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Autor(en): **Vishnia, Rachel**

Objekttyp: **Article**

Zeitschrift: **Museum Helveticum : schweizerische Zeitschrift für klassische Altertumswissenschaft = Revue suisse pour l'étude de l'antiquité classique = Rivista svizzera di filologia classica**

Band (Jahr): **46 (1989)**

Heft 3

PDF erstellt am: **16.07.2024**

Persistenter Link: https://doi.org/10.5169/seals-36083

Lex Atinia de tribunis plebis in senatum legendis

By Rachel Vishnia, Tel Aviv

We derive our knowledge about many ancient Roman laws from fragmentary usually non contemporaneous literary sources. Often enough the evidence consists of a pitiful sentence which is cited out of context and the scanty information it holds sheds little light on the law's genuine meaning or date. Consequently, as it is practically impossible to reach a definite solution, these poorly documented laws give rise to numerous often contradicting interpretations.

The *lex Atinia* is one of these perplexing laws. We learn about its existence from a passage in Gellius which records the differences of opinion that existed between Roman scholars on the question whether the *praefectus urbi Latinarum causa* had the *ius senatus convocandi consulendique*[1]. Iunius claimed that the *praefectus* could not hold a meeting of the senate since he was neither a senator nor had the *ius sententiae dicendae* as he was too young to hold any office which would endow him with senatorial status[2]. Capito disagreed with Iunius' judgment. It seems that in his opinion, the *praefectus* could convene the senate (although he was not yet a senator) since ... *"et tribunis", inquit, "plebis senatus habendi ius erat, quamquam senatores non essent ante Atinium plebiscitum"*[3].

Modern scholars have been debating about the date and the meaning of the law ever since the early nineteenth century. However, some relevant testimonies to the interpretation of this law in the ancient sources have not received the attention they deserve. Therefore, it seems worthwhile to explore the issue once again.

Hoffman, who wrote in the middle of the 19th century, refuted the views of his predecessors Rubino and Merklin who claimed that the *Lex Atinia* conferred senatorial rights upon tribunes during their year of office and the *ius sententiae dicendae* after they had stepped down from it till they were enrolled in the next *lectio*[4]. In his opinion it was impossible for tribunes to have had senatorial rights during their year of office since it is quite clear that magistrates who were already senators, lost their most important senatorial rights, i.e. the

* I should like to thank Z. Yavetz and Z. Rubin who read various drafts of this paper and made some very useful remarks. I am especially indebted to A. Giovannini for his criticism. The responsibility remains mine. All dates are B.C.

1 Gellius, *NA* 14, 8.

2 Ibid. 14, 8, 1.

3 Ibid. 14, 8, 2. Varro and Tubero were of a like mind. Cf. Gellius, *NA* 14, 7, 4.

4 F. Hoffman, *Der römische Senat zur Zeit der Republik* (Berlin 1847, rep. 1972) 146–149.

right to express their opinion and the right to vote, while in office[5]. His position on the *i.s.d.* of the tribunes is a bit ambiguous, but it seems that he thought that tribunes acquired this right only after Sulla's legislation[6]. Hoffman also rejected the dates offered by these scholars for the passage of the law (Rubino shortly before the tribunate of Gaius Gracchus, Merklin shortly after it)[7]. Basing his argument on Zonaras' description of the fourth stage in the development of tribunician rights vis-à-vis the senate (7, 15, 8 τέλος κἀκ τῶν βουλευτῶν τινες ἠξίωσαν δημαρχεῖν, εἰ μή τις εὐπατρίδης ἐτύγχανεν· οὐ γὰρ ἐδέχετο τοὺς εὐπατρίδας ὁ ὅμιλος), Hoffman claimed that the law stipulated that only senators were eligible for the tribunate and that it was enacted shortly before Sulla's first consulate[8].

Willems rejected Hoffman's thesis. He stated that the application of such a law before Sulla's legislation was impossible since all tribunes should have held the quaestorship beforehand. As only eight quaestors, patricians and plebeians, were elected each year, where would one find the suitable ten candidates for the tribunate?[9]

Willems' own solution does not greatly differ from the interpretations Hoffman had criticized. He claimed that the *lex Atinia* conferred the *ius sententiae dicendae* upon tribunes during the interval that elapsed between the moment they stepped down from office till the next *lectio*[10]. His view is based on a somewhat peculiar interpretation of the *lex Ovinia.* Willems believed that the *lex Ovinia,* although laying down that censors choose senators from the ranks of all ex magistrates, granted the *ius sententiae dicendae* to ex curule magistrates only[11]. The *lex Atinia,* therefore, extended the rights enjoyed until then by ex curule magistrates to ex tribunes. When was the law enacted? Willems held that the provisions of the so-called *lex Acilia repetundarum* which excluded from the juries those *quei tr(ibunus) pl(ebei), q(uaestor), III vir cap(italis), tr(ibunus) mil(itum) l(egionibus) IIII primis aliqua earum, triumvir a(gris) d(andis) a(dsignandis) siet fueritve, queive in senatu siet fueritve,* prove that tribunes did not have the *i.s.d.* in 123/122[12]. Willems calls our attention to the fact that the censors of 115 expelled 32 members from the senate, twice as much as the

5 Ibid. 149. See also 78–105, esp. 83–85. Cf. also Lange, *Röm. Alt.* II 369–370; Mommsen, *StR*^{3} I 211; III 908–909. 945.

