

THE PROCEDURE OF DEMOSTHENES' *AGAINST LEPTINES*: HOW TO REPEAL (AND REPLACE) AN EXISTING LAW

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Abstract: The article offers a novel interpretation of the procedure followed in the case of Demosthenes' speech *Against Leptines*, clarifying the workings of the institutions that secured the coherence of the laws of Athens. The procedure of this case of γραφή νόμον μη ἐπιτήδειον θείναι seems idiosyncratic: the case came to court over a year after the enactment of the law of Leptines, so Leptines was no longer liable to punishment and the action was only against the law itself; it also involved the proposal of a replacement law. Scholars have argued either that the θεσμοθέται devised a special procedure for these circumstances or that Demosthenes deceived the judges into believing they could enact the replacement law. I argue that there existed two regular uses of the γραφή νόμον μη ἐπιτήδειον θείναι: (1) to repeal laws that had been enacted irregularly and punish the proposer; (2) as part of *nomothesia*, to repeal existing laws that contradicted the new bill. This second use is the one that we find in *Against Leptines*: Demosthenes attempts to repeal Leptines' law as part of the procedure to enact the replacement law. If the accusation is successful, he pledges to have the new bill enacted by the νομοθέται.

Keywords: Athenian *nomothesia*, Leptines, judicial review, Demosthenes

I. Introduction: the procedure of *Against Leptines*

In 355/4 an Athenian named Apsephion brought a public action to repeal an inexpedient law (γραφή νόμον μη ἐπιτήδειον θείναι).¹ The prosecution was aimed at a law enacted by Leptines in 356/5, which abolished all exemptions from liturgies except those granted to the tyrannicides.² The charge was against the law, not against Leptines, who was no longer subject to prosecution because more than a year had elapsed since his law was enacted (§144). At the trial, Demosthenes delivered his speech as a supporting speaker (συνήγορος).³ Phormion also participated on Apsephion's side as a συνήγορος. Before the case came to trial, Phormion, Apsephion and Demosthenes proposed a law to replace Leptines' law. This replacement law proposed to institute a public action (γραφή) that could be brought against anyone who had received an honour in the past and was no longer considered worthy to retain it. As with all public actions, the decision about this issue would be made by a panel of judges in a lawcourt.⁴ In his speech at the trial, Demosthenes states that his ultimate goal is to enact this replacement law and that the public action against Leptines' law is the correct way to achieve this goal.

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¹ This is clearly indicated by the use of οὐκ ἐπιτήδειον associated with Leptines' law, cf. §§83, 88, 95, 153. Cf. also §1: εἵνεκα τοῦ νομίξειν συμφέρειν τῇ πόλει λελύσθαι τὸν νόμον.

² Demosthenes throughout the speech seems to imply that only honorary exemptions were abolished, yet at Dem. 20.29–50 he gives the impression that the law cancelled also exemptions from custom duties and commercial taxes (cf. MacDowell (2004) and Canevaro and Rutter (2015) 13–18). The citations of Leptines' law make clear that all exemptions from liturgies were involved.

³ Cf. Canevaro (2009) 117–19, and *passim*, and Kremmydas (2012) 2–3, 33–38 for the date, the actors and the context of the trial.

⁴ At §§88, 97–98 and 137 Demosthenes does not restrict the range of application of this law to exemptions, so it is possible that it was intended to be available to rescind any honour, not only ἀτέλεια. Unlike the γραφή παρανόμων, which was brought against the proposer of the honours, this γραφή was meant to be brought, even decades after the grant, directly against the honorand (or his heirs), who would be assessed for their merits and worth (*pace* Kremmydas (2012) 344). In addition to rescinding the honour, the judges could also vote additional punishments for the honorand, proposed by the accusers (§164).

Demosthenes' account of the procedure followed by himself, Apsephion and Phormion has given rise to considerable debate among scholars.⁵ These debates focus on two main issues. The first issue is: how did the public procedure against inexpedient laws fit within the *nomothesia* procedure to enact new laws? The second issue is: what was the correct procedure to enact a new law and how did Demosthenes expect it to be enacted in this case? These issues are of central importance for our understanding of Athenian law and legal procedure because they help us to understand how the Athenians achieved consistency in their legislation, which was a key feature of the rule of law, an essential part of democratic ideology.⁶

One of the main complications is the contradiction between Demosthenes' account of the procedure followed against Leptines' law and a document inserted into the text of Demosthenes' *Against Timocrates* (24.33). According to Demosthenes (for example §88) the ultimate aim of Apsephion's public action was not just to repeal Leptines' law, but also to enact new legislation (i.e. the replacement law). On the other hand, Apsephion had clearly brought a public action against an inexpedient law when prosecuting Leptines' law. Like all public actions, the case would have come before a court. Yet we know that after 403 all νόμοι had to be enacted by the νομοθέται.⁷ One could not enact one law by bringing a public action in a court against another law.⁸ Most scholars have dissociated the action against inexpedient laws from *nomothesia* and assumed that its sole function was to repeal laws:⁹ it was not used to repeal contradictory laws when someone proposed a new law.

This view of the function of the public action against inexpedient laws depends on information found in the inserted document at Dem. 24.33. This document states: 'It is prohibited to repeal any existing law except at a session of νομοθέται. And then, any Athenian who wishes to repeal a law, shall propose a new law to replace the one repealed'. This provision seems to prove beyond a doubt that in order to repeal an existing law one had to go before the νομοθέται and that to remove contradictory laws as part of *nomothesia* one did not bring a public action against an inexpedient law. This has important implications; if this view is correct, it would mean that Apsephion, Phormion and Demosthenes could not have enacted their new law by using a public action against an inexpedient law and they could also not have used this action to repeal Leptines' law. On the contrary, they should have gone before the νομοθέται to repeal Leptines' law. This would in turn imply that Demosthenes' statements about the appropriate procedures for enacting new laws are incorrect¹⁰ and that the procedure Apsephion followed in bringing the case against Leptines' law was highly irregular.¹¹

⁵ For example Kahrstedt (1938); Atkinson (1939); Wolff (1970); MacDowell (1975); Hansen (1979–1980); (1985); Calabi Limentani (1982); Rhodes (1985); (2003); Piérart (2000); Kremmydas (2012) 24–33, 341–66. Cf. Canevaro (2015) for the development of these procedures. The main sources, apart from this speech, are Dem. 24.18–35 and Aeschin. 3.38–40. The fourth-century laws preserved epigraphically are, in chronological order, *SEG* 26.72; Stroud (1998); Agora Excavations, inv. no. I 7495 (unpublished); *IG* II² 140; *IG* II³ 1 320, 429, 447, 445. Cf. also Clinton (2005–2008) no. 138, with commentary at 2.116; *SEG* 52.104.

⁶ On the democratic ideology of the rule of law, see Harris (2013) 3–20. On the Athenians striving for consistency among their laws, see Sickinger (2008); Wohl (2010) 292–301; Canevaro (2013b) 158–60; (forthcoming).

⁷ Cf. Harrison (1955) 26; Hansen (1991) 164; Kremmydas (2012) 24; Canevaro (2015) for the institution of

the new *nomothesia* in 403. Cf. also Hansen (1978); (1979); Hansen shows that laws were consistently enacted by the νομοθέται throughout the fourth century.

⁸ Cf. Canevaro (2013b) 143–50; (2013a) 80–93.

⁹ Cf., for example, Wolff (1970) 28–44; Hansen (1979–1980) 89–91; Calabi Limentani (1982) 361; Rhodes (1985) 58; Kremmydas (2012) 88–89. *Contra* Kahrstedt (1938) 23–25; Atkinson (1939) 133–34.

¹⁰ For example, when at §89 he states that 'on the one hand, if someone thinks that any of the existing laws is not good, he can bring a public action against it; on the other hand he proposes a replacement law'.

¹¹ This conclusion is inescapable unless one postulates that the procedure here described is prescribed by an old law in disuse. This was argued by MacDowell (1975) 65, 73 and *passim*, but his interpretation has been shown by Hansen (1979–1980) 92–95 and Rhodes (1985) 56 to be untenable (see below, section II.i).

Two main solutions have been proposed to solve these problems.¹²

(1) The law proposed by Apsephion, Phormion and Demosthenes to replace Leptines' law was nothing more than a ruse designed to deceive the judges and convince them that by repealing Leptines' law they would automatically enact the replacement law.¹³ This was not true, and Dem. 24.17–19, 24–26 and the epigraphical evidence make it clear that laws in the fourth century BC had to be enacted by the νομοθέται.¹⁴ Demosthenes' aim was simply to repeal Leptines' law, and none of the accusers had any intention of enacting any new law. If this view is correct, Demosthenes is lying when he describes the procedures he is following. H.J. Wolff was the first to propose this solution, which has been endorsed by P.J. Rhodes, C. Kremmydas and M.H. Hansen. Hansen, however, later retracted his endorsement.¹⁵

(2) After retracting his endorsement of Wolff's view, Hansen proposed a new solution.¹⁶ Because the case was unusual (more than one year had passed since the approval of Leptines' law, the original accuser, Bathippus, was dead and the law had therefore been formally enacted), the θεσμοθέται devised an ad hoc procedure that combined features of the *nomothesia* procedure with others from the public action against inexpedient laws. On the one hand, the θεσμοθέται took the election of advocates (σύνδικοι or συνήγοροι; Dem. 24.36, 20.146) and the proposal of a new law from the *nomothesia* procedure. On the other, they took the trial in court from the public action against inexpedient laws. Instead of having the new law enacted by the νομοθέται (as in the *nomothesia* procedure), it would be enacted by the court upon the repeal of Leptines' law.

