

Cambridge University Press

978-0-521-88536-2 - The Classical Foundations of the American Constitution: Prevailing Wisdom

David J. Bederman

Frontmatter

[More information](#)

## THE CLASSICAL FOUNDATIONS OF THE AMERICAN CONSTITUTION

The Framers of the American Constitution were substantially influenced by ancient history and classical political theory, as exemplified by their education, the availability of classical readings, and their inculcation in classical republican values. This book explores how the Framing generation deployed classical learning to develop many of the essential structural aspects of the Constitution: federalism, separation of powers, a bicameral legislature, independent courts, and the war-making and foreign relations powers. Also examined are very contemporary constitutional debates for which there were classical inspirations, including: sovereign immunity, executive privilege, line-item vetoes, and the electoral college. Combining techniques of intellectual history, classical studies, and constitutional interpretation, this book makes a unique contribution to our understanding of contemporary constitutionalism.

David J. Bederman is a professor of law at Emory University's School of Law in Atlanta, Georgia. After earning an undergraduate degree from Princeton University in international affairs (with highest honors), he went on to receive a M.Sc. in marine affairs at the London School of Economics. Professor Bederman read law at the University of Virginia, and, after graduating, clerked with the Hon. Charles E. Wiggins, judge of the U.S. Court of Appeals for the Ninth Circuit.

Professor Bederman's academic and professional career has focused on international law and its practical impact on American government. He has written extensively on the influence of ancient legal traditions on contemporary law and politics. In addition to holding a diploma from The Hague Academy of International Law, as well as a Ph.D. in law from the University of London, he has served as a legal advisor at the Iran-U.S. Claims Tribunal in The Hague. He is a member of the Board of Editors of the *American Journal of International Law*. After a stint in private practice with the Washington, D.C., firm of Covington & Burling, he accepted his current teaching appointment at Emory University School of Law. He has been a visiting professor at the University of Virginia and New York University law schools. In 2001, he was appointed as a Fulbright Distinguished Chair for Canada, lecturing on international and constitutional law at Osgoode Hall Law School, in Toronto.

Cambridge University Press

978-0-521-88536-2 - The Classical Foundations of the American Constitution: Prevailing Wisdom

David J. Bederman

Frontmatter

[More information](#)

THE CLASSICAL FOUNDATIONS OF  
THE AMERICAN CONSTITUTION  
PREVAILING WISDOM

**David J. Bederman**

Emory University School of Law



CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press  
978-0-521-88536-2 - The Classical Foundations of the American Constitution: Prevailing Wisdom  
David J. Bederman  
Frontmatter  
[More information](#)

CAMBRIDGE UNIVERSITY PRESS  
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press  
32 Avenue of the Americas, New York, NY 10013-2473, USA  
[www.cambridge.org](http://www.cambridge.org)  
Information on this title: [www.cambridge.org/9780521885362](http://www.cambridge.org/9780521885362)

© David J. Bederman 2008

This publication is in copyright. Subject to statutory exception  
and to the provisions of relevant collective licensing agreements,  
no reproduction of any part may take place without  
the written permission of Cambridge University Press.

First published 2008

Printed in the United States of America

*A catalog record for this publication is available from the British Library.*

*Library of Congress Cataloging in Publication Data*

Bederman, David J.  
The Classical foundations of the American Constitution : prevailing wisdom /  
David J. Bederman.  
p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-88536-2 (hbk.)

1. United States – Politics and government – 1783–1789. 2. United States – Intellectual life –  
18th century. 3. Political science – Greece – Rome – History. 4. Constitutional history –  
United States. 5. United States. Constitution. I. Title.

JK116.B43 2008  
342.7302'4–dc22 2007026964

ISBN 978-0-521-88536-2 hardback

Cambridge University Press has no responsibility for  
the persistence or accuracy of URLs for external or  
third-party Internet Web sites referred to in this publication  
and does not guarantee that any content on such  
Web sites is, or will remain, accurate or appropriate.

Cambridge University Press

978-0-521-88536-2 - The Classical Foundations of the American Constitution: Prevailing Wisdom

David J. Bederman

Frontmatter

[More information](#)

---

*For Paideia and all my teachers*



Cambridge University Press

978-0-521-88536-2 - The Classical Foundations of the American Constitution: Prevailing Wisdom

David J. Bederman

Frontmatter

[More information](#)

---

What chiefly attracts and chiefly benefits students of history is just this – the study of causes and the consequent power of choosing what is best in each case. Now the chief cause of success or the reverse in all matters is the form of a state’s constitution; for springing from this, as from a fountain-head, all designs and plans of action not only originate, but reach their consummation.