6 Ibid. 143–144. Cf. also 150–151. 165.

7 Ibid. 146.

8 Ibid. 158–165.

9 P. Willems, *Le sénat de la république romaine* (Louvain 1878–1885, rep. 1968) I 228. Hoffman's assumptions were also rejected by Mommsen, *StR*^{3} III 862 n. 1. On the number of quaestors see: W. V. Harris, *The Development of the Quaestorship,* Cl. Quart. n.s. 26 (1976) 92–98.

10 Willems, *Le Sénat* I 228–229.

11 Ibid. 160–161. This interpretation is quite surprising as Willems accepted the corrected version of the lex Ovinia (*ut censores ex omni ordine optimum quemque iurati* [MSS *curiati*] *in senatum legerent*): 169–171.

12 Ibid. 230. Cf. Mommsen, *StR*^{3} III 858 n. 3.

maximum number ever to be removed (Livy, Per. 62). Therefore he adds: "Cette augmentation subite ne s'explique que si par une loi récente des éléments nouveaux avaient été introduits au Sénat, sans l'intervention des censeurs précédents." The *lex Atinia,* he concluded, was voted around 119[13].

Lange also rejected Hoffman's view but he was not entirely convinced by Willems' argumentation. He thought that Willems' interpretation of the *lex Ovinia* could not be substantiated[14]. In his opinion the *lex Ovinia* compelled the censors to enroll ex curule magistrates only and granted the *i.s.d.* to these magistrates from the moment their year of office ended till the next *lectio.* The *lex Atinia,* therefore, was a supplement to the *lex Ovinia* which extended the rights enjoyed by ex curule magistrates to ex tribunes. Lange held that the law was enacted around 214 since it was not applied, in his opinion, in the extraordinary dictatorial *lectio* of 216 but was in force in 209 when the ex tribune of 213 M. or L. Caecilius Metellus was ignored (*praeteritus*) by the censors on account of his shameful behaviour after the disaster at Cannae[15].

Some ten years ago the issue was taken up again by R. Develin. He attempted to reinterpret the law, but many of his convictions are based on wrong assumptions. Not distinguishing between the tribunician rights to convene the senate and to confer with the *patres,* on one hand and the *ius sententiae dicendae* (i.e. the right to vote in the senate) on the other hand, Develin states that tribunes enjoyed senatorial rights only during their year of office and that there is proof of tribunes expressing their views in the senate as early as 326 or 216 at the latest[16]. However, he continues, the *Atinii* appear on the Roman political scene only in 212. The discrepancy between the fact that tribunes had the *i.s.d.,* according to his interpretation, earlier than the appearance of a possible author, calls in Develin's view, for a new explanation[17].

By juxtaposing Iunius' statement (*quoniam ne senator quidem sit neque ius habeat sententiae dicendae, cum ex ea aetate praefectus fiat quae non sit senatoria*) with Capito's reply (*"Nam et tribunis" inquit "plebis senatus habendi ius erat, quamquam senatores non essent ante Atinium plebiscitum"*), Develin arrives at the conclusion that until the Atinian plebiscite anyone who was a

13 Willems, *Le Sénat* I 231.

14 L. Lange, *Römische Alterthümer* (Berlin 1879, rep. 1974) II 358–360.

15 Ibid. 173. On Caecilius Metellus see T. R. S. Broughton, *The Magistrates of the Roman Republic* (New York 1951) (hence *MRR*) I 260. 285. Caecilius Metellus could not have been adlected in 214 as he was not yet *quaestorius.* Even if he had been ex quaestor by the time of the *lectio* it seems quite unlikely that he was enrolled; the reasons for his *praeteritio* which still held good in 209 were even more vivid in 214. It is very probable that the term *praeteritus* was used to depict expectant candidates, i.e. those who exercised the *i.s.d.* inbetween *lectiones* that had been ignored. The term that applied to expelled senate members was *movere* or *eicere senatu.* Festus, p. 290 (L): *Quo factum est ut qui praeteriti essent et loco moti haberentur ignominiosi.* Cf. Hoffman, *Der Senat* 50–51; Willems, *Le Sénat* I 243–244.

16 R. Develin, *The Atinian Plebiscite, Tribunes and the Senate,* Cl. Quart. 28 (1978) 142.

17 Ibid.

senator could not be elected to the tribunate[18]. This assumption, however, presupposes the existence of a law which excluded senators from the tribunate. When was this mysterious law enacted and why was it needed? Develin assumes that it was voted soon after plebeians had gained entry into the senate, i.e. sometime in the 4th century and that it was initiated by the plebeian leaders who were apprehensive lest a conflict of interests should arise between plebeian senators and tribunes[19]. When and why was the Atinian plebiscite which is supposed to have annulled the limitation imposed on plebeian senators enacted? Develin detects that between 212 and 190 there was a "plethora of Atinii" and, therefore, he claims that all that remains to be done is to find the "suitable historical context"[20]. The extraordinary dictatorial *lectio* of 216 seems to supply the necessary background. In this *lectio* 177 vacancies had to be filled. Among the new members there were many who had not yet held office. In order to allow these men who, according to the mysterious law, were excluded from the tribunate to be eligible for the important plebeian magistracy, the ban was lifted[21]. He sets the terminus ante quem in 187 since one of the tribunes for that year, Q. Petillius Spurinus, may have been a quaestor in 188 and, therefore, as Develin supposedly assumes, a senator already when tribune[22].