Hansen's solution collides with several objections. First, it gives the θεσμοθέται the power to create new procedures similar to that of a Roman *praetor*,¹⁷ yet the sources show that they could not create new procedures.¹⁸ The θεσμοθέται had only the power to receive charges and to check that the defendant's offence and the relevant procedure were actionable on the basis of a written statute, and that the accuser had framed his charges in accordance with the key words of the relevant statute. If a magistrate were to accept a charge that did not follow one of the procedures prescribed in the laws of the city, he would be subject to prosecution at his εὔθυναί ([Arist.] *Ath. Pol.* 48.4).¹⁹ Second, as we will see in section III, Demosthenes never states that the new law would automatically be enacted if the court voted to repeal Leptines' law.

This is an opportune moment to revisit these issues: the recent publication of Kremmydas' commentary on Demosthenes' *Against Leptines* and of my own study of *nomothesia* and of the relevant documents fully justify a reconsideration of the topic.²⁰ In particular, I have shown that the documents inserted into the text at Dem. 24.20–23 and 33, which have been used by scholars as evidence for reconstructing the key features of the *nomothesia* procedure, are unreliable forgeries.²¹ I have also shown that Demosthenes' own statements about *nomothesia* in *Against Leptines* and *Against Timocrates* are generally consistent with each other and are confirmed by the evidence of inscriptions.

I summarize here the main steps in the *nomothesia* procedure following my recent reconstruction. (1) In order to introduce a new law, a preliminary vote in the Assembly, at any point of the year, had to be held that would allow new laws to be proposed (Dem. 24.25; *IG II³ 320 = SEG*

¹² I do not deal here in detail with the reconstructions of Hansen (1979–1980) and Calabi Limentani (1982), as these have been respectively retracted and convincingly refuted by Hansen (1985).

¹³ Wolff (1970) 36; followed by Hansen (1979–1980) 89–90; Rhodes (1985) 58; Kremmydas (2012) 342–43 and *passim*.

¹⁴ Cf. Canevaro (2013b) 143–50; (2013a) 80–93; Hansen (1978); (1979).

¹⁵ In fact, Leptines claims that Apsephion, Demosthenes and Phormion had no intention to get the new law

enacted (cf. §§98–99).

¹⁶ Hansen (1985) 350–51.

¹⁷ On the *praetor*'s edict and discretionality in creating and modifying *actiones*, cf., for example, Watson (1970); (1995) 74–82; Brennan (2000) 1.125–35.

¹⁸ The law discussed at Andoc. 1.86 states that magistrates could not make use of unwritten laws.

¹⁹ Cf. Thür (2008) 70–71; Harris (2013) 117–18.

²⁰ Kremmydas (2012); Canevaro (2013a) 84–104; (2013b).

²¹ Canevaro (2013b); (2013a) 80–104.

12.87; *IG II²* 140); this vote, as all votes in the Assembly, had to be preceded by a *προβούλευμα* of the Council. (2) Once new proposals had been authorized by the Assembly, all new proposals had to be posted in front of the monument of the Eponymous Heroes (Dem. 24.25, 20.94), so that anybody could see them. (3) The bills had to be read out by the secretary in each Assembly until the appointment of the *νομοθέται* (Dem. 20.94). (4) In the third Assembly after the preliminary vote, on the basis of the bills presented, the people had to discuss the appointment of *νομοθέται* and pass a decree of appointment (Dem. 24.25, 20.92). (5) Opposing laws had to be repealed before the new laws could be enacted by the *νομοθέται* (Dem. 24.32, 24.34–35, 20.93). (6) Presumably at the same meeting of the Assembly that appointed the *νομοθέται* expert *συνήγοροι* were elected to defend those laws whose repeal was necessary for enacting the new laws (Dem. 24.36, 20.146). (7) If the proposer of a new law failed to abide by any of these provisions, anyone could prosecute him on a charge of enacting an inexpedient law (Dem. 24.32), and if the case was heard within a year from the enactment of the law, the punishment could be anything the court decided, from a small fine to *atimia* or death.

In my previous essays,²² I did not, however, examine how opposing laws were to be repealed in step 5 of the procedure. This issue is key for our understanding of the procedure followed by Apsephion in bringing his public action against Leptines' law.

This article will therefore attempt to shed light on the nature of the procedures followed in the case *Against Leptines* and on how they work in the wider context of fourth-century *nomothesia*. Section II will examine the statements of Dem. 24.32 and 34, and compare them with those of Dem. 20.88–89 and 93–94. It will explore what the correct procedure for repealing contradictory laws in the *nomothesia* process was and the ways of using the public action against inexpedient laws. In particular, this section will show how this action was used in one way in *Against Timocrates* and in another way in *Against Leptines*. Section III studies how the new law of Apsephion, Phormio and Demosthenes was to be enacted.

II. How does one repeal a contradictory law?

The purposes of the *γραφή νόμον μὴ ἐπιτήδειον θεῖναι*

Previous reconstructions of the procedure followed in *Against Leptines* all assume that the information provided by the document found at Dem. 24.33 is reliable. They are therefore based on the principle that, according to the laws on *nomothesia*, established laws were (and could be) repealed only by the *νομοθέται*. This contradicts the account of the procedure against Leptines' law followed by Apsephion, Phormion and Demosthenes. This document is however an unreliable forgery.²³

If one disregards the information of the document at Dem. 24.33 and looks instead at Diodorus' words before and after the law is read out (Dem. 24.32, 24.34), one finds that nothing there contradicts Dem. 20.88–89:

[Timocrates] also committed another crime, which was to introduce his proposal in violation of all the established laws. You will clearly understand this in a minute. Take and read for me first this law here, which explicitly forbids the enactment of any law contrary to the existing laws, and if someone enacts it, provides for a public action against him. Read it. [...] You have heard the law. It prohibits proposing a law contrary to the existing ones unless one rescinds the one already in effect (tr. Harris).

Diodorus simply states that before enacting a new law (with the *νομοθέται*) one has to repeal any contradictory laws, but does not explain how and where these contradictory laws must be repealed. This detail must have been contained in the law about *nomothesia*, but because it is irrel-

²² Canevaro (2013b); (2015).

²³ Canevaro (2013b) 156–58; (2013a) 102–04.

evant in the context of *Against Timocrates*,²⁴ the orator does not mention it in his summary. The account of Dem. 24.32–34 (excluding the document) therefore does not clash with that of Dem. 20.88–89.

There is moreover no evidence elsewhere that existing laws had to be repealed by the νομοθέται.²⁵ One passage that seems to envision this possibility may in fact support the opposite view and suggest that the νομοθέται were not usually in charge of repealing laws. Demosthenes in the *Third Olynthiac* (3.10) addresses the Athenians in the Assembly with the following words:

Do not be amazed, men of Athens, if I say something that most of you will find unexpected. You should appoint lawmakers. Use these lawmakers not to pass a law – you have enough of them – but to repeal those laws that are presently harming your interests' (tr. Trevett).

He expects that the Athenians will be surprised (μὴ [...] θαυμάσητε) to hear that he advises summoning the νομοθέται not to enact a new law (μὴ θῆσθε νόμον μηδένα) but to repeal some of the existing laws. This suggests that the normal responsibility of the νομοθέται was enacting new laws²⁶ and it was unusual that they may repeal one.²⁷ One may argue that what is paradoxical here is not to have a law repealed by the νομοθέται but rather, in accordance with the document at Dem. 24.33, to have a law repealed without passing an alternative law. Yet the remark εἰσὶ γὰρ ὑμῖν ἱκανοί after the exhortation ἐν δὲ τούτοις τοῖς νομοθέταις μὴ θῆσθε νόμον μηδένα (which is what is supposed to be παράδοξον) suggests that the result of using the νομοθέται in the normal way would be to increase the number of laws, which is to be avoided because there are already enough of them (Dem. 24.142 and 20.91–92 also lament that there are too many laws). If the new laws that Demosthenes exhorts the Athenians not to enact were only replacement laws, then they would not add to the number of Athenian laws, which would remain the same, and therefore there would be no need to remark εἰσὶ γὰρ ὑμῖν ἱκανοί. This expression makes better sense if we understand it to mean that the normal role of the νομοθέται is that of enacting new laws and not repealing existing ones.

Because the document at Dem. 24.33 is not reliable, there is no reason to reject out of hand the account of the procedure followed to repeal Leptines' law given in *Against Leptines*, which puts the judges of a lawcourt in charge of repealing contradictory laws. We should therefore pay careful attention to the statements about the legal procedure followed to repeal Leptines' law, in particular §§89–90 and 93–94 (as well as §96, Dem. 24.32–24 and 3.10). These passages make clear that public action against inexpedient laws could be used in two ways: (1) to repeal contradictory laws before enacting a new one, as part of the *nomothesia* procedure (as in Dem. 20) and (2) to repeal a law (and punish its proposer) that had not been enacted following the proper procedures or which contradicted existing laws, without enacting any new law (as in Dem. 24).

