed to the *demos*<sup>38</sup>. Once we established all this, we went back to the puzzling expression τοὺς δὲ πρυτάνεις ποιεῖν ἐκκλησίαν ἐπιγράψαντας νομοθέτας, rejecting (as Dietze-Mager also does) Dobree's emendation (ἐπιγράψαντας, νομοθέταις) and interpreting the expression straightforwardly, with Piérart and *pace* Rhodes, as «the *prytaneis* hold a meeting of the Assembly, writing on [or labelling the meeting] 'lawgivers' (*nomothetai*)»<sup>39</sup>.

What are Dietze-Mager's actual arguments to reject our reading? Ultimately, it comes down to a καί. At 39, the manuscripts have τὸν δ' ἐπιστάτην τῶν προέδρων διαχειροτονίαν διδόναι τῷ δήμῳ καὶ τοὺς μὲν ἀναρεῖν τῶν νόμων, τοὺς δὲ καταλείπειν. This καί has been consistently deleted or put between square brackets in all the major editions of the speech<sup>40</sup>, and we ourselves omitted it in a brief quotation at p. 133 of our article. Dietze-Mager claims that the omission of this καί changes radically the meaning of the passage at 39, and appeals to the authority of an unpublished 1975 Oxford DPhil Dissertation by Ronald Knox (inexcusably ignored in our article) to argue that, with that καί, the shape of the *nomothesia* procedure detailed in this passage becomes entirely different<sup>41</sup>. In sum, she claims that, with the καί, we no longer have one procedural stage with the *epistates* of the *proedroi* calling a *diacheirotomia* in the Assembly as a result of which some laws are retained and some are repealed (so that only one law remains on any given matter). We have instead two procedural stages (separated by the καί): the first with the *epistates* of the *proedroi* calling a *diacheirotomia* in the Assembly about the appointment of the *nomothetai* (somehow not mentioned), and a second

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<sup>36</sup> This possibility is considered by Knox 1975, 145, as his option 2, but dismissed because, to him (based on the document at Dem. XXIV 20-23), the *nomothetai* cannot be a special meeting of the Assembly, but must be selected by those who had sworn the Judicial Oath.

<sup>37</sup> Dietze-Mager 2022, 42 n. 144.

<sup>38</sup> Harris 2021, 96-98; Carawan 2020, 65.

<sup>39</sup> Piérart 2000, *pace* Rhodes 2003.

<sup>40</sup> The only exception is the 1928 edition by Martin and de Budé (p. 39).

<sup>41</sup> Knox 1975, 140-152, esp. 144-151, for the analysis of our passage.



with laws retained or repealed by the *nomothetai* (again, somehow not mentioned). Does this interpretation hold water? We believe that it does not.

First, it is worth noting that Harris and Esu, in a section of a recent article which builds on our interpretation, do not in fact omit the *καί*, yet they see no reason to translate (and interpret) the passage as Dietze-Mager suggests (following Knox)<sup>42</sup>. So, incidentally, did Martin and de Budé in their 1928 Budé edition: they retain the *καί* and translate «le chef des proèdres fera voter l'Assemblée pour que l'on annule telle lois et maintienne telle autre»<sup>43</sup>. Second, it should be noted that Knox's interpretation is prompted by his belief – shared by many before the authenticity of the document at Dem. XXIV 20-23 was challenged – that we do know already who the *nomothetai* are: a special body selected from those who had sworn the Judicial Oath. What he is trying to do is to find a way to preserve the *paradosis* yet prevent it from saying what it clearly says – that the *nomothetai* are a special session of the Assembly – in order to avoid a glaring contradiction with the information provided by the document at Dem. XXIV 20-23. If we do not take that document as gospel, it becomes clear that this interpretation of the Greek is very strained, bordering on ungrammatical<sup>44</sup>.

And Dietze-Mager's interpretation of that *καί* (based on Knox's preferred reading of the passage) is in fact very strained, bordering on ungrammatical. Let us go back to the text. What we have at 39 is, first of all, a conditional clause: if the *thesmothetai* find any contradictions in the laws, they must post the relevant laws before the monument of the Eponymous Heroes. This is followed by a series of two coordinate clauses, detailing successive procedural steps, marked by two successive *δέ*: *τοὺς δὲ πρυτάνεις* call an Assembly (*ἐπιγράφαντας νομοθέτας*); *τὸν δ' ἐπιστάτην τῶν προέδρων* gives the *demos* a *diacheirotonia*. *δέ* is in fact the most common particle in Greek to connect clauses, standard in narratives for moving to the next step<sup>45</sup>. In Knox's and Dietze-Mager's

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<sup>42</sup> Harris - Esu 2021.

<sup>43</sup> Martin - Budé 1928, 38. They chose this translation despite trying to interpret *ἐπιγράφαντας νομοθέτας* (along the lines of what Rhodes 2003 later proposed) as a summoning of the *nomothetai*, convinced (because of the document at Dem. XXIV 20-23) that the *nomothetai* were a separate body chosen from those who had sworn the Judicial Oath.