Develin's assumptions cannot be accepted for several reasons. Firstly he is wrong in assuming that tribunes enjoyed senatorial rights during their year of office. On the contrary, it is quite clear that the most important senatorial rights of "senatorial" magistrates were suspended for the duration of their magistracy[23]. The tribune who conferred with the senate in 216 was simply exercising his *ius referendi cum senatu,* a right the tribunes probably acquired together with the right to convene the senate shortly after the *lex Hortensia*[24].

Secondly, Develin's presentation of the content of Gellius' passage is misleading. It is quite clear that the issue at stake had nothing to do with the senatorial rights of tribunes. The disagreement focused on the question whether non senatorial magistrates could convene the senate. Iunius thought that it was impossible. Varro, Tubero and Capito thought otherwise. They presumably claimed that the right to convene the senate was in the *potestas* of certain magistrates regardless of their senatorial status. The tribunes served as a good example to prove their point as they were allowed to convene the senate before they became senators.

18 Ibid.

19 Ibid. 143. Develin cannot give a precise date. He assumes that the law was voted shortly before 312 but he cannot rule out an earlier date "... precision cannot go beyond saying that plebeians did enter the senate before the permanent reinstatement of the consulship".

20 Ibid. 143.

21 Ibid. 143–144.

22 Ibid. 143.

23 See n.5 above.

24 Mommsen, *StR*^{3} I 211; II 313–317.

Thirdly, why would plebeian leaders, whom Develin does not categorically define, neutralise their most effective tool when their struggle was not yet over?[25] Did M' Curius Dentatus tribune in 298 find himself in conflict with the plebeian senators when defeating the attempt of the interrex Ap. Claudius to thwart the candidacy of plebeians to the consulate?[26] And fourthly, the terminus ante quem he sets is also doubtful. If Q. Petillius Spurinus tribune 187 was indeed the quaestor of 188 he could not have been a senator in 187 as the previous *lectio* was held in 189[27].

The law which, according to Develin, the *lex Atinia* was supposed to have annulled, did not leave any trace in the ancient sources. Develin, when refuting the view that the *lex Atinia* was connected with the troublesome tribune of 131, C. Atinius Labeo, who confiscated the property of the censor Q. Metellus Macedonicus and attempted to throw him of the Tarpeian rock because he was ignored in the *lectio,* states in surprise: "It would seem strange, however, that no source mentions a plebiscite such as ours in connection with this vengeance."[28] One must remember that the sources for this affair consist only of Livy's meager Periochae and some anecdotal evidence in Cicero and Pliny. Is it not strange, therefore, that Livy, whose coverage of the period in which the mysterious law was supposed to have been enacted is fully preserved, ignored the existence of a law which, according to Develin's interpretation, was an important stage in the struggle between the orders?

Let us look again at some of the sources. The *lex Ovinia,* preserved by Festus, stated that: *Lex Ovinia tribunicia intervenit, qua sanctum est, ut censores ex omni ordine optimum quemque curiatim in senatum legerent*[29]. Unfortunately, the text sheds no light on the question who was to enjoy the *i.s.d.* during the interval between the termination of a magistracy and the next *lectio.* However, in another passage, Festus tells us precisely who could expect to enjoy these rights: *quibusque in senatu sententiam dicere licet; quia hi, qui post lustrum conditum ex iunioribus magistratum ceperunt, et in senatu sententiam dicunt, et non vocantur senatores ante quam in senioribus sunt censi*[30]. It is quite clear from this passage that the *i.s.d.* was not confined to ex curule magistrates only. A passage from Gellius which cites Varro's definition of the term *pedarii* clears the matter further: ... *equites quosdam dicit 'pedarios' appellatos videturque eos significare, qui nondum a censoribus in senatum lecti senatores quidem non*

25 E.g. Plebeians were allowed into the pontificate and the augurate only in 300. This achievement resulted from a tribunician measure: *MRR* I 172.

26 *MRR* I 174.