²⁴ Timocrates had not repealed the contradictory laws, and Diodorus was not enacting any new law.

²⁵ We have evidence for only six γραφαὶ νόμον μὴ ἐπιτήδειον θεῖναι: Dem. 20, 24, two examples at 24.138; Aeschin. 1.34; Lys. fr. 86–87. Hansen (1974) 45–46 shows that Dem. 18.102–05 is a case of γραφή παρανόμων, *pace* Wolff (1970) 30, 39 n.102; *cf.* also Canevaro (2013a) 267–71. In none of these references is there any claim that laws must be repealed by the νομοθέται. The procedure described at Aeschin. 3.38–40 does not involve, strictly speaking, the repeal of a legitimately enacted law by the νομοθέται. The νομοθέται must rather choose between two existing contradictory laws brought to their attention by the θεσμοθέται, and decide which one should be retained. Because the *nomothesia* procedure

should prevent a law from being enacted if it contradicts an existing one (*cf.* Canevaro (forthcoming)), when the θεσμοθέται find two contradictory laws, this means that somewhere along the line an irregularity has occurred, and one of them is illegitimate. The νομοθέται are tasked with deciding which one is legitimate. It is possible moreover that this procedure may be an innovation later than Dem. 20 (*cf.* Kremmydas (2012) 28–32).

²⁶ This is consistent with what we learn at Dem. 24.24–32; *cf.* Canevaro (2013b) 141–42, 143–50; Canevaro (2013a) 80–93.

²⁷ This is further evidence against the authenticity of the document at Dem. 24.33, which supplements Canevaro (2013b) 156–58; (2013a) 102–04.

II.i Dem. 20. 89–90

At §88 Demosthenes contrasts Leptines' law with the proposal that he and his associates have made, which allows the Athenians to revoke awards granted to those who no longer deserve them and those who have deserved their awards to keep them. Demosthenes then asserts that he and his associates have followed all the correct procedures (§89). He states that there is nothing strange or new in the way they are bringing a charge against Leptines' law and proposing a replacement law (καὶ τούτων πάντων οὐδὲν ἔστιν ἡμέτερον καινὸν εὔρημα). Demosthenes mentions that these very procedures have not been followed by Leptines, and this charge is repeated at §94: Leptines has failed to repeal a contradictory law before enacting his. Even though Demosthenes charges Leptines with procedural violations when enacting his law, it is clear from both passages that the main point of his argument is to show that the procedure followed by the accusers is correct.²⁸

Demosthenes claims that the procedure through which they are legislating is in accordance with an 'old law' (ὁ παλαιός [...] νόμος οὕτω κελεύει νομοθετεῖν). The use of the adjective παλαιός, together with the description at §91 of new and shameful legislative practices, led D.M. MacDowell to conclude that the procedure followed by Apsephion was set forth in an old law passed in 403/2, which was no longer in effect.²⁹ According to MacDowell, Leptines enacted his law by following a new legislative procedure enacted around 370, which he believes Demosthenes discusses with disapproval at §91–92.

There are three objections to MacDowell's view. First, at §§91–92 Demosthenes is not describing new legislative procedures that replaced old ones, but the abuse of the standard legislative procedures by contemporary politicians. The language used in the passage strongly suggests that the present situation in which 'The laws do not differ one iota from decrees, and the laws to be followed when passing decrees are more recent than the actual decrees themselves' (tr. Harris) has resulted not from new laws but from the schemes of powerful men (§91: κατεσκευάσαν). Second, the official who received the written indictment could not have accepted charges based on a statute that had been repealed; he would have run the risk of being attacked at his εὔθυναί.³⁰

Third, the law that Demosthenes calls 'old' at §89 is simply a summary of the procedures for *nomothesia* described at §§93–95 and at Dem. 24.18–19, 24–27, 28–32, 34–36.³¹ I will discuss Dem. 20.93–95 in section II.ii. The law on *nomothesia* is described as 'old' (παλαιός) not because it has been repealed and is no longer in effect, but rather to confer more authority on it. In the next paragraph it is also attributed to Solon, despite the fact that it was probably enacted in the aftermath of the restoration of democracy in 403/2.³² That the point of mentioning the antiquity of a law is to stress its authority is made even clearer by the words of Demosthenes at 24.24, which also refer to the law on *nomothesia*: 'All these laws have already been in effect for a long time, men of the court, and have often proved themselves beneficial for you' (tr. Harris).³³ And moreover, παλαιός is used elsewhere in *Against Leptines* to enhance the authority of laws that Demosthenes mentions explicitly as valid and in effect (§§18, 28, 153).³⁴

²⁸ The same focus is stressed at §93: ἡμεῖς δ', ὧ ἄνδρες Ἀθηναῖοι, πάντα, καὶ παρεισφέρομεν πολλῶν καὶ κρείττω καὶ δικαιότερον τοῦ τούτου νόμον. γνώσεσθε δ' ἀκούοντες. Note also that Leptines was not personally liable (§144), and therefore his procedural violations are tangential to the main point of this section. On the other hand, Demosthenes states explicitly that Leptines had attacked himself, Apsephion and Phormion at the *anakrasis*, arguing that the procedure followed was incorrect and the replacement law a ruse (§§99–100).

²⁹ MacDowell (1975) 65, 73 and *passim*; cf. also MacDowell (2009) 156–66.

³⁰ Cf. Thür (2008) 70–71; Harris (2013) 117–18.

³¹ Cf. Hansen (1979–1980) 88–95; Rhodes (1985) 56; Canevaro (2013a) 241; (forthcoming).

³² Cf. Canevaro and Harris (2012) 110–16. On the action of the late fifth-century νομοθέται, cf. Harrison (1955) 26; Hansen (1991) 164; Kremmydas (2012) 24; Canevaro (2015). On the attribution of laws to Solon and its meaning, cf. Hansen (1989); Thomas (1994); Johnstone (1999) 25–33; Canevaro (forthcoming).

³³ Cf. also Antiph. 5.14 = 6.2; Canevaro (forthcoming).

³⁴ Cf. Rhodes (1985) 57.

The *παλαιός νόμος* therefore is simply the current law on *nomothesia*,³⁵ the one Demosthenes claims that he, Apsephion and Phormion are following. In Demosthenes' words at §89, the correct method of legislation this law prescribed (οὕτω κελεύει νομοθετεῖν) is composed of two separate parts, γράφεσθαι (bringing a public charge) and proposing a replacement law, two different actions that are connected by the particles μέν ... δέ. The first part, γράφεσθαι, does not appear to be compulsory whenever one wants to enact a new law. It is in fact qualified by the protasis of a future more vivid conditional clause – 'if someone thinks that any of the existing laws is not good' (ἄν τις τινα τῶν ὑπαρχόντων νόμων μὴ καλῶς ἔχειν ἠγήται) – which applies, from a syntactical point of view, only to γράφεσθαι μέν. Bringing a public action is therefore necessary only if one believes that one of the existing laws is not good, and not in order to propose any new law.³⁶ In fact, the protasis ἄν τις τινα τῶν ὑπαρχόντων νόμων μὴ καλῶς ἔχειν ἠγήται must refer to the rule that when one proposed a new law, one needed first of all to repeal any contradictory laws (*cf.* Dem. 24.32–24 and §93).³⁷ The middle form γράφεσθαι (*cf.* also §96 πρὶν τοῦτον ἔλυσε γραψάμενος) must refer to bringing a public action, a *graphē*. This is the sense of the verb in legal language. MacDowell wishes to translate the infinitive as 'getting a law put down for formal consideration of its repeal',³⁸ yet here and at §96 the verb γράφεσθαι clearly refers to the current action brought by Apsephion, an action against an inexpedient law (*cf.* §94).

Demosthenes clearly states that the correct venue for repealing contradictory laws before enacting a new one is a lawcourt, and that this is done through a public action against inexpedient laws (*pace* the document at Dem. 24.33).³⁹ The second prescription mentioned at §89 of the law on *nomothesia* (ὁ παλαιός [...] νόμος οὕτω κελεύει νομοθετεῖν), marked by δέ, is παρεισφέρειν δ' αὐτὸν ἄλλον ('to present a replacement law'). The second part of the procedure aims to enact a new law because the existing law on the subject is not good; this is taken as a given because it was the case with Leptines' law. So the summary of the law on *nomothesia* applies to the present case brought by Apsephion. In fact, in many cases new laws were probably enacted without repealing any existing law (this is what both Leptines and Timocrates apparently did, *cf.* §§95–97, Dem. 24.32–64). This was not in itself irregular, as long as no contradictory laws existed, because γράφεσθαι, as we have seen, was compulsory only when an existing law contradicted the new bill.

At §89 therefore Demosthenes provides an account of the rules of *nomothesia* that contemplates a further use of the public action against inexpedient laws. Dem. 24.32–24 (excluding the document) informs us that this procedure could be used against the proposer of a law (either during its enactment or afterwards), on the grounds that he had failed to repeal contradictory laws or to follow the correct procedures. Here (at §89) the public action against an inexpedient law can be used to repeal contradictory laws in order to enact a new law (the Assembly elected σύνδικοι of the 'contradictory' laws; *cf.* §146, Dem. 24.36). The public action is therefore an integral part of the procedure of *nomothesia* itself. Scholars, mainly on the basis of Dem. 24.33, have doubted Demosthenes' words, and claimed that he is lying and trying to convince the judges that they are in fact νομοθέται. It is important therefore to compare his account here with what he says right after the law on *nomothesia* is read out by the clerk, at §§93–94.

