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David E. Kyvig, ed. *Unintended Consequences of Constitutional Amendment.* Athens, Georgia: University of Georgia Press, 2000. 260 pages. $20.00 (paper), ISBN 978-0-8203-2191-2.

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The Law of Unintended Consequences and the Unintended Consequences of the Law[1]

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This valuable symposium, rooted in a 1997 conference at Bowling Green State University, captures the intersection of two useful but overlooked lines of investigation of American constitutional history. The first is the history of amending the U.S. Constitution; the second is the aftereffects – particularly the unexpected aftereffects – of lawmaking and policy-making.

Whenever the American people have considered amending the Constituiton, they have had to address three major questions. First, will nothing less than amending the Constitution solve the problem? Is the solution to the problem beyond the scope of the ordinary political process to achieve? Second, is the amendment on the table the best constitutional fit between problem and solution? Third, does the proposed amendment carry seeds of unanticipated issues or problems? In other words, will the amendment, if ratified cause more trouble than it will solve?[2]

Unintended consequences pervade battles over amendments that fail to win ratification. For example, opponents of the proposed Equal Rights Amendment skillfully invoked such sensational issues as forced "coed bathrooms," drafting women into combat forces, and a parade of similar "horribles" that, they claimed, would result from ratifying the ERA. But what of the unintended consequences of successful constitutional amendments? Thus, the inquiries proposed by this volume make excellent sense.

The book's editor, David E. Kyvig of Northern Illinois University, is the leading historian of the Constitution's amending process.[3] His introduction (pp. 1-8) sets the stage for the essays that follow. He also contributes the first essay, "Arranging for Amendment: The Unintended Outcomes of Constitutional Design" (pp. 9-42), which assesses the unintended consequences of the Constitution's Article V. Kyvig shows that, as he observes, whenever later generations have made use of the Article V process, they have indeed met the framers' expectations that "the terms of the Constitution should be adjusted to suit the contemporary preferences of a supermajority consensus of the American nation" (pp. 39-40). And yet, he argues, the experience of the 1937 Court-packing controversy and its aftermath shifted the locus of sweeping constitutional change from uses of Article V to battles to sway – or to intimidate – the Supreme Court as constitutional interpreters. In light of this shift of focus of constitutional change, Kyvig urges renewed examination of the place of the amending process in governance under the Constitution.

David J. Bodenhamer, a political scientist at Indiana University –Purdue University Indianapolis, examines the unintended consequences of the criminal-procedure guarantees of the Bill of Rights. "Lost Vision: The Bill of Rights and Criminal Procedure in American History" (pp. 43-72) notes the often conflicted history of rights protection in the context of criminal investigation and prosecution, questioning the Supreme Court's recent trend away from vigorous protection of those rights.

David P. Currie, a law professor at the University of Chicago Law School, surveys the unintended outcomes of the Twelfth Amendment, which reshaped the Electoral College in the wake of the Jefferson-Burr tie of 1800 (pp. 73-109). Usefully synthesizing primary sources and existing scholarhsip to trace the amendment's evolution, Currie reaches the unsurprising conclusion that "constitutional changes are seldom as simple as they seem; displace a single brick and you may end up rebuilding the entire facade" (p. 95)[4]

Richard L. Aynes, dean and professor of law at the University of Akron Schjool of Law, assesses the "Unintended Consequences of the Fourteenth Amendment" (pp. 110-140). His fresh and enlightening essay notes that the amendments' framers hoped that its citizenship

clause would strengthen the amendment's commands to state governments, but that early judicial interpretation of that clause in the *Slaughter-House Cases* (1873) actually weakened the amendment. He points out also that the due process clause, trated almost as an afterthought by the amendment's framers, developed a potency far beyond their expectations.

Further, he juxtaposes two unintended consequences of the equal protection clause: Although the framers' goal of protecting African-Americans went unmet for generations, later interpreters of the clause used it to protect corporations in ways unimagined by the amendment's framers or ratifiers. Finally, Aynes explores the fascinating question how the framers linked discrete clauses and provisions to form a package for ratification by the states. He posits that the framers so created the amendment because they believed (with some justification) that submitting the provisions as separate amendments might well result in partial or total failure in the ratification phase of the amending process.

Mary J. Farker, a doctoral candidate in history at Bowling Green State University, joins with Donald G. Nieman, professor of history there (and the organizer of the 1997 conference that gave rise to this volume) to focus on "Race, Gender, and the Unintended Consequences of the Fifteenth Amendment" (pp. 141-163). They argue that, based on political realism, the Fifteenth Amendment's framers crafted it to leave control of the suffrage largely where it was, within the hands of state governments, merely imposing a federal constitutional limit on the kinds of limits that states could place on the franchise. In so doing, the framers left an opening for white-dominated state governments to impose seemingly race-neutral disfranchisement statutes that excluded most African-Americans and many poor whites from the polls. Farmer and Nieman conclude by exploring how modern statues such as the 1965 Voting Rights Act reshaped the political terrain of the South, paradoxically enforcing a Republican-devised Fifteenth Amendment and revitalizing a far more conservative Republican Party in the South.