<sup>44</sup> Knox 1975, 140-141 and esp. 146-147 (where he explicitly admits that his rejection of his option 2 is based on evidence external to Aeschines' passage, i.e. the document at Dem. XXIV 20-23).

<sup>45</sup> Boas *et al.* 2020, 671; see also Denniston 1954, 162-165; Bonifazi - Drummen - de Kreij 2016, 588-589.



interpretation, after these two coordinate clauses (and procedural steps) marked by two *δέ*, we would have a further coordinate clause (indicating a further, wholly separate, procedural step) marked instead by a *καί*: this would deal with the actual retention or repealing of laws, and would be separate from the vote of the *demos*. The sheer rarity of a series of coordinate clauses switching from *δέ* to *καί* is likely to be behind the fact that editors have almost universally chosen to delete or bracket the *καί*<sup>46</sup>. When we do find *δέ* and *καί* together, they normally play very different roles – in the words of the new *Cambridge Grammar of Classical Greek*, «although both *δέ* and *καί* [...] may be translated with *and*, these particles operate on different levels: whereas *δέ* serves to indicate shifts from one text segment/topic to another [...], *καί* connects several things said about a topic, linking several elements within a larger text segment»<sup>47</sup>. The Herodotean example they offer is revealing:

οὗτος ὧν ὁ Ὀτάνης [...] Βυζαντίους τε εἶλε καὶ Καλχηδόνιους, εἶλε δὲ Ἄντανδρον τὴν ἐν τῇ Τρωάδι γῆ, εἶλε δὲ Λαμπώνιον, λαβὼν δὲ παρὰ Λεσβίων νέας εἶλε Λημὸν τε καὶ Ἴμβρον. (Hdt. V 26)

This Otanes, then, captured Byzantium and Calchedon; next he captured Antandrus in the Troad, and next Lamponius; and having taken some ships from the Lesbians he captured Lemnus and Imbrus.

In this passage, «some of the captured cities are connected by (*τε*) *καί*, others by *δέ*: this suggests several distinct campaigns of conquest, with Byzantium and Calchedon being captured in the one campaign, and Lemnus and Imbrus in another»<sup>48</sup>. When *δέ* and *καί* are found together, that is, *δέ* marks a discontinuity, and therefore a higher level of coordination – successive segments, topics, or, indeed, steps – whereas *καί* provides lower level articulation/coordination/connections within a given segment, topic, or step already marked by *δέ*. In the case of Aeschin. III 39,

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<sup>46</sup> This is completely different from *καί* and *δέ* used together to mark the same item of a chain (whether next to each other or separated by one or, at most, two words), or from *δέ* *καί* joined to introduce a single coordinate clause, on which see Denniston 1954, 199-203 and 305. For some (very rare) examples of such switching see Denniston 1954, 289 (but note that in the two examples provided it is words or phrases that are joined, not clauses).

<sup>47</sup> Boas *et al.* 2020, 674, superseding Denniston 1954, 162. Cf. Bonifazi - Drummen - de Kreij 2016, 588: *δέ*'s «meaning consists in indicating that a new communicative act (or even move) is being performed. This new act may have a different subject (to speak in terms of content), or a different force (to speak in terms of intention), or both». Basically, *δέ* marks a degree discontinuity, while *καί* indicates continuation – it adds something to what came before.

<sup>48</sup> Boas *et al.* 2020, 674.

the two successive δέ mark two separate procedural steps, happening at different times and in different places: (1) the *prytaneis* call an Assembly labelling it 'nomothetai' (presumably drafting the agenda in the Tholos following a *problouleuma* of the Council); (2) the *epistates* of the *proedroi*, at that Assembly meeting, calls a *diacheirotomia* of the *demos*. This second step, if we accept the *καί* – and there is in fact no reason to reject it –, has an internal articulation of its own: the vote of the *demos* is called and, as a result, some laws are annulled and some others are retained. But this must be all one step, otherwise the Greek would have marked the shift to a further (temporally later) procedural step with another δέ. The use of the *καί* here stresses that the two coordinate clauses it connects are part of the same procedural step, with the retention and repealing of some laws which 'closely follows upon, or is the direct consequence of' the *diacheirotomia* of the *demos*<sup>49</sup>. The connection is explicitly marked as much closer than those indicated by δέ, thus excluding that the shift here is to a different meeting of a different body, at a later point in time. The *καί*, rather, confirms and strengthens our interpretation that this is all one procedural step whereby, as a result of a *diacheirotomia* of the *demos*, some laws are retained and some are repealed, so only one remains on any given matter. The duality of the *diacheirotomia* in fact anticipates the *μὲν ... δὲ* of *τοὺς μὲν ἀναρεῖν τῶν νόμων, τοὺς δὲ καταλείπειν* – a dual vote by show of hands with two possible outcomes – with the *καί* underlining this tight link. This is the same step that is glossed at 40 as a vote of the *nomothetai*, and the whole procedure is summarised at 38 as *διορθοῦν ἐν τῷ δήμῳ τοὺς νόμους*. Ultimately, that *καί*, far from causing a problem for our interpretation of the passage, confirms that Aeschines is describing here the *nomothetai* as a specially summoned and labelled session of the Assembly explicitly in charge of legislation<sup>50</sup>.