³⁵ Hansen (1979–1980) 88–95 argues (following Schöll (1886)) that this law, summarized in more detail at §§93–95, is that quoted at Dem. 24.33 (MacDowell (1975) named it 'Repeal Law'). Yet the document at Dem. 24.33 is a forgery. Moreover its provisions do not completely match all those of the *παλαιός νόμος* (which shares some also with the law summarized at Dem. 24.24–25). The *παλαιός νόμος* is more likely to correspond to the rules of *nomothesia* in their entirety, as they are described at Dem. 24.18–36; *cf.* Rhodes (1985) 56–

57; Canevaro (2013b) 141–42, 143–50; (2013a) 80–93.

³⁶ *Pace* Hansen (1985) 346–52 and Rhodes (1985) 57 who read these words (and Dem. 24.33) as describing a procedure which allows new legislation only as the replacement of old laws.

³⁷ *Cf.* Canevaro (2013a) 91–94; (2013b) 147–50; (forthcoming) for the rationale of this norm.

³⁸ MacDowell (1975) 64.

³⁹ Kahrstedt (1938) and Atkinson (1939) understand this clearly.

II.ii Dem. 20.93–94

Demosthenes makes it very clear at §92 that the reason why he is asking the clerk to read out the law on *nomothesia* is to confirm the argument made at §§89–92: Apsephion, Phormion and Demosthenes have followed all the correct procedures ('so that I may not rely on mere assertion, but show the actual law that I am discussing ...').⁴⁰ The summary of the law should therefore be read in the light of what Demosthenes states at §§89–90. The orator asks the clerk to read out the law on *nomothesia* with the words λαβέ μοι τὸν νόμον καθ' ὃν ἦσαν οἱ πρότερον νομοθέται. The expression οἱ πρότερον νομοθέται is parallel to the description of the law as a παλαιός νόμος at §89 and coherent with the description at §§90–92 of two imaginary times, one when the laws were respected and one when they were ignored.⁴¹ The law read out and summarized at §§93–94 is therefore the same law discussed at §89, and this is confirmed at §93, where the law is once again ascribed to Solon, as it is at §90. It is also the same law discussed at Dem. 24.18–35.⁴²

The account of the provisions of this law opens with the words: 'You see the excellent method that Solon provides for enacting laws' (ὁ Σόλων τοὺς νόμους ὡς καλῶς κελεύει τιθέναι), which parallel οὕτω κελεύει νομοθετεῖν of §89. The provisions which are relevant to the current case are: πρῶτον μὲν παρ' ὑμῖν, ἐν τοῖς ὁμωμοκόσιν, παρ' οἷσπερ καὶ ἄλλα κυροῦνται, ἔπειτα λύοντα τοὺς ἐναντίους. The correct procedures imply an assessment by the ὁμωμοκότες and the repealing of contradictory laws. ἐν τοῖς ὁμωμοκόσιν refers to those that have sworn the Judicial Oath at the beginning of the year and can therefore act as judges in the lawcourts.⁴³ The most obvious interpretation of this expression is therefore that 'first' (πρῶτον μὲν) the procedure requires a step before the judges in a lawcourt. Scholars have, however, normally subscribed to a different interpretation: this would be a reference to the νομοθέται, who, according to the document of Dem. 24.20–23, were selected from among those who had sworn the Judicial Oath.⁴⁴ Demosthenes would therefore be mentioning the Oath in order to deceive the judges about their identity and prerogatives, and convince them that they are νομοθέται. The document at Dem. 24.20–23 is, however, a later forgery.⁴⁵ The information it provides is unreliable, and could in fact derive from this very mention of the ὁμωμοκότες. And moreover it is important to notice that ὁμωμοκότες is used again in this very speech at §118, and refers unequivocally to the judges, and that the νομοθέται are never mentioned at §§93–94. It is therefore important to pay close attention to Demosthenes' words at §93 in the context of the argument developed from §89, without pre-judging the issue based on the document at Dem. 24.20–23.

The main issue with the expression πρῶτον μὲν παρ' ὑμῖν, ἐν τοῖς ὁμωμοκόσιν, παρ' οἷσπερ καὶ ἄλλα κυροῦνται, ἔπειτα λύοντα τοὺς ἐναντίους is the meaning of πρῶτον μὲν [...] ἔπειτα. The most obvious meaning – the temporal one – cannot be accepted. If we were to interpret the ὁμωμοκότες as νομοθέται, the temporal sequence of the procedure would be the wrong way round; according to the rules discussed at Dem. 24.32–34 (excluding the document) the contradictory

⁴⁰ Pace Kremmydas (2012) 350–51, who claims that this passage has a different emphasis from §§89–92.

⁴¹ Cf. Canevaro (forthcoming) for an analysis of this narrative. It is, however, unlikely that οἱ πρότερον νομοθέται could be the νομοθέται in charge of enacting laws, those mentioned in the motion and enactment clauses of fourth-century νόμοι (for example *IG II³ 1 429* l. 6: δεδόχθαι τοῖς νομοθέταις). They are instead opposed to the politicians described at §91, who ignore the correct rules and procedures. They must therefore be the proposers of new laws, who followed the correct procedures. The term νομοθέτης is in fact used in literary sources and inscriptions both for those who assessed and enacted new laws and for those who proposed them; cf., for example, Dem. 24.103, 113, 152; *IOrp 297 = IG II³*

1 348 with Lambert (2004) 106, 109 n.84.

⁴² Cf. Canevaro (2013b) 143–50.

⁴³ Cf., for example, Boegehold (1995) 186–87 for the practical arrangements of the Judicial Oath; Harris (2013) 101–37 for its provisions and its importance. The document at Dem. 24.149–51 is unreliable; cf. Canevaro (2013a) 173–80; Sommerstein and Bayliss (2013) 70–80 accept that it is not a transcription of the oath at one time, and that it contains unreliable features, but would like to salvage some more clauses.

⁴⁴ For example, MacDowell (1975) 62–74; Hansen (1979–1980) 88–95; (1985) 363–65, 371; Rhodes (1985) 55–60; (1987) 19; (2003) 124–25; Kremmydas (2012) 16–31, 350–51.

⁴⁵ Cf. Canevaro (2013a) 94–102; (2013b) 150–56.

laws must be repealed before the final decision of the νομοθέται, not afterwards.⁴⁶ And in the following paragraph καὶ πρὸ τούτων, which introduces the previous procedural steps (posting the bills before the monument of the Eponymous Heroes and having them read out in the Assembly), shows that Demosthenes is not following any temporal sequence in describing the procedure of *nomothesia*.⁴⁷ Kremmydas suggests plausibly that πρῶτον μὲν [...] ἔπειτα may refer to the disposition of the provisions in the text of the law just read out.⁴⁸ It is as likely that they may simply reflect the logical priority of the two notions in Demosthenes' argument. Whatever the case, Demosthenes is explicit at §§89 and 96 that contradictory laws must be repealed through a public action, and therefore by the judges (the most obvious interpretation of ἐν τοῖς ὁμομοκόσιν). We should therefore consider the possibility that πρῶτον μὲν παρ' ὑμῖν, ἐν τοῖς ὁμομοκόσιν and ἔπειτα λύοντα τοὺς ἐναντίους may not describe two separate stages of the procedure, but rather two separate features (separately mentioned in the law) of the same procedural step: repealing the contradictory laws. This interpretation is confirmed by the wider context of the argument, which still reflects the agenda expressed at §89: the public charge against Leptines' law is in accordance with the rules of *nomothesia*. It is therefore completely natural that, after the law is read out by the clerk, Demosthenes would concentrate on those particular rules that concern the repealing of contradictory laws and govern the very public charge brought against Leptines' law.

The phrase ἐν τοῖς ὁμομοκόσιν is qualified by παρ' οἷσπερ καὶ τᾶλλα κυροῦται. This qualification is not problematic for this interpretation. The term κυρώω, in the passive and middle, means 'to confirm', for example a marriage (Hdt. 6.130: ἐκεκύρωτο ὁ γάμος Κλεισθένει). Andoc. 1.85 uses it with reference to the laws of the city, which are already valid but are reviewed and confirmed in 403 after the restoration of democracy (ἔδοκιμάσθησαν μὲν οὖν οἱ νόμοι, ὃ ἄνδρες, [...] τοὺς δὲ κυρωθέντας ἀνέγραψαν εἰς τὴν στοάν).⁴⁹ This is the meaning of the verb at §93: in order to enact a new law one must first bring a charge against existing laws that contradict its provisions; these laws are in effect, and the judges in the lawcourt must decide whether to confirm or repeal them (and therefore make the enactment of the new law by the νομοθέται possible). When Demosthenes states that the judges have the power to confirm καὶ τᾶλλα, he is probably referring to the power to repeal or confirm decrees of the Assembly through a γραφὴ παρανόμων, to which Solon (in Demosthenes' account) adds the power to repeal or confirm existing laws. But even if one wants to read more into this expression, a reference to 'sovereignty', this is not incompatible with the δικασταί; the lawcourts in Athens had in fact the role of final review of the decisions of both the Assembly and the νομοθέται, performing a task akin to modern judicial review, and some scholars have argued that sovereignty ultimately rested with them.⁵⁰ The implications of their powers were not lost on ancient commentators, and Aristotle (*Pol.* 1274a 4–5) famously stated that Solon was criticized by some for κύριον ποιήσαντα τὸ δικαστήριον πάντων ('making the lawcourts sovereign over everything').

