

skeptical method of argument used by visiting Greek philosophers, and the implications this kind of thinking had for the survival of the republic. Philosophers such as Carneades had adopted a relativistic approach to moral questions, with striking similarities to certain “living constitution” views today. The story is that Carneades argued one side of a case and won; then he took the other side and won again. In Cato’s vision, such arguments could undercut the authority of Roman laws by elevating political expediency over adherence to fundamental truths; as the Roman youth abandoned the certainties of the past, the Roman political order would be vulnerable to potentially fatal changes. By inducing the Senate to order the philosophers out of Rome, Cato could claim to have saved the republic, by rescuing its moral character and its constitutional foundations from such skeptical assaults.

Aristotle came closest to providing an alternative to the skeptics and the sophists, as well as to religious traditions. He viewed laws neither as dogmas inherited from a divinely inspired past nor as subjective constructs, but rather as objective generalizations by which jurors judge particular cases. This approach starts with facts, since “the underlying facts do not lend themselves equally well to the contrary views.” The jurors should be concerned with the facts, and the laws should provide the means to evaluate those facts: “Properly formulated laws should define as much of a case as they can, and leave as little as possible for the jurors to decide.” As well as reducing the influence of passions and individual interests on judgment, Aristotle’s claim reflects the nature of the lawmaking process —to produce general rules without knowing the particular facts of the future —and the process of judgment, which has evidence but needs rules about how to judge the facts. Laws are objective principles that can be used to guide our decisions about particular matters. This is all the more true in matters of constitutional interpretation, which deals with the most abstract and general rules for a nation, and which serves to guide lower levels of legislation. At the level of constitutional interpretation, the issue of rule by laws versus men is of greatest importance.

Carneades (214–129 b.c.), head of Plato’s Academy, visited Rome in 155 b.c., along with Critolaus (a Peripatetic) and Diogenes (a Stoic). This does not imply that Carneades was a sophist.

Aristotle defends Solon’s laws by noting the difficulty involved in formulating general principles applicable to particular cases is clear that the rule of good laws is superior to the rule of men. Aristotle says that passion warps the decisions of kings.

6. Conclusion It would be improper to exaggerate the institutional and conceptual precision of the classical Athenians in solving their problems. They were certainly not aware of a need for a written plan of their government, and no ancient prescriptive “constitution” as detailed as that of the United States has ever been found. But the essential identification the Athenians made—the need for a law that is superior to the actions of the people and their agents, and which can be changed only by a procedure that differs from routine political actions —is essentially the same as the identification made by the American Founders. What constitutions should do must be determined within the broader identification of a constitution as the fundamental law of the land.

CONTRACT, COVENANT, CONSTITUTION.

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