There is in fact some external evidence confirming that this is the case, as noted by Harris in a recent article<sup>51</sup>. *Lex. Seg. N 282 s.v. νομοθεταί* states:

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<sup>49</sup> We quote again from Boas *et al.* 2020, 674. Cf. also Denniston 1954, 293: «Of two clauses linked by *καί*, the first sometimes gives the time or circumstances in which the action of the second takes place». This is precisely what happens in our passage.

<sup>50</sup> Pace Dietze-Mager 2022, 43, there is nothing at Dem. XXIV 25 which contradicts this reconstruction. That passage states that a standard session of the Assembly cannot enact laws – it must be the *nomothetai*. Aeschin. III 38-40 makes clear that the *nomothetai* are not a standard session of the Assembly, but a specially summoned and labelled session in which the *demos* acts as *nomothetai*, and is institutionally labelled as such.

<sup>51</sup> Harris - Esu 2021, 98; see already Piérart 2000, 236. Harris - Esu (pp. 98-99) also cites a further passage from Aeschin. I 117-118 that, although less straightforward, strongly suggests that the *nomothetai* were a special session of the Assembly.

καὶ οἱ τοὺς νόμους εἰσηγούμενοι νομοθέται καλοῦνται, καὶ ἐκκλησία τις Ἀθήνησι νομοθέται καλεῖται, οἱ τοὺς εἰσφερομένους ἐδοκίμαζον νόμους, καὶ δι' ὧν οἱ ἀσύμφοροι ἐλύοντο.

Those who enacted the laws are called *nomothetai*, and the Assembly at Athens is called *nomothetai*, who vetted the laws introduced, and through whom inexpedient ones were removed.

This passage, albeit late, states uncontroversially that it was the Assembly that was called *nomothetai* when it dealt with the laws, and confirms Aeschines' statements at III 38-40. A further piece of evidence cited by Harris that corroborates this reconstruction comes from Demosthenes' *Against Leptines* (XX 94). There Demosthenes, after describing in the previous paragraph the procedure for repealing contradictory laws,<sup>52</sup> turns to previous stages of the *nomothesia* procedure about the publication of proposals for new laws. Demosthenes summarizes the steps of the procedures in this way. These bills must be posted before the Monument of the Eponymous Heroes and handed over to the secretary of the Assembly (τῷ γραμματεῖ παραδοῦναι) to be read out by him in the following Assemblies (τοῦτον δ' ἐν ταῖς ἐκκλησίαις ἀναγιγνώσκειν), «so that each one of you may hear them multiple times and consider them at leisure (ἵν' ἕκαστος ὑμῶν ἀκούσας πολλάκις καὶ κατὰ σχολὴν σκεψάμενος) and, if they are just and useful (ἂν ἦ καὶ δίκαια καὶ συμφέροντα), he may enact them as legislation (ταῦτα νομοθετῆ)». Here, the setting where «each one of you» hears the proposals from the *grammateus* and then «enacts them as legislation» is identified with the Assembly (ἐν ταῖς ἐκκλησίαις), which is consistent with our analysis of Aeschin. III 38-40.

Acknowledging this does not mean reducing Athenian lawmaking to standard decree-making – Canevaro has shown in several publications how different lawmaking was, and how important was the layering of several procedural steps, the increased publicity of bills, and the involvement of the lawcourts in vetting new proposals for their consistency with existing laws. But it does clarify further the procedure, stressing how the *demos* chose, at the end of the fifth century, to take charge directly of lawmaking, all the while trying hard to establish and maintain the higher status of *nomoi* compared to that of *psephismata*<sup>53</sup>. The power of the *demos* and the rule of law, far from being incompatible alternatives, were made to sustain each other<sup>54</sup>. Acknowledging that the *nomothetai* were a special

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<sup>52</sup> Canevaro 2016a, 19-23 and 2016b, 46-48.

<sup>53</sup> Canevaro 2015 makes this case at length.

<sup>54</sup> See Harris 2013 and 2016 for the most comprehensive statements of this thesis. See also Canevaro 2017.

session of the Assembly also helps understand why, for Aristotle (but not in these authors' opinion), Athenian *nomothesia* was not a satisfactory form of *nomophylakia* – it still left the laws in the hands of the *demos* in the Assembly and in the lawcourts. Finally, trying correctly to understand the logic of the Aristotelian account (and of its omissions and silences), without resorting too promptly to charges of straightforward lying or distortion, is not the same as agreeing with Aristotle's assessment of the Athenian constitution, or denying his conservative leanings. It is rather to do with paying adequate attention to key nuances and complexities in his treatment, and with fully appreciating its theoretical underpinnings.

MIRKO CANEVARO  
*University of Edinburgh*  
mirko.canevaro@ed.ac.uk

ALBERTO ESU  
*University of Nottingham*  
alberto.esu@nottingham.ac.uk

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