Demosthenes at §93 is discussing the need to bring a charge against contradictory laws as the first step in enacting a new law. The expression ἐν τοῖς ὁμομοκόσιν must refer to the judges, not to the νομοθέται. His words right after the law is read out do not contradict, but rather confirm the account of §89. And the need to repeal contradictory laws in a lawcourt before the judges is confirmed a few paragraphs later. At §94 the orator reminds the judges of other procedural steps

⁴⁶ If we were instead to follow the document at Dem. 24.33, the contradictory laws would be repealed by the νομοθέται and there would be no temporal sequence.

⁴⁷ The scholiast is aware of this and comments: "πρῶτον" δὲ οὐ τῆ τάξει, ἀλλὰ τῷ ἀξιώματι καὶ τῷ κυροῦν (Schol. Dem. 20.93.205 Dilts).

⁴⁸ Kremmydas (2012) 250–51. He also claims that the order mirrors that of the document at Dem. 24.33, but this is a circular argument, as this passage is probably the

source of that document.

⁴⁹ Cf. Canevaro and Harris (2012) 110–13.

⁵⁰ Cf. Pasquino (2010) and Lanni (2010), on judicial review, and, for example, Hansen (1974); (1991) 150–55, 300–04; Ober (1989) 22–23; Ostwald (1989); Todd (1993) 170, 298–99; Blanshard (2004); Pecorella Longo (2004); Cammack (2012) for the debate on the place of sovereignty in Athens.

of *nomothesia*: posting the new bills before the monument of the Eponymous Heroes and reading them in each Assembly after the original vote that allowed new proposals to be made.⁵¹ He then repeats that he, Apsephion and Phormion have followed all these rules, while Leptines did not. At §§95–96 the orator has some provisions of Leptines' law read out, and immediately afterwards an existing law that, he claims, contradicts them. He therefore points out that according to the rules of *nomothesia*, the same ones that he is following in bringing a charge against Leptines' law, Leptines should have brought a charge against that law before enacting his, and his failure to do this makes the existence of this contradictory law evidence against him. This passage confirms the account of §§89 and 93: contradictory laws must be repealed through a public charge.

Demosthenes then mentions that, according to 'another law', if someone fails to repeal contradictory laws before enacting a new one he can himself be subject to a public charge (καὶ ταῦθ' ἐτέρου κελεύοντος νόμου καὶ κατ' αὐτὸ τοῦτο ἔνοχον εἶναι τῇ γραφῇ, ἐὰν ἐναντίος ἢ τοῖς πρότερον κειμένοις νόμοις). This ἕτερος νόμος is not actually a different law, but just a different clause of the law on *nomothesia*, the clause discussed also at Dem. 24.32–34 (excluding the document), which authorizes the use of the γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι against those who do not follow the correct procedures and rules for legislating.⁵² The word νόμος can in fact be used to mean a law in its entirety as well as specific provisions of a law.⁵³

II.iii. Provisional conclusion

All the relevant passages of the *Against Leptines* are consistent in stating that existing laws had to be repealed by judges in a lawcourt, and not by the νομοθέται, and Dem. 24.32–4 (excluding the document) does not contradict this. They isolate two different purposes for which the γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι could be used, prescribed in two different provisions of the law on *nomothesia* (cf. καὶ ταῦθ' ἐτέρου κελεύοντος νόμου). 1) It had to be used to repeal in a lawcourt, before the judges, contradictory laws before a new law could be enacted by the νομοθέται; these existing laws were defended by advocates (called σύνδικοι or συνήγοροι)⁵⁴ elected by the Assembly, as explained at Dem. 24.36 and §146 (this is the use of the procedure made by Apsephion, Phormion and Demosthenes). 2) It could be used, after a new law had been enacted or while it was being enacted, against the proposer who did not follow the correct procedures or failed to repeal contradictory laws, without enacting any new law; if the charge was brought within a year, the proposer was personally liable (this is the use of the procedure made by Diodorus in Dem. 24).

III. How was the replacement law enacted? The correct procedure and Leptines' objections

Some scholars have interpreted certain passages in *Against Leptines* as implying that the law proposed by Apsephion, Phormion and Demosthenes would automatically be enacted once the court repealed Leptines' law. This is impossible because Demosthenes at Dem. 24.18–19, 24–32 and 34–35 is adamant that the body which enacted new laws was that of the νομοθέται and not the lawcourts. Scholars have therefore argued either that Demosthenes is lying and attempting to deceive the judges into thinking that they could act as νομοθέται or, alternatively, that the use of a public action against an expedient law followed at the trial was an ad hoc procedure created by the θεσμοθέται.⁵⁵ In this section I discuss the relevant statements at §§89 and 99–100, and show that Demosthenes does not suggest that the judges would automatically enact the replacement law by their vote against Leptines' law. On the contrary, Demosthenes reveals that he is well aware that this will have to happen before the νομοθέται. I also show that Leptines' objections to

⁵¹ Cf. Dem. 24.18 and 24–26 with Canevaro (2013b) 143–50.

⁵² Cf. Canevaro (2013b) 147–39.

⁵³ Cf. Hansen (1985) 358.

⁵⁴ Cf. Rubinstein (2000) 43–45 for the relationship between these two terms and Canevaro (2013b) 156 for their use in the procedure of *nomothesia*.

⁵⁵ See section I for these interpretations and for the problems with them.

Apsephion's use of a public action against inexpedient laws have nothing to do with attempts by Apsephion, Phormion and Demosthenes to convince the judges that they have the power to enact the replacement law. Leptines objects instead to the inclusion (permitted by the θεσμοθέται) of the replacement law in the plaint presented by Apsephion when he initiated his action against Leptines' law.

III.i Dem. 20.89

The first controversial statement is at §89; Demosthenes states that if someone believes that one of the existing laws is not good, he must bring a public charge against it and propose a new law to replace it. He adds: ὃν ἂν τιθῆ λύων ἐκείνον, ὑμᾶς δ' ἀκούσαντας ἐλέσθαι τὸν κρείττω. According to most scholars, Demosthenes is allegedly claiming that the replacement law will be enacted automatically as a result of the repeal of the old law by the judges in court.⁵⁶ The description of the procedure is very compressed, but Demosthenes' choice of words does not necessarily support this interpretation. The phrase ὃν ἂν τιθῆ λύων ἐκείνον does not necessarily mean that the new law was enacted automatically when the old one was repealed. The present participle λύων, used predicatively, does not always have a causal sense (the proposer enacts his law *because* the other is repealed, that is, as a result of the repeal of the other law) or a temporal sense, which would express contemporaneity (when he repeals the other law, he enacts the other law simultaneously).⁵⁷ The meaning of the participle can also be conditional (if he were to repeal the other, on the condition that he repeals the other).⁵⁸ The use of ἂν with the subjunctive in the relative clause indicates in fact that the enactment of the new law is a possibility, not a certainty, and a prerequisite for its enactment is the repeal of the other law. One does not therefore need to interpret Demosthenes' words as describing a one-step procedure, in which the new law is enacted at the same time as the old law is repealed. Given what we know about the procedures of *nomothesia* and the general context of the passage, we should interpret Demosthenes' words to mean that the new law may be enacted (at a separate stage of the procedure, before the νομοθέται) if, and only if, the old one is previously repealed. This interpretation fits well with the general argument in this section that Apsephion's decision to bring a public action against inexpedient laws against Leptines' law is the correct way to proceed when attempting to enact a law to replace it.

The expression ὑμᾶς δ' ἀκούσαντας ἐλέσθαι τὸν κρείττω ('you then have the power to hear them and chose the better one' (tr. Harris)) does appear to describe a one-step procedure in which the judges hear the relevant arguments and make a decision between two laws. Here again Demosthenes' description is very compressed, but it is nothing more than a brief summary of the entire procedure of *nomothesia*.⁵⁹ 'You' (ὑμᾶς) does not refer only to the judges, but rather to the Athenians in general, who sat in the courts as judges, voted on proposals in the Assembly and on laws as νομοθέται.⁶⁰ Throughout all the various stages of *nomothesia*, the people are made aware of the options before them (in the Assembly, in the courts, by reading proposals placed before the Eponymous Heroes; cf. §94 and Dem. 24.25) and ultimately make a decision between the existing laws that contradict the new proposal and the new proposal. This very abbreviated summary of the *nomothesia* procedure does not imply that the procedure Demosthenes claims to be following

⁵⁶ For example, Hansen (1979–1980) 89; (1985) 350–51; Kremmydas (2012) 345

⁵⁷ The temporal relationship of the present participle with the main verb should also be understood from the context; cf. Smyth (1920) nos 1872, 2061.

⁵⁸ Cf., for example, Ar. Av. 1390 with Smyth (1920) no. 2067 and Aloni (2003) no. 54b. Note the translation of Harris (2008) 131: 'should the former law be abolished'.