27 On Petillius' tribunate: *MRR* I 369; on his quaestorship: *MRR* I 366; on the *lectio* of 189: *MRR* I 361.

28 Develin, Cl. Quart. 28 (1978) 141; on Atinius Labeo's tribunate see: *MRR* I 501.

29 Festus, p. 290 (L).

30 Festus, p. 454 (L).

erant, sed, quia honoribus populi usi erant, in senatum veniebant et sententiae ius habebant. Nam et curulibus magistratibus functi, si nondum a censoribus in senatum lecti erant, senatores non erant et, quia in postremis scripti erant, non rogabantur sententias, sed, quas principes dixerant, in eas discedebant[31]. Varro's statement that *even* ex curule magistrates were not considered senators till properly enrolled, is of great importance as it proves that not only ex curule magistrates enjoyed the *i.s.d.* However, the fact that Varro singles them out points to their privileged position and may suggest that the censors were obliged to enroll them. Varro's inference, therefore, supports Festus' definition and it is quite clear from both sources that the *i.s.d.* was not confined to ex curule magistrates but granted to those *qui honoribus populi usi erant.*

Three Livian passages which describe incidents that occurred within the period of 25 years might shed some light on the problem and may help us in determining whether Varro's and Festus' definitions were valid at that period. In 216, after the disastrous losses at Cannae, Livy enumerates among the casualties: *ambo consulum quaestores, L. Atilius et L. Furius Bibaculus, et undetriginta tribuni militum, consulares quidam praetoriique et aedilicii – inter eos Cn. Servilium Geminum et M. Minucium numerant, qui magister equitum priore anno, aliquot annis ante consul fuerat – octoginta praeterea aut senatores aut qui eos magistratus gessissent unde in senatum legi deberent cum sua voluntate milites in legionibus facti essent*[32]. The division is quite interesting. *Consulares, praetorii* and *aedilicii* (one should note that Livy does not differentiate between curule and plebeian aediles) are terms that depicted the more distinguished status groups of which the senate was composed, i.e. there is no doubt that all these victims had been senators. When he turns to the lesser senators that had died he makes no distinctions but he probably includes among them senators who were ex tribunes or ex quaestors. In their number Livy counts: *qui eos magistratus gessissent unde in senatum legi deberent.* This definition is in line with Varro's and Festus' statements and the words *in senatum legi deberent* may be changeable with *sententiae dicendae ius haberent.* However, the word *deberent* is not quite accurate. As we shall see later, the censors were not forced to enroll all those who exercised the *i.s.d.*

The extraordinary dictatorial *lectio* of 216 is an illustrative example as Fabius Buteo probably adhered to principles exercised by censors during regular *lectiones.* It is also quite clear that the general guidelines set by the *lex Ovinia* were followed: *Et ita in demortuorum locum sublecturum ut ordo ordini, non homo homini praelatus videretur. Recitato vetere senatu, inde primos in demortuorum locum legit qui post L. Aemilium C. Flaminium censores curulem magistratum cepissent necdum in senatum lecti essent, ut quisque eorum primus creatus erat; tum legit qui aediles, tribuni plebis, quaestoresve fuerant; tum ex iis*

31 Gellius, *NA* 3, 18, 5–6.
32 Livy 22, 49, 15–17.

qui magistratus ⟨non⟩ cepissent ...[33]. But this *lectio* was different not only because it was conducted by a dictator. As the number of vacancies was enormous (177), the dictator enrolled not only *all* ex magistrates who had not been previously adlected, a deed which as we shall see was practically impossible in regular times, but he also had to choose from among non office holders[34]. Can one draw any conclusions from the procedure followed in this *lectio*? Again, the fact that ex curule magistrates were chosen first does not necessarily imply that they alone enjoyed the *i.s.d.* The procedure fully agrees with Varro's statement that even ex curule magistrates were not full senators but exercised the *i.s.d.* together with those *qui honoribus populi usi erant* till the next *lectio.*

In 191, as part of the heated preparations for the war against king Antiochus III, the consul P. Cornelius Scipio Nasica issued an edict ordering that: *qui senatores essent quibusque in senatu sententiam dicere liceret, quique minores magistratus essent, ne quis eorum longius ab urbe Roma abiret quam unde eo die redire posset, neve uno tempore quinque senatores ab urbe Roma abessent*[35]. In this passage Livy depicts three different status groups: senators, who had been transcribed and enrolled by the censors in the *lectio* of 194[36]; those who since the lectio of 194 had held offices which entitled them to enjoy the *i.s.d.* and the *minores magistratus* whose position vis-à-vis the senate is not defined.

Is it possible to determine who were those *quibus in senatu sententiam dicere liceret* in 191? If we follow Lange's interpretation and dating of the *lex Atinia* this group would have included ex curule magistrates, ex plebeian aediles and ex tribunes who had held office since the lectio of 194[37]. If we follow Willems' assertion then in 191 this group would have probably consisted of ex curule magistrates only[38]. According to Willems' own calculations the number of these ex magistrates would have been extremely small, at any given time, as it seems very improbable that ex consuls and ex praetors were not already senators[39]. Does the number of ten ex curule aediles at best, assuming that none had been previously adlected, justify such a general and inclusive definition? Moreover, if we follow Willems' guidelines strictly, we may deduce that in certain years (especially a year or two after a *lectio*), if all ex curule magistrates had been senators already, a possibility which is not inconceivable, there would have been no ex magistrates who deserved the title *quibus in senatu sententiam dicere liceret.*

33 Livy 23, 23, 4–6.
34 Livy 23, 23, 6: ... *tum ex iis qui magistratus non cepissent.* Cf. *Epit.* 23.
35 Livy 36, 3, 3.
36 *MRR* I 343.
37 Lange, *Röm. Alt.* II 173. Lange believed that the *lex Atinia* extended the *i.s.d.* also to plebeian aediles.
38 Willems, *Le Sénat* I 169. 231 maintained that the plebeian aediles did not possess the *i.s.d.* in 216 but had acquired the right by 123/2.
39 Ibid. 164–168.

