

grave crisis by a democratic government that had abandoned its laws in favor of unrestrained popular rule. At the depths of the crisis, however, the people of Athens rose past the strictures of tradition and faction to develop a unique solution, which allowed them to control their political decision-making without reverting to tyranny, to define their laws hierarchically, and to subordinate the decrees of the citizen Assembly to fundamental laws. The Athenian people faced a number of crucial questions. What is the nature of these fundamental laws? Should the laws remain immutable, legitimated by claims to divine sanction and the authority of their ancestors—or should the laws be open to the changes desired by people living now? How far should those changes be allowed to go? In answering such questions, the Athenians developed a constitutional solution, with precise conceptual terminology and highly refined procedures, to a grave moral-political-legal problem.

Extant Greek “constitutions” are descriptive studies, not prescriptive plans; see, e.g., the Aristotelian Constitution of the Athenians; the Constitution of the Theban Federation; and the pseudo-Xenophonic Constitution of the Athenians. A few Greek constitutional laws are extant, e.g., the law code of Dreros, which set term limits for officials; and Chios, which established a council. “Foundation” documents for colonies, such as for Cyrene, do not specify a political system. The seventh-century Constitution of Medina is a list of laws governing relations between groups.

The politeia is the taxis (arrangement or organization) of the polis, specifically its offices.

In cases where a polis did change its fundamental character, the early Greeks often relied upon the wisdom of a single lawgiver. The reforms of Solon (c. 594 b.c.) and of Cleisthenes (512–508 b.c.) involved major social and institutional changes. The constitution of Athens changed to a democracy in the middle of the fifth century, under the leadership of Ephialtes and others; a group of Athenians changed their constitution to an oligarchy in 411 b.c., probably with a written document, before turning back to democracy. In Federalist No. 38, Madison wonders how “a people, jealous as the Greeks were of their liberty, should so far abandon the rules of caution as to place their destiny in the hands of a single citizen?”

Aristotle on unwritten nomos, explains this as a matter of the generality of laws at Nicomachean Ethics, and Rhetoric. The Spartans took this literally, and created an oral society in which it was unlawful to write the laws.

## 2. The Athenian Crisis of the Late Fifth Century b.c.

In the aftermath of the Peloponnesian War with Sparta (431–403 b.c.), Athens was defeated, garrisoned by a foreign army, and brutalized by a ruthless dictatorship —the so-called “Thirty Tyrants” —that was imposed by the Spartans. Although this crisis threatened the very existence of Athens as a democratic polis, the Spartans were not the major problem; a group of Athenian democrats overthrew the dictatorship and restored citizen government in a few months. The deeper and longer-term problem was internal, political, and, in modern terms, constitutional. This problem struck to the very core of the reasons for Athens’s ignoble defeat.

Over the three generations prior to the war, the people of Athens had instituted unprecedented political changes, in which property qualifications for offices were eliminated, the power of the established nobility was undercut, and political power was placed directly into the hands of the