⁵⁹ Cf. Harris (2008) 49 n.121: 'Demosthenes here combines two procedures: first, the public action against the old law; second, the process of enacting the new law'.

⁶⁰ The orators often identify the judges with the *dēmos* in general, of which the courts are a manifestation. Cf., for example, Dem. 21.11, 91 with MacDowell (1990) 235, 314; and also Hansen (1981) 520, who argues, however, that this is not evidence that the δικαστήρια were regarded as a manifestation of the *dēmos* (cf. against this view Rhodes (1981) 160; Ostwald (1989) 34–35 n.131).

involves only one stage. In this preliminary description of the procedures he is following he does not go into too much detail, and his words, if read out of context, may create the impression of a faster and simpler procedure than was actually the case. But Demosthenes is not lying; a few paragraphs later he has the actual law on *nomothesia* read out, and later still, as we shall see, he states explicitly that the new law will be enacted by the νομοθέται and not by the judges (§137).

III.ii Dem. 20.98–100

The most extensive discussion of the enactment of the replacement law is found at §§98–100. Here Demosthenes not only discusses the enactment of the replacement law, but also Leptines' objection to the way Apsephion is using it at the trial. Prior to this, Demosthenes discusses the rules about *nomothesia* and shows that Leptines failed to repeal an opposing law before enacting his own law. Next he has the clerk read out the law that he, Apsephion and Phormion have proposed, to show that it is better than Leptines' law. At §98 Demosthenes states that not even Leptines will try to deny this, because he cannot prove that his law is better. Instead he will use the same arguments he employed at the *anakrasis* before the magistrate:⁶¹ that the replacement law had been written next to the other to deceive the judges, and that Apsephion, Phormion and Demosthenes in fact do not intend to enact it.

This discussion shows that the replacement law had already been discussed at the *anakrasis* and had been placed in the ἐχῖνος as one of the documents to be read out in court. It also shows that Leptines had already objected to it at the *anakrasis*. Hansen argues that the θεσμοθέται innovated in this case, and Leptines was contesting the legitimacy of their innovation, which would have brought about the enactment of the replacement law when the court voted to repeal Leptines' law. As noted above, there is no reason to think that the θεσμοθέται could have made such an innovation.⁶² Kremmydas, on the other hand, argues that 'at some point during the *anakrasis* the prosecution would have declared their intention of passing their draft law in place of Leptines' law and that would probably have created confusion' and that 'the *thesmothetai* were probably not competent juristically to disqualify it from the documents appended to the written documents of the *graphē*. It was up to the δικασταί of the trial to decide the relevance of the appended documents'.⁶³ Kremmydas concludes that the fact that the θεσμοθέται accepted the replacement law is irrelevant, and that Leptines was right in objecting to it, because the public action against inexpedient laws had nothing to do with the enactment of a replacement law. Yet Kremmydas' reconstruction of what happened at the *anakrasis* is problematic for several reasons. First, what was relevant or not for the verdict was defined by the written plaint,⁶⁴ not by the judges in court, and the judges swore to vote only on the charges made in the plaint (Aeschin. 1.154: ὑπὲρ αὐτῶν

⁶¹ On the workings of the preliminary hearings, see recently Thür (2008) and Faraguna (2009), who show that these involved cross interrogation by the litigants as well as the introduction of documents that were then sealed in an ἐχῖνος. Only these documents could be used in the lawcourt (*pace* [Arist.] *Ath. Pol.* 53.2; *SEG* 32.329 shows that this rule applied not only to private cases, but also to public ones). Harris (2006) 410–18 also shows that an accuser could withdraw a charge as long as he did so formally at the *anakrasis*.

⁶² *Cf.* above nn. 17–18.

⁶³ Kremmydas (2012) 361–62.

⁶⁴ The written plaint, usually called ἔγκλημα in private cases and γραφή in public ones, was of key importance in Athenian judicial procedure; it recorded the identity of the litigants, the issues which were the

subject of the action, the laws and the procedure according to which the action was brought and the offence or crime contested (which was phrased according to the relevant laws). On the structure and importance of the written indictments, see the thorough discussion of Harris (2013) 114–36 and, more briefly, Thür (2008) 65–72. The Judicial Oath compelled the judges to base their judgement exclusively on the issues mentioned in the written indictment, and the parties also swore to keep to the point, as defined in the indictment, and not to speak ἔξω τοῦ πράγματος; see [Arist.] *Ath. Pol.* 67.1 about private cases; the same oath was sworn also in public cases (*cf.* Rhodes (2004) 137) and in homicide cases (*cf.* Antiph. 5.11; *pace* Lanni (2006) 75–114; *cf.* Harris (2009–2010) 327–28). These oaths were generally respected; *cf.* Rhodes (2004); Harris (2013) 126–36.

ψηφιεῖσθαι ὧν ἂν ἡ δίωξις ᾗ).⁶⁵ Second, the complaint was introduced when the charge was first brought before the magistrate, not at the preliminary hearings. What, then, was Leptines objecting to? Demosthenes states clearly that he objected to the παραγεγράφθαι of the replacement law (*cf.* also οἱ θεσμοθέται τοῦτον ὑμῖν παρέγραψαν, §99), which seems to refer to the inclusion of the replacement law in the written indictment (γραφὴ). If the replacement law was included in the written indictment, this would have meant that any comparison of its merits with those of Leptines' law would have been considered relevant in court (εἰς αὐτὸ τὸ πρᾶγμα ἐρεῖν, [Arist.] *Ath. Pol.* 67.1). The inclusion of the replacement law in the written indictment was therefore key for Apsephion's strategy at the trial; if the law had not been included in the written indictment, the judges would have had to restrict their decision to an evaluation of the merits of Leptines' law and could not have compared the two laws. Had the new law not been included in the complaint, Leptines would have had an easier time defending his own law because his opponents could not argue that the judges should repeal Leptines' law because there was a better alternative available. Leptines therefore objected to the inclusion of the replacement law in the complaint at the *anakrisis* because he knew that its inclusion would weaken his case when pleading before the judges in court. He was not objecting to any innovations made by the θεσμοθέται in the public action against enacting an inexpedient law.

When Demosthenes at §99 claims that the θεσμοθέται (at the *anakrisis*) παρέγραψαν the replacement law, what he means is that they did not oppose its inclusion (as Leptines asked them to), but rather confirmed it – in this sense they 'included' the replacement law. Demosthenes uses παρέγραψαν as shorthand while summarizing what happened – the θεσμοθέται dismissed Leptines' objections and refused to force Apsephion to remove the law from the indictment – at the same time giving the impression that the inclusion of the replacement law, because it was so legitimate and necessary, had been effected directly by the θεσμοθέται. The reason for which the θεσμοθέται did not agree with Leptines' objection, and allowed the replacement law to stay in the complaint, is expressed by Demosthenes very clearly: this was in accordance with the law on *nomothesia*. Kremmydas nevertheless argues that the θεσμοθέται presumably allowed the replacement law to stay not because this was lawful, but simply because they 'were probably not competent juristically to disqualify it from the documents appended to the written documents of the *graphe*'. There is evidence, however, that the magistrate who received a charge had the power to force a change in the complaint in certain circumstances. In *Lys.* 13 Dionysius accuses Agoratus of murdering his father and brings an *apagogē* against him. The statute authorizing this procedure required, however, that the wrongdoer be caught ἐπ' αὐτοφόρῳ, that is, in circumstances that made his guilt obvious.⁶⁶ Dionysius did not include this expression in his complaint (possibly to make it easier for him to prove his charge), but the Eleven forced him to add the expression to the indictment and to follow the language of the relevant statute.⁶⁷ At *Isae.* 10.2 we likewise learn that the archon compelled the litigant to add in the ἐγκλημα that his mother was the sister of Aristarchus (II), thus allowing the accuser to make a claim on the estate of Aristarchus (I) not as the grandson of Aristarchus (I), as he wished to, but as the nephew of Aristarchus (II).⁶⁸ Magistrates (in the case of *Against Leptines*, the θεσμοθέται) therefore had the power to require accusers at the *anakrisis* to make changes to the complaint if this contradicted the provisions of the relevant laws.⁶⁹ Leptines asked them to do exactly this, but they allowed the proposed law to remain in the indictment. Demosthenes states that they did this in accordance with the law on *nomothesia* (*cf.* §99: ὁ παλαιὸς κελεύει νόμος, καθ' ὃν οἱ θεσμοθέται τοῦτον ὑμῖν παρέγραψαν).

⁶⁵ *Cf.* also Dem. 45.50 and Aeschin. 1.170 with Harris (2013) 114–36.

⁶⁶ For the requirement that accusers follow the language of the relevant statute when drawing up the complaint, see Harris (2013) 118–25.

⁶⁷ See Harris (2006) 373–90 for the meaning of this

expression.

⁶⁸ ἠνάγκασμαι μὲν οὖν [...] τὴν μητέρα τὴν ἐμὴν ἐν τῇ ἀνακρίσει Ἀριστάρχου εἶναι ἀδελφὴν προσγράψασθαι. *Cf.* Edwards (2007) 162; Cobetto Ghiggia (2012) 404; Griffith-Williams (2013) 213–14.

⁶⁹ *Cf.* Harris (2013) 182.

