

Fragments of the True Cross



THE FOUNDERS' CONSTITUTION



Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*. 5 vols. Chicago: University of Chicago Press, 1987. xiv, 714 pp.; x, 672 pp.; x, 604 pp.; x, 702 pp.; x, 504 pp. \$395.00; in paper from the Liberty Press, \$60.00; as a CD-ROM from the University of Chicago Press, \$40.00; online, no charge.

Thanks to the University of Chicago Press and the Liberty Fund, the five stout volumes of Philip B. Kurland and Ralph Lerner's collection of constitutional source material, *The Founders' Constitution*, first published in 1987, are now available in a searchable electronic format, both online and on a CD-ROM. Users will thus be able to decide which of three versions they prefer—the original hard copy (available from the University Press of Chicago or as an inexpensive

paperback from the Liberty Fund), the online version, or the disk.

Briefly put, *The Founders' Constitution* resembles one of those eighteenth-century compilations that went by the title of *The Flowers of [fill in favorite author]*. These forerunners of Reader's Digest condensed books did the work for you by collecting the good bits and leaving out the extraneous or distracting or even unsuitable parts. So, too, *The Founders' Constitution*. Kurland and Lerner went through what they saw as the relevant texts (starting with Magna Carta and ending with the decisions of the Marshall Court), found the telling material, and arranged their excerpts according to the constitutional provision on which they threw light. The result was arbitrary but hardly accidental; these were scholars who knew what they thought, and they thought the materials they gathered for their readers would help them learn a good deal about what the Constitution meant to those who framed it. Kurland and Lerner liked the idea of a recoverable original intent; even more, they seem to have liked the idea that the Founders' intent, once conveniently presented, could be made use of today. Aware that some of their readers might have difficulty swallowing these propositions, they tried in their introduction to overcome potential objections. But in the end, and like many of us, they knew what they liked, and they assumed that what worked for them would work for the rest of us, too.

How good is *The Founders' Constitution* at what it claims to do? The answer depends in part on what you choose to look at. In the case of the Second Amendment, to take a subject of more interest today than it was for Kurland and Lerner in the 1980s, the job it does is pretty poor. On this notorious provision of the Bill of Rights we get ten snippets, occupying some six pages and ranging from the 1328 Statute of Northampton to an 1833 Indiana decision. Admittedly, this is two pages more than are devoted to the Third Amendment, but it's an awful lot less than the twenty-six pages on the Fourth Amendment, or the 166 pages for the First Amendment. And yet in recent months few constitutional topics have been of more interest to early American historians than the Second Amendment. This suggests that there may be something inherently unworkable about Kurland and Lerner's effort to locate an unchanging constitutional essence that can be tied to carefully chosen texts, the whole packaged as a reliable if not infallible guide to what the Constitution means.

Even Michael Bellesiles's badly flawed *Arming America: The Origins of a National Gun Culture* (New York, 2000) does a much better job with the Second Amendment than Kurland and Lerner. In fact, as Jack Rakove notes in the January 2002 *William and Mary Quarterly*, it's a redeeming feature of Bellesiles's book that it forces us to think about the sorts of contextualizing material that can help us to understand the Framers. Nothing, I think, could be further from the mental world of *The Founders' Constitution* than the notion that social history has a role to play in this process. But perhaps the probate inventories Bellesiles studies really are more helpful than the Statute of Northampton, and maybe, to move closer to the sort of material Kurland and Lerner privilege, all those letters from Washington complaining about the militia he quotes do have something to say about what was in the Founders' minds. You won't find this

sort of stuff in Kurland and Lerner, though, in part because their principles of selection are conventional, if not downright unimaginative, in part because what they really go in for is proof texts.

When *The Founders' Constitution* appeared in 1987, it was possible to overlook some of its more dubious aspects. It was convenient, it was handy, it had a wonderful index that allowed you to look things up very quickly. Of course you might have been advised to check the originals from which Kurland and Lerner drew, just to make sure they hadn't wrenched their excerpts out of context or because you never know what will happen when you read the complete text instead of a snippet. No question, though, in the age of paper *The Founders' Constitution* was a great quick fix.

Things have changed since 1987, and the fact that this review is appearing in an e-journal is indicative of that change. Thus many—not all, but a healthy percentage—of the texts included in *The Founders' Constitution* are available in unabridged form on the Yale Law School's [Avalon Project site](#) and that's only the tip of the cyber iceberg when it comes to materials of constitutional relevance. So unless you find Kurland and Lerner's choice of what to excerpt particularly appealing and don't want to be distracted by other possibilities, there's no real reason to prefer *The Founders' Website* to the Avalon Project's. Moreover, there's been enormous progress since 1987 with the documentary editions—in particular *The Documentary History of the Ratification of the Constitution* (Madison, Wi., 1976) and *The Documentary History of the First Federal Congress* (Baltimore, 1972-)—so that scholars today have at their fingertips far more sources than Kurland and Lerner had in the 1980s. The result, then, is that the issues of access that once made a work like *The Founders' Constitution* an attractive proposition even to those who don't share Kurland and Lerner's presumptions have largely disappeared, and with them a not inappreciable part of its *raison d'être*.

Lest I appear ungrateful to the Liberty Fund and the University of Chicago Press, I'll end by saying that *The Founders' Constitution* is not without its uses and that, given the choice of having the compilation or not having it at all, I'd certainly choose to have it. But it's a work that needs to be used with a fairly robust sense of its limitations, and it should never, ever be a final stopping point in research.

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