

constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those that are not fundamental."

This statement establishes a hierarchy between the fundamental laws, written in the Constitution, and the nonfundamental laws enacted by the legislature. By urging judges to follow the fundamental laws, the statement implies that legislative acts that are contrary to the fundamental laws ought not be enforced. The Athenians offer a lesson here as well. In Athens, the citizen Assembly, the council, and the juries were the same people—every citizen was eligible for all—and (despite political machinations) they all had to accept the objective supremacy of the laws to some degree, or face a legal challenge from any concerned citizen. It was in the Assembly that decrees could be passed to handle particular cases not addressed by the laws—and those decrees had to be consistent with the generalized laws. Such an approach is inconsistent with the modern claim that "the Constitution is what the judges say it is," just as it is inconsistent with any shout from the Assembly that the people may do whatever they wish and call it lawful. Although the line has blurred in the past century—for example, through the regulatory powers delegated by Congress to administrative bureaucracies of the executive branch.

The Americans and the Athenians attempted to preserve their fundamental laws in different ways. The American system upholds a separation of powers by granting the courts no role in passing legislation, and allowing the legislature no power to intervene in legal judgments. Yet the system allows judicial review of laws in particular cases, in which the courts may rule a law unconstitutional if it contradicts the Constitution. In contrast, the Athenians interjected judicial review at the level of legislation, allowing any citizen to initiate a review of any proposal prior to passage. American judges always hear particular cases, which can reveal contradictions between a provision of the law and the Constitution. The Athenians put the proposed law itself on trial, subjecting it to prosecution and defense before a sworn jury. The American Constitution forbids bills of attainder—legislative acts that single out individuals or groups—as well as ex post facto laws. The Athenians forbade decrees that did not apply to all, and, in crisis, stopped ex post facto decrees and trials against supporters of the former government (the amnesia).

The Athenians and the American Founders also recognized that their fundamental laws had to be written by a few select men, and then accepted by the people as written. The early Athenian lawgivers Solon and Draco were models for the establishment of the many offices, boards, and commissions established in the fifth and fourth centuries to study, define, and inscribe the laws. The moral sanction of the early lawgivers provided an important source of legitimacy for the laws. In Federalist No. 43, James Madison observed that one of the defects in the original Articles of Confederation was that "in many of the States it had received no higher sanction than a mere legislative ratification." Not only did the Articles fail to meet the standards for popular consent (thereby failing to rise above the status of treaties), but they were open to legislative and popular manipulations. To remedy this flaw and to place the nation's fundamental laws and principles off-limits to popular and legislative fiat, the American Founders designed specific and distinct procedures for constitutional ratification and amendment. The Constitutional Convention of 1787, the state ratifying conventions, and the processes of constitutional amendment were the processes by which the original Constitution was to be formulated and debated. The supreme authority of the Constitution—the standard against which other laws would be evaluated—provided ongoing legal