

John David Lewis draws on the experience of ancient Athens to illuminate the nature of constitutional law in his essay, "Constitution and Fundamental Law: The Lesson of Classical Athens." During the fifth century b.c., Lewis notes, the Athenians instituted radical changes to their political system, undermining the influence of the established nobility and the traditional laws, and placing political power directly into the hands of an Assembly made up of the entire body of male citizens. Under this new system, there were virtually no limits to the Assembly's power, and this led to a number of problematic practices. For example, the Assembly could vote to exile anyone suspected of gathering too much personal power, and persuasive orators used this mechanism to eliminate their political rivals. The Assembly could also audit government officials at the end of their terms, demanding that they account for their actions. And the Assembly had the authority to elect military commanders, which meant that Athenian generals were subject to the Assembly's decisions and were less likely to follow their own best judgment in military matters. Lewis argues that these factors weakened the city-state of Athens and led to its defeat by the Spartans in the Peloponnesian War. This defeat, however, ushered in a movement in Athens to rediscover the traditional laws established by Solon and other lawgivers, as a means of establishing proper limits on the actions of the Assembly. The Greek term *nomos* came to signify a fundamental law inscribed in public view—as distinguished from *psephisma*, a decree of the Assembly. On this understanding, a *nomos* was viewed as a fixed standard, which could not be overridden by the arguments of orators in the Assembly. Lewis concludes by drawing parallels between the Athenian case and the American understanding of the importance of a written constitution to serve as a fundamental law and to limit the power of the legislature and other branches of government.

The grounding of constitutional government in the consent of the governed is the subject of Loren E. Lomasky's contribution to this volume, "Contract, Covenant, Constitution." Lomasky begins with a discussion of social contract theory, which occupies a central place in the Western liberal understanding of the origins of government. According to the social contract view, individuals living in a pre-political "state of nature" find themselves beset by scarcity and rampant violence. In order to secure a peaceful coexistence, they agree to establish a government with the power to defend them from aggression and resolve disputes that arise among them. The social contract model, Lomasky argues, has several defects. Since no actual historical agreement has occurred, the social contract must be understood to be hypothetical, and its terms are thus subject to disagreement. Even if specific historical individuals were thought to have consented to the formation of a government, important questions would remain. For example, can the consent of one generation bind members of future generations? And what methods exist for interpreting the obligations of citizens? Given these shortcomings of social contract theory, Lomasky proposes an alternative way of understanding the establishment of government in terms of "covenant" —on the model of the biblical covenant enacted between the Israelites and their god at Sinai. Lomasky goes on to argue that the U.S. Constitution can be understood as a kind of covenant. Like a covenant, and unlike a hypothetical social contract, the U.S. Constitution represents an agreement entered into by specific people (the American colonists, represented by their delegates) at a specific time and place. Unlike a hypothetical contract, the Constitution's terms are spelled out in detail. Moreover, the Constitution has within itself the resources to resolve some of the other problems faced by social contract theory. The fact that the Constitution contains provisions for its own amendment strengthens the case for believing that future generations should be bound by its terms (since they have the opportunity to alter those terms as they see fit). Likewise, the Constitution provides for an independent judiciary