Polybius, *The Histories*, vi.2.8–10

CONTENTS

<i>Preface</i>	<i>page</i> ix
<i>Abbreviations</i>	xiii
<b>1 The Framers’ Classical Education and World View . . . . .</b>	<b>1</b>
A. Modes of Classical Education and Expression	3
B. Classicism’s Values	25
<b>2 Classical Political Models and the Founders . . . . .</b>	<b>50</b>
A. Empires and Colonial Governance	52
B. Mixed Constitutions and Separation of Powers	59
<b>3 Constitution-Making and Ancient History . . . . .</b>	<b>95</b>
A. Confederations and Leagues	104
B. Bicameralism and the Senate	134
C. Executive Power	144
D. Judicial Functions	154
E. Republics at War and in Peace	163
<b>4 Modern Resonances . . . . .</b>	<b>176</b>
A. Sovereign Immunity and Federalism	178
B. Executive Privileges and Accountability	190
C. Line-Item Vetoes	197
D. The Electoral College	203
E. Republican Government	209
<b>5 The Classical Constitution . . . . .</b>	<b>222</b>
<i>Notes</i>	233
<i>Index</i>	325

Cambridge University Press

978-0-521-88536-2 - The Classical Foundations of the American Constitution: Prevailing Wisdom

David J. Bederman

Frontmatter

[More information](#)

## PREFACE

OUR RECEIVED WISDOM IS THAT THE FRAMERS OF THE UNITED States Constitution were pragmatists, not theorists. Just as importantly, we have come to believe that the American Revolution and the subsequent creation of the American republic marked a definitive break from previous political models and truths, that it well and truly began a modern mode of government of the people, for the people, and by the people. Indeed, some have gone so far to suggest that the Founders knew they were making “a new kind of society that produces a new kind of human being. That human being – confident, self-reliant, tolerant, generous, future-oriented – is a vast improvement over the wretched, servile, fatalistic, and intolerant human being that traditional societies have always produced.”<sup>1</sup> In short, the political story of the Founding has been turned into the ultimate morality play.

I intend to question this radical and revolutionary construct of the Framing by suggesting a simple, but subversive, idea: that 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 by the exigencies of the struggle against Great Britain. Even more pertinently, I intend to show here that the Framers’ use of ancient history (perhaps even more than their reading of classical philosophy) informed their decisions in drafting the Constitution of the United States. More than merely suffusing their general political theories, my thesis is that ancient history guided, in many material respects, the fashioning of the most basic features of our government. Such organizational elements I will call here the “structural Constitution,” as distinct from the provisions of our national charter that grants rights to individuals, groups, or civil society in general.<sup>2</sup> Foremost among the enduring aspects of the structural Constitution are the federal scheme, which allocates authority amongst the national and state

Cambridge University Press

978-0-521-88536-2 - The Classical Foundations of the American Constitution: Prevailing Wisdom

David J. Bederman

Frontmatter

[More information](#)

governments; bicameralism in Congress; the separation of powers among the legislative, executive, and judicial branches; the provision of a strong and vigorous presidency; and the constraint of the war-making and foreign relations powers of the national government. Together these elements define a constitutionalism of limited, but effective, government. Each – as I will argue here – had its roots in classical antiquity, antecedents that the Framers were well aware of and that they fashioned for their own instrumental ends in creating the American republic.

I am mindful in writing this book that I am wading into treacherous intellectual waters. Perhaps no political subject has been given as much attention as the *mentalité* of the Framers and the consequent impact on the Constitution and their historic legacy. Nor has the subject of the Framing generation's inculcation in classical learning gone unnoticed, and it is appropriate for me to reflect at the outset of this project on the significant contributions made to this subject by previous writers. Even with the rediscovery in the 1960s of the influence of republicanism on the Framers,<sup>3</sup> “the extent to which Americans' republican sensibilities derived from Roman [and other ancient] models has often been overlooked by modern scholars whose interests and training lie elsewhere.”<sup>4</sup>

Most illustrative of this dismissal of the classical tradition in the framing of the Constitution is this gracious passage from Bernard Bailyn's towering work, *The Ideological Origins of the American Revolution*: “The classics of the ancient world are everywhere in the literature of the Revolution, but they are illustrative, not determinative, of thought. They contributed a vivid vocabulary but not the logic or grammar of thought, a universally respected personification but not the source of political and social beliefs.”<sup>5</sup> Or, as Russell Kirk put the matter: “America's political *institutions* owe next to nothing to the ancient world – although American modes of *thinking* about politics were indeed influenced, two centuries ago, by Greek and Roman philosophers long dead.”<sup>6</sup> But perhaps Clinton Rossiter put the sharpest point on the proposition: “Most [American revolutionary and early republic] authors used the ancient Greeks for window dressing. . . . Americans would have believed just as vigorously in public morality had Cato and the Gracchi never lived.”<sup>7</sup> Central to this vision of the intellectual basis of the Founding was the primacy of Enlightenment rationalism and political pragmatism over all competing influences, whether classical antiquity, the common law, or Protestant theology.<sup>8</sup> Indeed, it may be properly suggested that the contemporary dismissal of the Framing's classical debts is attributable to either a willful refusal to recognize that the Framers had a very different cultural construct than we have today, or that it is somehow improvident to believe that



they were motivated by anything other than Enlightenment ideals.<sup>9</sup> And although one might err in believing that ancient history provided direct and linear inspiration for the Framers' political judgments in crafting the Constitution,<sup>10</sup> it would be safer to give the classical tradition its due.