Who were the *minores magistratus*? Messala in his book on the Auspices gives the following definition: *Reliquorum magistratuum minora sunt auspicia. Ideo illi 'minores' hi 'maiores' magistratus appellantur. Minoribus creatis magistratibus tributis comitiis magistratus, sed iustus curiata datur lege; maiores centuriatis comitiis fiunt*[40]. If we abide by Messala's definition we would have to conclude that curule aediles were considered minor magistrates also and therefore excluded from those who exercised the *i.s.d.* However, as Mommsen pointed out, one should remember that Messala's definition applies only to the religious aspect of the magistracies[41]. Mommsen also proved quite convincingly that the terms *maiores* and *minores* were used in a purely relative manner so that at different times under different circumstances different magistrates were called *minores*[42]. Could the term be identical with the *iuniores magistratus* mentioned by Festus? Probably not. As Festus states categorically that ex junior magistrates enjoyed the *i.s.d.* it is improbable that the terms are interchangeable. Moreover, although the tribunate was considered a junior office, it was never thought of as a minor magistracy[43].

Lange has already pointed out that the fact that L. or M. Caecilius Metellus, tribune 213, was *praeteritus* in the *lectio* of 209, suggests that as ex tribune he had the *ius sententiae dicendae*[44]. The term *praeteritus,* as it has been claimed, probably applied mostly to expectant candidates[45]. So it is possible to conclude, for the time being, that those who had the *ius sententiae dicendae* in 191 consisted of ex curule magistrates, ex plebeian aediles and ex tribunes.

Did ex quaestors enjoy the *i.s.d.* in 191? It is impossible to give a definite answer. Many modern scholars thought that quaestors acquired that right only after Sulla's legislation[46]. But as Gabba has demonstrated there are a few cases which imply that quaestors enjoyed the *i.s.d.* earlier[47]. In 168 the tribune Cn. Tremellius vetoed the proposal to prolong the censors' term of office *quia lectus non erat in senatum.* This would suggest that as *quaestorius* he enjoyed the *i.s.d.* and was expecting to enter the senate but was ignored[48]. Another case in point is the story recorded by Valerius Maximus which depicts how Q. Fabius Maxi-

40 Gellius, *NA* 13, 15, 4.

41 Mommsen, *StR*^{3} I 21.

42 Ibid. Cf. E. Meyer, *Römischer Staat und Staatsgedanke* (Zürich/Stuttgart ^{3}1964) 111.

43 Cf. Cic. *Leg.* 6, 9.

44 Lange, *Röm. Alt.* II 173. Willems, *Le Sénat* I 229 thought that Lange was wrong because he did not distinguish between those who were eligible to be chosen to the senate and those enjoying the *i.s.d.* However, Willems' peculiar interpretation of the *lex Ovinia* has been rightly rejected by Lange, loc. cit. Cf. E. Gabba, *Note Appianee,* Athenaeum n.s. 33 (1955) 221-222.

45 See n. 15 above.

46 Willems, *Le Sénat* I 233; Mommsen, *StR*^{3} III 863; Passerini, *Epigrafia Mariana,* Athenaeum n.s. 17 (1939) 56.

47 Gabba, art. cit. (n. 44) 221–224.

48 Livy 45, 15, 9; Gabba, art. cit. (n. 44) 222. Willems, *Le Sénat* I 385, also claimed that Tremellius had been *quaestorius* in 169 but according to his view he could not have exercised the *i.s.d.* On Tremellius cf. F. Münzer, RE VI A, 2 (1937) s.v. *Tremellius* (2).

mus, mistaking P. Crassus Mucianus for a senator as he held the quaestorship three years beforehand, told him about the secret plans for the third Punic war[49]. Crassus, however, was not yet properly enrolled as there had not been a *lectio* since his quaestorship[50]. Hoffman and Willems believed that this anecdote indicates that in 150/149 the quaestors had not yet enjoyed the *i.s.d.*[51]. But as Gabba claimed, the story proves quite the opposite[52]. Crassus, enjoying the *i.s.d.* due to his ex quaestorship, was probably a regular participant in the senate meetings. Fabius, unaware of his precise status mistook him for a full senator. A third illustrative case is that of the tribune of 131, C. Atinius Labeo who tried to take revenge on the censor Q. Metellus Macedonicus *a quo in senatu legendo praeteritus erat*[53]. This affair also suggests that Atinius was expecting to be enrolled as ex quaestor but was ignored by the censors.