On what grounds did Leptines object to the inclusion of the replacement law in the plaint? Demosthenes makes this clear: he claimed that, were his law to be repealed, Apsephion, Phormion and Demosthenes would not proceed to enact their own law (§98: ἐὰν δ' ὄν αὐτὸς ἔθηκεν λυθῆ, τοῦτον οὐ τεθήσεσθαι). That this was the objection is confirmed by the repeated replies to Leptines' argument in the rest of the speech (§§99, 100, 137); Demosthenes promises the judges that he, Apsephion and Phormion will enact the replacement law and observes that there are laws and procedures against those who deceive the people which Leptines and others can use to compel them to carry out their promise. If this was in fact Leptines' objection, it is not surprising that the *θεσμοθέται* ignored it. Demosthenes, therefore, *pace* Kremmydas,⁷⁰ did not reply to Leptines' argument by arguing that 'the law-proposal in question was only brought as part of the evidence of the *graphe* to demonstrate the defects of Leptines' law by contrast to a better law'. The replacement law was not only part of the evidence sealed in the ἐχῖνος; it was directly relevant to the issues defined in the plaint. And the *θεσμοθέται* allowed the inclusion of the replacement law in the indictment not because this was an unusual case⁷¹ or because they were innovating,⁷² but simply because the law on *nomothesia* supported the position of Apsephion, Phormion and Demosthenes. Demosthenes asserts in fact at §99 that the *θεσμοθέται* accepted the law because of the παλαιὸς νόμος, the law on *nomothesia*. The παλαιὸς νόμος, as we have seen above, prescribed that in order to enact a new law one had first to repeal opposing laws through a public action against inexpedient laws. So the repeal of Leptines' law was a normal stage of the procedure for enacting the replacement law. This meant that the inclusion of the latter in the written indictment was fully justified.⁷³ This must have been what the accusers said at the *anakrasis* and thereby provided the rationale for the *θεσμοθέται*'s decision.

Demosthenes moves then at §99 to a further argument: Leptines' objections show that even he knows that the replacement law is better than his own. Because he cannot make a convincing argument about substance, Leptines concentrates on procedure.⁷⁴ The transition to the next argument is made through a *paraleipsis* ('I shall leave aside this point' – ἐάσω), which contains yet another compressed description of how the replacement law will be enacted. This passage has given scholars the impression that Demosthenes envisages a one-step procedure requiring only one vote in which Leptines' law would be repealed and the new law enacted at the same time.⁷⁵ First of all, one must dispense with the idea that this *paraleipsis* implies that Leptines' procedural arguments are strong.⁷⁶ The *paraleipsis* is here used simply as a transition to a further argument, which is strong even if his opponents dared to attack his previous arguments (ἵνα μὴ περὶ τούτου τις ἀντιλέγη μοι refers to this possibility). The same strategy is used in this speech at §§116 and 121: after showing that the ancestors honoured their benefactors, Demosthenes considers for a moment a scenario in which this was not the case, only to show that this would make no difference in the present circumstances. This obviously does not mean that the argument that the ancestors were principled and honoured their benefactors is weak. Demosthenes states in the *paraleipsis* that introducing a replacement law, like the public action against enacting inexpedient laws itself, is an essential part of the procedure followed by Apsephion, Phormion and himself, and prescribed by the law on *nomothesia*. Including the replacement law in the plaint was therefore legitimate. This argument is not weak, but it can be made briefly because it has been made extensively at §§89 and 93–94.

⁷⁰ Kremmydas (2012) 361–62 confuses the status of the documents in the ἐχῖνος with that of those in the plaint.

⁷¹ According to Wolff (1970) 36 (followed by Hansen (1979–1980) 89–90; Rhodes (1985) 58; Kremmydas (2012) 342–43, 361–62 and *passim*) it was midway between a normal *nomothesia* procedure and a γραφή νόμον μὴ ἐπιτήδειον θεῖναι.

⁷² Cf. Calabi-Limentani (1982); Hansen (1985) 350–51.

⁷³ Likewise, contradictory laws were included in the plaint for a γραφή παρανόμων against a decree; cf. Aeschin. 3.200 with Harris (2013) 121–22.

⁷⁴ A similar argument is made by Demosthenes at Dem. 21.26–27.

⁷⁵ Cf., for example, Wolff (1970) 28–44; Calabi-Limentani (1982) 360; Hansen (1979–1980) 89–91.

⁷⁶ This is how Kremmydas (2012) 363 reads it (cf. also, for example, Wolff (1970) 28–44; Calabi-Limentani (1982) 360; Hansen (1979–1980) 89–91).

The expression τῆ ὑμετέρα ψήφῳ τοῦ τούτου νόμου λυθέντος τὸν παρεισενεχθέντα κύριον εἶναι σαφῶς ὁ παλαιὸς κελεύει νόμος has been interpreted as a clear statement that Demosthenes envisions a one-step procedure which will repeal Leptines' law and enact the replacement law with one vote of the judges. In fact this expression need not be interpreted in this sense. The main verb is κελεύει, which does not necessarily mean 'to order', but rather 'to authorize', 'to provide a procedure for'.⁷⁷ Therefore, the law on *nomothesia* clearly provides for the replacement law to go into effect (τὸν παρεισενεχθέντα κύριον εἶναι) after Leptines' law has been repealed (τοῦ τούτου νόμου λυθέντος) by the vote of the judges (τῆ ὑμετέρα ψήφῳ). The phrase τῆ ὑμετέρα ψήφῳ is linked with the genitive absolute τοῦ τούτου νόμου λυθέντος ('after the law has been repealed by your vote'), not with τὸν παρεισενεχθέντα κύριον εἶναι.⁷⁸ Therefore, the vote of the judges only repeals Leptines' law, which is necessary before the replacement law can be enacted (which could otherwise be attacked through a public action against an inexpedient law). This passage, therefore, like that at §89, does not actually state that the repeal of Leptines' law and the enactment of the new one will happen at the same time and by the same vote. It only states that repealing Leptines' law is a prerequisite for enacting the new one. The *paraleipsis* therefore summarizes in one quick statement the argument developed since §89.

III.iii Provisional conclusion

It is clear, therefore, that neither at §89 nor at §98–99 does Demosthenes state that the judges have the power to enact the new law by their vote or that the new law will be enacted as a result of the present trial. Nor does he state this at §164, when he asserts that, if the judges vote as he, Phormion and Apsephion wish, those who deserve their prizes will keep them, while the undeserving will lose them and moreover will suffer any punishment the judges deem fit, according to the replacement law. In this later passage Demosthenes assumes that if Leptines' law is repealed, the replacement law will eventually be enacted, but he does not insinuate that it will be enacted as a result of this trial,⁷⁹ and at §100 he says explicitly that the new law will be enacted in the future and that Apsephion, Phormion and himself will make sure of this. He states: 'I, Phormion, and anyone else he wishes to add, have pledged to enact the law' (tr. Harris). The future infinitive θήσειν τὸν νόμον shows that the enactment of the law will take place in the future, at another stage of the procedure. At §137 Demosthenes goes so far as to suggest that, if Leptines and those elected to defend the law (σύνδικοι) are so convinced that some people do not deserve their exemptions or have other accusations to make against them, they should aim to bring a charge according to the procedure provided by the replacement law, which Demosthenes swears Apsephion, Phormion and himself will enact. But if Leptines and the law's defendants are so keen, they should enact it themselves at the first available session of the νομοθέται! Apart from the joke made at Leptines' expense, Demosthenes is well aware of the need for the replacement law to be enacted by the νομοθέται and explicitly recognizes that by repealing Leptines' law the judges are not enacting the new law. There are therefore no grounds for accusing Demosthenes of attempting to deceive the judges into believing that they have the power to enact the new law or that the procedure followed in this case is an innovation involving one vote on both Leptines' law and the new proposal to replace it. The procedure followed, and advocated by Demosthenes, in this case, does not contradict the accounts of Dem. 24.18–19, 24–32, 34–35, which make clear that the correct venue for enacting new laws is that of the νομοθέται, and not the lawcourts.

⁷⁷ Cf. Dem. 29.9 with MacDowell (1989) 257–72; (2009) 46–47; cf. also Harris (2006) 131 for another example. See the translation of Harris (2008) 53: 'the old law [...] permits the law substituted in its place to be ratified'.

⁷⁸ Cf. Harris (2008) 52: 'once this law has been rescinded by your vote'.

⁷⁹ As stated, for example, by Rhodes (1985) 58.

IV. Conclusions: the procedures followed in Against Leptines and their implications

The arguments laid out in this article offer a new interpretation of the procedures followed and advocated in the case against Leptines brought in 355/4 by Apsephion with the active support of Phormion and Demosthenes. This interpretation has the advantage of being consistent with the procedures of *nomothesia* as they can be reconstructed from Dem. 24.18–19, 24–32, 34–35 and other sources. It does not posit unlikely procedural innovations effected by the *θεσμοθέται* to make sense of alleged inconsistencies, nor does it assume that Demosthenes and his allies managed first to deceive the *θεσμοθέται* and then attempted to deceive the judges into believing that a law could be enacted in a lawcourt without a vote of the *νομοθέται*.

