

CONSTITUTION AND FUNDAMENTAL LAW: THE LESSON OF CLASSICAL ATHENS.

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1. Introduction:

The Constitution as Fundamental Law.

One of the major innovations that the American Founders brought to constitutional thought was their conception of a constitution as a written, fundamental law —the supreme “law of the land” that defines the organization of government and serves as the ruling principle for the proper exercise of power by legislators, officials, and judges. This conception of what a constitution should do stood against centuries of European history, in which constitutions were shaped by traditions, circumstances, and bloody warfare, legislative acts and the decrees of kings had constitutional force, and constitution-making usually involved upheaval by violence and revolution. With the American constitutional revolution, a written constitution was no longer a description of a political system, but a prescriptive plan of government and a law to govern its operation, enacted by rational deliberation and used as a legal standard.

In Federalist No. 1, Alexander Hamilton asked “whether societies of men are really capable or not, of establishing good government from reflection and choice,” or whether they will be forever dependent “on accident and force.”

This American legal conception also ran counter to the premises of Greek political thought, which defined basic constitutional forms and grappled with constitutional change, but never theorized about a written constitution as a fundamental law. Although the figure of the lawgiver looms large in ancient Greek political history, a Greek polis (city-state) grew largely from local customs or the customs of a colony’s mother city, not from conscious design, and many of its constitutional provisions remained implicit, unwritten and customary. Greek thinkers had understood a constitution —a politeia —to be the organization of a polis, founded on the ethical nature of its citizens; the polis functioned according to the conception of justice that dominated it. Aristotle developed a concept of *epieikeia* (roughly, “fairness” or “equity”) to account for the influence of unwritten norms on the judgments of magistrates, which affirmed the moral foundations of the polis. He wrote: “The goodness or badness, justice or injustice, of laws varies of necessity with the constitution of states. This, however, is clear, that the laws must be adapted to the constitutions (*politeiai*).” The Greek conception of a constitution is an ethical conception, in which justice guides the development and use of laws, but in which there is no written constitution to serve as a fundamental law of the land.

Despite this disjunction with modern constitutional thought, ancient Athens offers an important lesson about the relationship between constitutions, laws, and political decision-making. During the fifth century b.c., Athens—the most culturally elevated of the Greek city-states —was brought into