It seems that in 168 the quaestors had already enjoyed the *i.s.d.* Gabba thought that they may have acquired the right through the *lex Villia Annalis*[54] but it may well be that quaestors enjoyed the *i.s.d.* at an earlier stage. In 210, during the Campanian debate, some senators thought that the presence of Q. Fulvius Flaccus, away in Capua which he had recently subjected, was necessary. Then, upon spotting Fulvius' legates, his brother C. Fulvius and M. Atilius Regulus and the legates of Flaccus' deceased colleague, Ap. Claudius Pulcher, Q. Minucius and L. Veturius Philo in the senate, it was decided that their testimony would be sufficient. M. Atilius Regulus, *cuius ex iis qui ad Capuam fuerant maxima auctoritas erat,* was asked to give his opinion[55]. Can one trace the status of these legates who obviously enjoyed some senatorial standing? M. Atilius Regulus was obviously the senior member. He was praetor in 213 and already a full senator who could address the senate[56]. L. Veturius Philo was praetor in 209 and consul in 206[57]. He was probably enrolled in the *lectio* of 216 or 214. C. Fulvius Flaccus did not hold any office we know of[58] and therefore it is difficult to determine his position. He was probably younger than his brother, Cn. Fulvius Flaccus, the praetor of 212 who was prosecuted and driven into exile in 211[59]. He could have been enrolled as *eques* in the extraordinary *lectio* of 216, or as ex quaestor in 214. There is of course the possibility that he was quaestor between the *lectio* of 214 and the senate session of 210 (with his brother in Capua 212?) and therefore exercising his *i.s.d.* as *quaestorius.* Q. Minucius

49 Val. Max. 2, 2, 1.
50 Crassus was probably quaestor in 152: *MRR* I 454. The last *lectio* took place in 155: *MRR* I 449.
51 Hoffman, *Der Senat* 39. 45; Willems, *Le Sénat* I 232–234.
52 Gabba, art. cit. (n. 44) 222 n. 6.
53 Livy, *Per.* 59.
54 Gabba, art. cit. (n. 44) 224.
55 Livy 26, 33, 4–8.
56 On his praetorship *MRR* I 263.
57 On his praetorship *MRR* I 286; on his consulate *MRR* I 298.
58 F. Münzer, RE VII 1 (1910) s.v. *Fulvius* (52).
59 On his praetorship *MRR* I 268; on his trial Livy 26, 2, 7–26, 3, 12.

Rufus is a better case in point. He was plebeian aedile in 201, praetor in 200 and consul in 197[60]. His *cursus* suggests that he was too young to have been enrolled in either 216 or 214. It is very probable that he was quaestor (perhaps in 212?) before his legateship and when attending the senate meeting in 210 he was exercising his *i.s.d.* as *quaestorius.* It may be assumed that Festus' and Gellius' definitions were valid already during the second Punic war. The *minores magistratus,* whom Livy implicitly contrasts with senators and those who enjoyed the *i.s.d.,* were probably the XXVIviri whose office did not entail entry to the senate.

This, of course, is impossible to prove unequivocally but it is, in my opinion, more than logical. Bearing the different interpretations in mind one should ask oneself a very simple question. Is it not strange that magistrates who were eligible for the senate would be absent from the house during the interval that elapsed between the end of their office and the next *lectio*? Is it perceivable that tribunes who enjoyed such powerful rights during their year of office were considered unworthy to exercise the *i.s.d.* once they ended their office? Were they supposed to sit home and await the next *lectio* patiently? This attitude does not make much sense. The junior magistrates were the future leaders of Rome, where were they supposed to get apprenticed if not in the best school of law and government of the day?[61] It seems more than probable that all ex magistrates enjoyed the *i.s.d.* One cannot determine whether this practice resulted from a law or more probably a custom, but it was well established in the period of the second Punic war.

If the *lex Atinia* had indeed conferred the *i.s.d.* on ex tribunes, we would have to assume that it was enacted sometime in the 3rd century. However, if we look carefully at Gellius' text we will see that Capito's reply to Iunius has nothing to do with the *i.s.d.* of the tribunes. As stated above, Capito was presumably claiming that the *ius senatus convocandi consulendique* was in the *potestas* of certain magistrates regardless of their senatorial status. He merely stated that the plebeian tribunes were not senators until the Atinian plebiscite made them senators (*quamquam senatores non essent ante Atinium plebiscitum*)[62]. Hoffman, who read Gellius' text similarly, concluded that the law could be interpreted in two ways only: the law either conferred senatorial status on tribunes upon election or stipulated that only senators were eligible for the tribunate. Proving that it was impossible for senators who were office holders to exercise senatorial rights and claiming that these rights would have been meaningless to tribunes if we take into account the powers they enjoyed *ex officio,* Hoffman chose the second option. However, his interpretation was generally

60 Cf. *MRR* I 320. 323. 332–333.

61 Augustus enabled the young sons of senators to attend senate meetings *quo celerius rei publicae assuescerent,* Suet. *Aug.* 38, 2.

62 Gellius, *NA* 14, 8, 2.

rejected[63]. Hoffman did not consider another possibility which was more in line with Roman tradition regarding senate membership: the possibility, to which our evidence points, that the *lex Atinia* enacted that all tribunes become full senate members once they stepped down from office without having to await the next censorial *lectio*[64].

Why was such a compulsory law necessary if the tribunes had already enjoyed the *i.s.d.* and could expect to be enrolled as senate members in the forthcoming *lectio*?

