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## The Classical Foundations of David Bederman

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## THE CLASSICAL FOUNDATIONS OF DAVID BEDERMAN

*Polly J. Price\**

Professor David Bederman's scholarly contributions spanned many fields. Underlying his work was an immense facility with history—a judicious understanding of historical method along with breadth of knowledge, painstakingly obtained. His contributions in admiralty and international law, for example, proceeded from a keen understanding of developments over time in those fields. It is this feature of his work—David Bederman as legal historian—on which I write.

My favorite Bederman opus is *The Classical Foundations of the American Constitution: Prevailing Wisdom*,<sup>1</sup> published in 2008 by Cambridge University Press. Quite apart from the subtle, novel arguments in this book (more on this below), one's breath is taken away by his knowledge of Roman history, law, and theories of government. When teaching demands permitted, David offered a course in Roman law at Emory, but enthusiasts of his scholarship in international and admiralty law might not be aware that his was more than a passing knowledge of the classical era. Bederman marshaled a wide range of sources from ancient history, as those familiar with his book, *International Law in Antiquity*,<sup>2</sup> would attest.

But there is more to my appreciation, and that is that he combined his classical knowledge with an intimate understanding of the Founding Period of the United States. The point of *Classical Foundations*, after all, was to unearth the degree to which the Founders and Constitution drafters were influenced by classical antiquity. It is the rare legal historian who is comfortable in both worlds.

To the arguments in this book: other scholars, of course, have previously noted the classical influence, and the Founders themselves discussed examples of government drawn from Greece and Rome. The founding generation viewed the classics as the standard measure of education. David tested this influence in

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<sup>1</sup> DAVID J. BEDERMAN, *THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION: PREVAILING WISDOM* (2008).

<sup>2</sup> DAVID J. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* (2001).

several ways, and ultimately offered a rebalanced view of the significance of this classical learning for the Framers of the U.S. Constitution.

David's thesis, best expressed in his own words, was his challenge to the received view that the Founders were pragmatists, not theorists, and to the extent they were theorists, that the primary influence was Enlightenment liberal philosophy:

I intend to question this construct of the Framing by suggesting a simple but subversive idea: the members of the Framing Generation were as much influenced by the political values and experiences of classical antiquity as they were by Enlightenment liberal philosophy and the exigencies of the struggle against Great Britain. I intend to show here that, even more pertinently, the Framers' use of ancient history greatly informed their decisions in drafting the Constitution of the United States, perhaps even more so than classical philosophy. My thesis is that ancient history more than merely suffused the Framing Generation's general political theories, but actually guided, in many material respects, the engineering of the most basic features of our government. I will call such organizational elements the "structural Constitution," as distinct from the provisions of our national charter which grant rights to individuals, groups, or civil society in general.<sup>3</sup>

David also provided a critical assessment of the Framers' use of classical history—Did they get it right? Drawing upon modern discoveries in archeology, philology, and historiography, he concluded that, at times, the Constitution drafters misunderstood or misapplied historical precedent. Such errors are not surprising, of course, but nonetheless, he used these differences to test the sincerity of what the Framers believed they were relying upon when citing to a historical episode. Most important to the Framers were the Roman Republican models, and David demonstrated the theory of mixed government as applied to the Roman constitution, and the distribution of powers among the organizations, as the way that the Framers understood these classical designs.

The legal historian Richard Bernstein had this to say:

Chapter V, "The Classical Constitution," sums up the book's case and once more restates Bederman's disagreement with the conventional wisdom that the framing and adoption of the U.S. Constitution represented a radical break with the past. Instead,

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<sup>3</sup> David J. Bederman, *The Classical Constitution: Roman Republican Origins of the Habeas Suspension Clause*, 17 S. CAL. INTERDISC. L.J. 405, 405–06 (2008).

Bederman insists, drawing on his previous chapters, that the architects of the Constitution recognized and sought to maintain continuities between past and present, hoping to learn from Greek and Roman history enduring lessons about constitutional design and the workings of politics and republican governance applicable to their situation in the late 1780s.<sup>4</sup>

Bederman's book notes where the Founding Fathers got things wrong as well as where they got them right. His careful sifting of instances when they were misled by faulty texts or flawed translations, or where their quest for applicable historical precedents and analogies led them to minimize the differences between past and present is one of the most important and enlightening features of his book.

The David Bederman we knew would not be content to leave the story at the end of the Founding Period. Indeed, *Classical Foundations* considered five "Modern Resonances," as the relevant chapter is titled.<sup>5</sup> Here, Bederman suggested, the classical understanding of the Framers of the U.S. Constitution is relevant to modern controversies, to the extent we seek an originalist understanding. David included discussions of sovereign immunity and federalism, executive privilege and accountability, the Electoral College, republican government, and even the line-item veto.

Thus, it is a "usable past" that animates this and other scholarly contributions in David Bederman's oeuvre. He saw his role to uncover the historical influences that are very much a part of the present, and attempted to demonstrate this relevancy in a way that is sophisticated, historically accurate, and accessible to the nonspecialist. On a personal level, one could not ask for a better colleague working in a similar field. Generous with his time, he shared ideas and criticisms in an equally gentle spirit.

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<sup>4</sup> R.B. Bernstein, *Book Review: The Classical Foundations of the American Constitution: Prevailing Wisdom*, 18 LAW & POL. BOOK REV. 976, 978 (2008) (citation omitted), available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/bederman1108.htm>.

<sup>5</sup> BEDERMAN, *supra* note 1, ch. 4.