The crux of this book's approach to intellectual history is to take the Framers at face value in their speeches and writings – to let them speak for themselves (sometimes at great length, given the rhetorical styles of their day<sup>11</sup>) when they make use of classical idioms to explain and amplify the political considerations in drafting the Constitution. This does not mean that we are obliged to assume that the Framing generation had a perfect understanding of ancient history. Indeed, they did not. One of the contributions that this book hopes to make is to assess – based on modern archaeology, philology, and historiography – the actual operation of the constitutions of ancient polities and republics and thereby better appreciate how the Framers used and abused the historical evidence then at their disposal. For some writers on this subject, the classics are merely a window onto the intellect of the Framers; for them, the underlying ancient history really does not – and cannot – matter. I prefer to reverse the polarity of this assumption and evaluate the ancient tradition of constitution-making in its own right while considering the practical impact that tradition has had on American constitutional practice.

The last significant confession that has to be made at the outset of this book is that it comes from the mind of an academic lawyer. Although the intellectual history charted here is significant, it does not exist for its own sake. Rather, as someone who has combined the disciplines of law and classics in previous volumes,<sup>12</sup> my preoccupation is with the impact of classical philosophy and ancient history on constitutional text and doctrine. And although the first part of this book is concerned with making the (relatively easy) case of demonstrating the classical predilections of the Framing generation (in Chapter 1) and the impact of ancient political models on the Framers (Chapter 2), the balance of this book quickly turns to more lawyerly pursuits.

In the Chapters 3 and 4, my objective is to chart a *terra incognitae* in the legal literature: the Framers' original intent – as based on their use of ancient history – in drafting various textual provisions of the structural constitution. Although the dangers of originalism in constitutional interpretation are notorious,<sup>13</sup> I am willing to accept for the purposes of writing this book that it remains a potent, if not the preeminent, approach to constitutional discourse in the United States. In pursuing this mission, I intend to look at two sets of constitutional controversies. The first (considered

Cambridge University Press

978-0-521-88536-2 - The Classical Foundations of the American Constitution: Prevailing Wisdom

David J. Bederman

Frontmatter

[More information](#)

in Chapter 3) is the central and defining structural issues of the Constitutional Convention of 1787 and the state ratification conventions that followed: the allocation of authority between the federal union and the states; the construction of the deliberative senate, energetic executive, and safeguarding judiciary; and the concerns over the war and foreign relations power of the new nation. The second set of issues (addressed in Chapter 4) is torn from the headlines of today's constitutional debates: the sovereign immunity enjoyed by the states in our federal union, executive privileges exercised by the presidency, the executive branch's insistence on a line-item veto, and the continued use of the electoral college in presidential votes.

At stake in the revival of the ancient tradition of government in the constitutional debates of 1787 and today is nothing less than a common vision of republican government. And although, throughout this book, I refer to the Framing generation and a classical tradition, I am mindful that neither is a monolithic and homogenous concept. Rather, there is a set of values and concerns that are implicated in the way that the Framers employed ancient history in the making of the structural Constitution. This book continues the superb intellectual historiography on this subject by adding a lawyerly sensibility on modern constitutionalism, as well as a classicist's concern for fidelity to the truths imparted by ancient history.

I incurred many debts in writing this book. Among them are those to my colleagues at many universities, including Thomas C. Arthur, Curtis A. Bradley, Christopher L. Eisgruber, Martin S. Flaherty, Michael J. Gerhardt, Marc Miller, Polly J. Price, Michael Ramsey, Robert Schapiro, and M. N. S. Sellers. All errors and omissions remain my own, despite the best efforts of these fine scholars and friends. I wish to particularly thank the staff of the Emory Law Library, and especially my colleague Will Haines for all his assistance in gathering sources for this book. I am also grateful to my editor at Cambridge University Press, John Berger, without whose gentle encouragement this project would not have been brought to fruition. As always, without the support and sacrifices of my family this book would not have been possible.

ABBREVIATIONS

AHR	<i>American History Review</i>
AJLH	<i>American Journal of Legal History</i>
AJP	<i>American Journal of Philology</i>
Art. Confed.	Articles of Confederation (1781)
CAF	THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing, ed., Chicago: University of Chicago Press, 1981)
CJ	<i>Classical Journal</i>
CQ	<i>Classical Quarterly</i>
Cont. Cong.	JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 (Worthington C. Ford et al., eds., Washington, DC: 1904–1937)
Elliot	Jonathan Elliot, THE DEBATES IN THE SEVERAL STATES CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (Washington, DC, 1854)
Farrand	Max Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787 (New Haven; Yale University Press, 1937)
Federalist	THE FEDERALIST PAPERS (Clinton Rossiter, ed., 1961)
GRBS	<i>Greek, Roman, and Byzantine Studies</i>
JHI	<i>Journal of the History of Ideas</i>
JRS	<i>Journal of Roman Studies</i>
RIDA	<i>Revue Internationale des Droits de l'Antiquité</i>
U.S. Const.	Constitution of the United States (1787)
WMQ	<i>William and Mary Quarterly</i>