The *lex Ovinia* defined the *ordines* from which the censors had to enroll new senate members but it did not compel them to adlect all those who were eligible. This was specifically left to the censors' discretion as they had the right to determine who was *optimus quisque.* The dictator who conducted the extraordinary *lectio* of 216 had very few options. Since he had to enroll 177 new senators he had to choose *ordo ordini non homo homini*[65] which can only mean that he did not exercise his right to determine who was *optimus quisque.* And indeed, he enrolled all those who had exercised the *i.s.d.* But this was an unusual procedure. In more normal times the number of vacancies opened in each *quinquennium* was much lower. Willems calculated that about 50 senators died within the period of five years[66]. In the second century, assuming that most aediles (plebeian and curule) especially after the enactment of the *lex Villia Annalis* had already been senators, there would be theoretically 50 tribunes and 40 quaestors to choose from. Even if we assume that some of the tribunes had been senators already on account of previous quaestorships, and even if we take into account the ejected members, it is still quite clear that not all those who enjoyed the *i.s.d.* could be adlected[67].

The censors choice, therefore, was determined firstly by the number of vacancies. Thereafter they had to decide who was *optimus quisque.* Members of noble families among ex non curule magistrates were most probably preferred[68]. Personal preferences undoubtedly played a part as well. In the *lectio* of 169, for example, very few vacancies were open. Pliny remarks that the *quinquennium* between 174–169 was extraordinary since not even one senator had died[69]. Willems was able to trace four senatorial deaths[70]. As only seven old

63 Hoffman, *Der Senat* 150.

64 Hoffman, ibid., also claimed that it was unlikely that censors were deprived of their rights to appoint senate members. But it was precisely this right, concerning tribunes, that the law abolished.

65 Livy 23, 23, 4.

66 Willems, *Le Sénat* I 164.

67 In 209 (Livy 27, 11, 12), for example, eight magistrates were ignored. We do not know if any existing members had been removed but the relatively high number of new entrees (70–80?) probably reflects war losses among senators.

68 T. P. Wiseman, *New Men in the Roman Senate* (Oxford 1971) 98.

69 Pliny, *NH* 7, 48, 157.

70 Willems, *Le Sénat* I 165.

members were expelled[71], it seems that only a limited number of new senators were enrolled. Cn. Tremellius a *quaestorius homo novus* was not enrolled[72]. On the other hand it is almost certain that *nobiles quaestorii* had been adlected[73].

The *lex Atinia,* one may assume, was designated to take the decision out of the censors' hands when it came to the enrollment of *tribunicii.* Can we trace the background and date of this law?

O. Rossbach's reconstruction of line 109 in book 50 of Livy's Ox. Ep. (Teubner edition 1910) indicated that the law was enacted in 149[74]. Astin, however, proved that the restoration was "extremely tenuous"[75]. In his opinion the author of the law was C. Atinius Labeo, tribune 131, who tried to take revenge on the censors for ignoring him in their *lectio*[76]. Willems, as remembered, held that the *lex Atinia* could not have been enacted before 123/2 as the provisions of the so-called *lex Acilia repetundarum* rule out the possibility that tribunes were senators by that year. He claimed that the *lex Atinia* was voted after 122 but before 115, probably in 119[77]. This view, however, was refuted by Lange and Tibiletti[78].

Let us go back to the tribune of 131 C. Atinius Labeo. Labeo, probably a *quaestorius,* was *praeteritus* in the *lectio* conducted in 131. The infuriated tribune ordered that the censor Q. Metellus Macedonicus be thrown of the Tarpeian rock but was vetoed by his colleagues. They agreed, however, to the confiscation of the censor's property[79]. Astin remarked that the fact that Atinius' colleagues did not object to the confiscation of Metellus' property "suggests that the issue was not so much personal as one of principal concerning the rights of tribunes to become members of the Senate"[80]. One should remember that the *lectio* of 131 took place shortly after Ti. Gracchus' turbulent and riotous tribunate and that relations between tribunes and senate were bound to be strained. It is quite possible that the censors, apprehensive of unruly elements in

71 Livy 43, 15, 6: *Septem de senatu eiecti sunt.*

72 Livy 45, 15, 9.

73 P. Cornelius Lentulus was *tribunus militum* in 171 (*MRR* I 417), curule aedile in 169 (*MRR* I 424), praetor in 165 (*MRR* I 438). He was most probably quaestor in 170 and adlected as *quaestorius* in 169. P. Cornelius Scipio Nasica who was Lentulus' colleague in 169 and 165 was probably also enrolled as *quaestorius* in 169. M. Claudius Marcellus, tribune in 171 (*MRR* I 417), praetor in 169 (*MRR* I 424) and M. Iuventius Thalna, tribune in 170 (*MRR* I 420) praetor in 167 (*MRR* I 433) were probably also adlected as *tribunicii.*

74 Niccolini, however, accepted Rossbach's dating: *I fasti dei tribuni della plebe* (Milan 1934) 129. Cf. *MRR* I 458–459.