Whatever the charge brought originally by Bathippus against Leptines' law (which was brought within a year and was probably a *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι* akin to that brought by Diodorus against Timocrates in Dem. 24), a new charge was brought by Apsephion, Bathippus' son, against Leptines' law, because Leptines was no longer personally liable after a year (§144). This charge, another *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι*, was not, however, a stand-alone accusation (as the first one probably was). It was part of the wider procedure of *nomothesia* that would end, if successful, with the enactment of a new law. Leptines does not discuss the early stages of this procedure, which are irrelevant for his argument, but we can assume, on the basis of the information provided at Dem. 24.18–19, 24–25, that it involved a vote in the Assembly opening the floor to proposals of new laws and publicity of the new law before the monument of the Eponymous Heroes and through readings in the Assembly (§94). It also required the repeal of all contradictory laws before enacting the new one before the *νομοθέται* (Dem. 24.32–34, excluding the document). This is the rationale of the *γραφὴ νόμον μὴ ἐπιτήδειον θεῖναι* against Leptines' law within the procedure of *nomothesia*; as Demosthenes repeatedly protests, repealing contradictory laws is compulsory when enacting a new one, and therefore Apsephion, Phormion and Demosthenes are simply following the law on *nomothesia* when they try to repeal Leptines' law. And this is confirmed by the fact that Leptines' law is defended by publicly-appointed advocates, in accordance with the provision of the law on *nomothesia* discussed at Dem. 24.36 (*cf.* also §146).⁸⁰ This is also why they wrote down the text of the replacement law in the plaint against Leptines' law; the public charge was part of the overall procedure for enacting that law. The *θεσμοθέται* agreed with Apsephion, Phormion and Demosthenes that this was the correct procedure. They therefore ignored Leptines' protests that Apsephion, Phormion and Demosthenes had no intention of enacting the replacement law and this was nothing more than a ruse to repeal Leptines' law. Demosthenes in response to these accusations promises that they will proceed with enacting the new law at the first meeting of the *νομοθέται* and points out that if they do not, there are several ways to force them (§§99–100, 137). But, before they can do this, the judges need to repeal Leptines' law, as they cannot enact a new law without first repealing the contradictory laws.

This reconstruction of the procedures followed in the public charge against Leptines' law, and of the respective cases of the accusers and of the defendants, is therefore consistent with the rest of the evidence about *nomothesia*, and shows that even a talented speaker like Demosthenes could not misrepresent the wording and the meaning of Athenian laws and procedures beyond recognition. In *Against Leptines*, as elsewhere, Demosthenes is quite accurate in reporting the provisions of the relevant laws, in particular in sections immediately preceding or following when they are read out by the clerk.⁸¹

⁸⁰ In the case against Timocrates, however, there were no elected *σύνδικοι*, because the public charge against an inexpedient law was not being brought as part

of the *nomothesia* procedure.

⁸¹ See, on the reliability of the orators' accounts of Athenian laws, Canevaro (2013a) 27–36.

The conclusions of this essay have important implications. First, they show that one of the functions of the *anakrisis* was to discuss the plaint: to allow the defendant to request modifications and the officials to make them. This was the case with Lys. 13 and Isae. 10.2, and Leptines tried at the *anakrisis* of the public charge against his law to convince the θεσμοθέται to remove the replacement law from the plaint. Minor modifications of the wording of the plaint might have major implications for the strategies at the trial and could make it remarkably easier for the accuser to prove his charges or for the defendant to refute them.⁸² Second, it provides further evidence that the functions of the magistrates in Athens were carefully circumscribed and that they did not have the power to create new procedures or to modify old ones.⁸³

Third, it helps to clarify an important step in the *nomothesia* procedure as reconstructed in Canevaro (2013b). Dem. 24.32–34 (excluding the document) makes clear that contradictory laws had to be repealed before a new law could be enacted by the νομοθέται. Yet, because the document at Dem. 24.33 is unreliable, we were left with the question of what the correct venue was for repealing contradictory laws in the process of enacting a new one. A correct reading of the evidence of Dem. 20 allows us to answer this question: contradictory laws had to be repealed through a public charge against inexpedient laws. This procedure therefore had two separate purposes: it could be used against the proposer of a new law who had not followed the correct procedures, or had failed to repeal contradictory laws, without leading to the enactment of any new law (this is the use we find in Dem. 24); or it could be used, as in Dem. 20, to repeal a contradictory law as part of the procedure for enacting a new one. Once the contradictory laws had been repealed with a γραφή νόμον μὴ ἐπιτήδειον θεῖναι, the new law could be enacted before the νομοθέται.

One may wonder what happened after the old law(s) had been repealed by the courts through the γραφή νόμον μὴ ἐπιτήδειον θεῖναι and before the new law was enacted by the νομοθέται. During this period the Athenians were apparently left without any law at all on the matter at stake. And what would happen if the νομοθέται refused to ratify the new law? In the case of Leptines' law, this is hardly an issue; once Leptines' law is repealed by the court, the older law confirming grants by the demos (§96) – which Leptines did not bother to repeal – stays valid and unchallenged. But more generally, even in cases in which there was no law beforehand on a given topic, there was no reason why the Athenians should not have decided to leave a particular topic unregulated. This is indeed what happened whenever a γραφή νόμον μὴ ἐπιτήδειον θεῖναι was brought successfully against the proposer of a law within a year from its enactment (as in Dem. 24). The topic of that law remained unregulated, unless a new *nomothesia* procedure was started to enact a new law. On the other hand, because once the *nomothesia* procedure was started in the Assembly several laws could be proposed, it was not necessarily the case that there would be only one proposal on a given topic. And even if there was only one, and the νομοθέται chose not to enact it, they may have asked the πρυτάνεις to put that topic in the agenda of the next Assembly meeting (or of the next νομοθέται, as *IG II*³ 1 355 ll. 39–40 does with changes to the μερισμός), in order to receive new proposals if a need was felt for a particular issue to be better regulated.

The fourth implication, if this reconstruction is correct, is that the only evidence we thought we had about the identity of the νομοθέται vanishes. Only two passages provided (or seemed to provide) evidence that they were chosen from among those who had sworn the Judicial Oath. Because the document at Dem. 24.20–23, which states exactly this, is unreliable, the expression ἐν τοῖς ὁμωμοκόσιν of §93 is the only remaining piece of evidence that would indicate that they were chosen from among the potential judges. Yet I have argued in this article that ἐν τοῖς ὁμωμοκόσιν actually refers to the judges who repeal the contradictory laws, not to the νομοθέται who will enact

⁸² This supplements the account of the *anakrisis* offered by Thür (2008) and Faraguna (2009), and that of the importance of plaint provided by Harris (2013) 114–36.

⁸³ The Athenians were obsessed with officials' misconduct, and circumscribed carefully the power of the magistrates, in particular when it came to legal procedure; cf. Harris (2013) 117–18; Thür (2008) 70–71.

the new one (section II.ii). If this is correct, there is no evidence to confirm this widely-held view.⁸⁴ I plan to come back to this issue and discuss various possibilities for the identity of the νομοθέται in a separate article. But, whoever the νομοθέται were, whether they were citizens who had sworn the Judicial Oath, a specific committee or a session of the Assembly labelled νομοθέται,⁸⁵ the *nomothesia* procedure was distinctive in setting precise (and extended) times to enact a new law, in enforcing a high degree of publicity of new bills, in securing the coherence of the laws of the city through the obligation to repeal contradictory laws and in involving various bodies (the Council, a normal Assembly meeting, the lawcourts and the νομοθέται) in the enactment of new laws.

The Athenians had in the fourth century not several contradictory *nomothesia* procedures enacted at different times⁸⁶ or valid side-by-side,⁸⁷ but rather one procedure of *nomothesia* articulated in a series of clear steps, the purpose of which was to allow legislation while at the same time ensuring that the city's laws were consistent and free from contradictions. The existence of such a procedure does not mean that irregularities never occurred and that contradictory laws were never enacted. The very existence of the speeches *Against Leptines* and *Against Timocrates* shows that sometimes the correct procedures were not followed to the letter, but it also shows that, when this happened, mechanisms were in place to correct the problem and even punish the transgressor. The mention at Aeschin. 3.38–40 of a separate procedure that tasked the θεσμοθέται with finding contradictory laws among the existing ones and submitting them to the νομοθέται shows that sometimes laws that contradicted previous statutes were in fact enacted. But the aims of these procedures should not be judged by their failings. The aims are clear: to provide a system for making new laws while at the same time safeguarding the coherence of the laws of the city. As Demosthenes states (§93):

opposing laws are repealed so that there is one law for each subject. This avoids confusion for private individuals, who would be at a disadvantage in comparison to people who are familiar with all the laws. The aim is to make points of law the same for all to read as well as simple and clear to understand (tr. Harris).

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⁸⁴ This was attacked with strong arguments by Piérart (2000); *contra* Rhodes (2003).

⁸⁵ This is Piérart's suggestion, on the basis of the *paradosis* of Aeschin. 3.39 (τοὺς δὲ πρυτάνεις ποιεῖν ἐκκλησίαν ἐπιγράψαντας νομοθέτας), which he reads as

'the πρυτάνεις shall hold an assembly labelling it νομοθέται'.

⁸⁶ As argued by MacDowell (1975); Rhodes (1985).

⁸⁷ Cf. Hansen (1985); recently Wallace (2006) 65–66.

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