Richard F. Hamm, a historian at the State University of New York –Albany, builds on his valuable 1995 study, *Shaping the Eighteenth Amendment*,[5] in his essay "Short Euphorias Followed by Long Hangovers: Unintended Consequences of the Eighteenth and Twenty-first Amendments" (pp. 164-199). As Hamm points out, the Eighteenth Amendment's most obvious unintended consequence was its repeal by the Twenty-first. Indeed, the Twenty-first Amendment showed the potential not only of using Article V to repeal a ratified amendment but also that of using ratifying conventions rather than state legislatures to ratify amendments – although these both remain roads not taken since 1933. Furthermore, both amendments significantly expanded the scope of the Article V amending process – by using the Constitution as a vehicle to launch major social-reform movements – and the scope of federal criminal law and law enforcement powers.

In "The Unintended Consequences of the Nineteenth Amendment: Why So Few?" (pp. 200-234), Suzanne M. Marilley, assistant professor of history and government at Capitol University in Columbus, Ohio, turns the theme of this volume on its head. Her essay is drawn from her well-received 1996 study, *Women's Suffrage and the Origins of Liberal Feminism in the United States, 1820-1920*,[6] Noting the often-bitter conflicts within the ranks of the women's rights movement over whether and how to use the amending process to secure rights for women, Marilley points out, "When diverse organized interests unite around a common goal and try to create a powerful coalition, the coalition usually lasts only long enough to achieve a single success" (pp. 200-201). In large part, the amendment had so few unintended consequences because the long, bitter battle to secure it thoroughly aired the arguments for and against women's suffrage; because the amendment had groundwork prepared for it by state statutory enactments; and because the male-dominated political establishment and women's political organizations engaged in a long and complex tussle over whether, when, and how women would gain increasing roles and visibility in politics, "undermining exclusionary practices without destabilizing the system" (p. 226).

Kyvig's lucid and engaging Afterword (pp. 235-248) explores how unintended consequences of the Twentieth, Twenty-second, and Twenty-fifth Amendments helped to shape the 1998-1999 crisis over the impeachment of President Clinton. Kyvig skilfully shows how the political concept of the "lame duck" exerted influence over both the fate of the President and thea ctions of the "lame duck" House in December 1998. He then synthesizes the previous essays to draw conclusions about the place of unintended consequences in understanding the workings of constitutional texts in American public life.

These essays ably survey a spectrum of unintended consequences of constitutional amendments, which we may categorize as (1) consequences for the operation of the constitutional system; (2) consequences for the politics taking place within the structures of the constitutional system; and (3) consequences for such social issues

and problems as crime and law enforcement, diversity, and equality.

The essays raise two other issues as well. First, they do not address another potential category of unintended outcomes – those for the evolution of American values and national identity – but in part that may be because it is more conceptual, attenuated, unfashionable, and perhaps unrecoverable by the close-focus empirical approach characterizing this book.[7]

The second issue receives recognition from several authors in this symposium. What import does investigating unintended consequences of constitutional design have for the framing and adoption of the Constitution itself? To put the question bluntly, if those who drafted and ratified the Constitution were caught unaware by the constitutional system's unexpected workings, and in particular by its unpleasant surprises, as they so often were, what is the significance of that history for those who invoke original intent or understanding or meaning underlying constitutional arrangements?[8] Readers of this excellent volume would do well to ponder this uncomfortable question.

Notes

[1]. With apologies to Hendrik Hartog – *see* Hendrik Hartog and William E. Nelson, eds., *Law as Culture and Culture as Law: Essays in Honor of John Phillip Reid* (Madison, Wis.: Madison House, 2000); Hendrik Hartog, ed., *Law in the American Revolution and the Revolution of the Law* (New York: New York University Press, 1981).

[2]. *See generally* Richard B. Bernstein, *Amending America: If We Love the Constitution: Why Do We Keep Trying to Change It?* (1993; Lawrence: University Press of Kansas, 1995), chapter 14.

[3]. David E. Kyvig, *Repealing National Prohibition* (Chicago: University of Chicago Press, 1979) (unaccountably and unjustifiably out of print); David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* (Lawrence: University Press of Kansas, 1996). The latter study won the 1997 Bancroft Prize for History.

[4]. On the election of 1800, *see also especially* Joanne B. Freeman, "The Election of 1800: A Case Study in the Logic of Political Change," *Yale Law Journal* 108 (June 1999): 1959-1994.

[5]. Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920* (Chapel Hill: University of North Carolina Press, 1995).

[6]. Susan F. Marilley, *Women's Suffrage and the Origins of Liberal Feminism in the United States, 1820-1920* (Cambridge, Mass.: Harvard University Press, 1996).

[7]. On the relationship between the Constitution and American national identity, *see generally* Bernstein, *Amending America*, *passim*.

[8]. *See*, *e.g.*, R. B. Bernstein, "A New Matrix for National Politics: The First Federal Elections," in Donald R. Kennon and Kenneth R. Bowling, eds., *Inventing Congress* (Athens, Ohio: Ohio University Press, 1999), 109-137. I am now investigating such issues with respect to the First Federal Congress as an experiment in government.

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