75 A. E. Astin, *The Atinii,* Hommages à Marcel Renard (Bruxelles 1969) 34 n. 1.

76 Ibid. 38.

77 See notes 12 and 13 above.

78 See n. 15 above; G. Tibiletti, *Le leggi de iudiciis repetundarum fino alla guerra sociale,* Athenaeum n.s. 31 (1953) 68. Cf. also O'Brien Moore, RE Suppl. VI (1935) s.v. *Senatus,* esp. cols. 692–694.

79 Livy, *Per.* 59; Cic. *Dom.* 123; Pliny, *NH 7, 143.*

80 Astin, art. cit. (n. 75) 37–38.

the senate, ignored many expectant *tribunicii.* Atinius' fellow tribunes, foreseeing difficulties in the future *lectio* for those among themselves who were not yet senators[81], supported the measure. Atinius achieved his personal goal and became a senator after ending his year of office[82], but he also enabled his present and future colleagues to become senators at the end of their magisterial year.

Is there any proof to substantiate this view? Willems maintained that the expulsion of 32 senate members in 115 implies that new elements had entered the senate and that these could have been only the ex tribunes to whom the *lex Atinia* granted the *i.s.d.*[83]. However, in claiming that the verbs *eicere* and *movere* were used to depict the expulsion of full senators while the verb *praeterire* applied to expectant ex magistrates enjoying the *i.s.d.* as well as to regular senators[84], Willems contradicts his entire theory. Even according to his criterion those expelled in 115 could not have been expectant members as the epitomator categorically states that: *duos et triginta senatu moverunt*; he did not use the term *praeteriti*[85]. However, if, since 131, all tribunes had become senators once they have ended their office, their number would have increased senate membership considerably. Unfortunately, we know nothing about the *lectiones* of 125 and 120[86], but as the epitomator was not amazed by the huge number of ejected senators in 115, it is possible that the previous *lectiones* involved high numbers as well. The *lex Atinia* may have deprived the censors of their right to determine who was *optimus quisque* among the *tribunicii,* but it did not diminish their expulsion powers.

Willems also traced the first evidence of a tribune who was a senator prior to a censorial *lectio.* L. Appuleius Saturninus had been quaestor in 104 and tribune for the first time in 103[87]. As the last *lectio* took place in 108[88] he could not have been officially enrolled. In the *lectio* conducted in 102 the censor Q. Caecilius Metellus Numidicus wished to expel him from the senate but was prevented by his colleague[89]. Willems concluded that: "Si Saturninus n'avait possédé comme *tribunicius* le *ius sententiae,* l'accord des deux censeurs n'eût

81 How many plebeians started their political career as tribunes? it is impossible to determine. However, it is quite certain that in the pre-Sullan period all tribunes could not have been ex quaestors. Moreover, it is very probable, especially after 180, that not all plebeian quaestors pursued the tribunate. E. Cavaignac, *Le sénat de 220, étude démographique,* Rev. Et. Lat. 10 (1932) 458–468, calculated that in 220 42% of the *tribunicii* in the senate were not ex-quaestors.

82 If Astin is right in his conjecture that the Atinii suffered disgrace due to the participation of some of their members or clients in the Bacchanalian conspiracy and that Atinius Labeo was the first of his family to reach office after more than 50 years, Labeo's frustration at being ignored by the censor could be understood. Astin, art. cit. (n. 75) 37–39.

83 Willems, *Le Sénat* I 231.

84 Ibid. 243–244.

85 Livy, *Per.* 62.

86 On the censorships of 125 and 120 see: *MRR* I 510. 523.

87 *MRR* I 560. 563. Willems, *Le Sénat* I 232, thought that Saturninus was quaestor in 106 or 105.

88 *MRR* I 548–549.

89 App. *BC* 1, 28; Cic. *Sest.* 101.

pas été nécessaire pour l'exclure; la volonté d'un seul eût suffi pour intercéder à son inscription"[90]. If we follow Willems' reasoning in this passage and his interpretation of the *lex Ovinia* we would have to assume that, in his view, the assent or refusal of one censor alone was sufficient to enroll or ignore ex magistrates who did not exercise the *i.s.d.* but were expectant candidates. This theory, however, contradicts everything we know about the inherent interdependence that characterised Roman censorship. If Saturninus had not been a full senator in 102, Q. Caecilius Numidicus should have succeeded in preventing his enrollment simply by objecting to his colleague's supposed approval. Since Numidicus' efforts to erase Saturninus' name from the senatorial list were counterchecked by his colleague, one must deduce that Saturninus was a full senator in 102, a right he had acquired as ex tribune through the *lex Atinia.*

I would suggest, therefore, that the *lex Atinia* stipulated that tribunes become senate members once they have stepped down from office without having to await a censorial *lectio*[91] and that it was enacted in 131. The law probably set the precedent for Sulla's law *de XX quaestoribus supplendo senatui creandis.* It was also the first step in the curtailment of censorial powers.

90 Willems, *Le Sénat* I 232.

91 This interpretation is in line with Zonaras' description of the third stage in the development of tribunician powers vis-à-vis the senate, 7, 15, 8: εἰσέπειτα μέντοι καὶ μετέλαβον τῆς βουλείας οἱ δημαρχήσαντες.