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Book Review: Explicit & Authentic Acts. by David Kyvig.

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VI. CONCLUSION

Choper's failure to justify his normative presuppositions and apply his corresponding Religion Clause principles consistently is not unique to him; the same problems plague the Supreme Court's largely arbitrary and inconsistent jurisprudence in this area. As difficult as it is to interpret and apply the Religion Clauses, Choper demonstrates that it is even more difficult to ascertain abstract fundamental principles underlying those clauses and apply them consistently and sensibly. Choper criticizes the Supreme Court's approach to state aid to schools as "sacrific[ing] clarity and predictability for flexibility,"⁶⁰ (p. 176) but he substitutes one flexible, confusing framework for another. In applying Choper's principles, judges inevitably would give effect to their individual predilections, further confusing and mystifying Religion Clause jurisprudence.

In the end, Choper's work is a provocative but unconvincing attempt to bring clarity and consistency to the muddled arena of Religion Clause jurisprudence. He understands the problems involved in such an undertaking, but cannot avoid them. His project overreaches and thus collapses under the weight of its laudable idealism. Choper does not provide much hope for a uniform interpretation of the Free Exercise and Establishment Clauses. Instead, he only adds his distinctive, confusing spin to a rather arbitrary and ambiguous jurisprudence.

EXPLICIT & AUTHENTIC ACTS. By David Kyvig.¹ Lawrence, Kansas: University Press of Kansas. 1996. Pp. 604. Hardcover, \$55.00.

*John Vile*²

Of all the innovations of the U.S. Constitution, the process of providing for formal constitutional change through an amending process may be one of the most underappreciated. When properly functioning, such a mechanism renders violent revolution unnecessary by allowing for legal changes without the resort to violence. A well-constructed amending mechanism also helps

60. Citing *Committee for Public Education v. Regan*, 444 U.S. 646, 662 (1980).

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guard a constitution against temporary excitements or the addition of a profusion of trivial policy matters.

I

Article V of the United States Constitution provides that amendments must be proposed by two-thirds majorities of both houses of Congress and ratified by three-fourths of the states; alternatively, two-thirds of the states can petition Congress to call a constitutional convention to propose amendments.³ Before this process was even adopted, James Madison defended it as guarding "equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."⁴ Throughout its early history, observers generally lauded the amending process, and the early success of the Bill of Rights and the Eleventh and Twelfth Amendments undoubtedly contributed to its popularity. Later, the process's apparent immobility in the face of impending Civil War and a forty plus year hiatus from 1870 through 1912, during which no amendments were adopted, led to renewed skepticism about the procedure's efficacy. Since then, belief that the amending process is too easy, too difficult, or just about right has varied from one decade to another with the fortunes of amendments that have been proposed and adopted.

Commentators have also increasingly recognized that the formal amending process in Article V is but one means of introducing change into the political system. For almost sixty years now, the Supreme Court's "shift in time that saved Nine" in the wake of Franklin Roosevelt's decision to attempt to pack the Court rather than seek amendments legitimizing the New Deal, has exerted particular influence on legal commentators.⁵

Although the constitutional amending process has, over the past few years, been the subject of intense theorizing, there are surprisingly few good histories of the process and the twenty-seven amendments it has produced. Three particularly stand out. One is Alan Grimes's,⁶ the second is by Richard Bernstein with

3. U.S. Const., Art. V.

4. Federalist 43 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 271, 278 (Mentor, 1961).

5. This decision is highlighted by William E. Leuchtenburg, in *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Oxford U. Press, 1995), as well as by the book under review here.

6. Alan P. Grimes, *Democracy and the Amendments to the Constitution* (Lexington Books, 1978).

Jerome Agel,⁷ and the third is by George Anastaplo.⁸ The first and third volumes are chiefly directed to scholars, with Grimes focusing on congressional debates and the theme of democratic progress and Anastaplo chiefly focusing on issues of original intent. The second volume is written with a more popular audience in mind and is generally more suitable for such readers.⁹

David E. Kyvig is a professor of history at the University of Akron who has previously treated the amending process in valuable books on the amendments initiating and repealing national alcoholic prohibition (the Eighteenth and Twenty-First)¹⁰ and in useful articles on the income tax amendment, the New Deal, and the balanced budget amendment.¹¹ With his latest book, Kyvig has added a volume which is, in most respects, superior to all three of the previous volumes on the amending process discussed above and others that have been written on the subject. Kyvig's title—*Explicit & Authentic Acts: Amending the U.S. Constitution, 1776-1995*—as well as the size of his book (just over 600 pages), the length of time he devoted to researching it,¹² and its publication by a scholarly press are all indications of its more comprehensive range and depth. While such characteristics make it ideal for scholars, such characteristics also make it unlikely that Kyvig's tome will displace Bernstein's and Agel's as the most accessible volume for general readers.

The publication of Kyvig's book was almost simultaneous with the appearance of my own *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues*,

7. Richard B. Bernstein and Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying to Change It?* (Random House, 1993).

8. George Anastaplo, *The Amendments to the Constitution: A Commentary* (Johns Hopkins U. Press, 1995).

9. I omit Lester Orfield's *The Amending of The Federal Constitution* (U. of Michigan Press, 1942) and Russell L. Caplan's, *Constitutional Brinkmanship: Amending the Constitution by National Convention* (Oxford U. Press, 1988), both useful volumes, because the first focuses primarily on amending issues rather than amending history, and the second focuses almost exclusively on questions surrounding the untried Article V convention mechanism.

10. David E. Kyvig, *Repealing National Prohibition* (U. of Chicago Press, 1979); David E. Kyvig, ed., *Law, Alcohol and Order: Perspectives on National Prohibition* (Greenwood Press, 1985).

11. David E. Kyvig, *The Road Not Taken: FDR, the Supreme Court and Constitutional Amendments*, 104 *Pol. Science Q.* 463 (1989); David E. Kyvig, *Can the Constitution Be Amended? The Battle Over the Income Tax, 1895-1913*, 20 *Prologue* 181 (1988); and David E. Kyvig, *Reforming or Resisting Modern Government? The Balanced Budget Amendment to the U.S. Constitution*, 28 *Akron L. Rev.* 97 (1995).

12. Kyvig traces the project back to 1980. See David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995*, xix (U. Press of Kansas, 1996).

1789-1995.¹³ As one who has recently surveyed much of the same scholarly territory and time period,¹⁴ I believe I am in a fairly good, if somewhat awkward,¹⁵ position to assess it. Although I have written my volume as a series of alphabetical entries rather than as historical narrative, it is fascinating to see that both Kyvig's volume and my own give considerable attention to amendments that have been proposed and not ratified. My volume aims for breadth, with separate entries on every identifiable subject of proposed amendments and with additional attention to proposals to rewrite the Constitution,¹⁶ and other issues. Kyvig deals only in passing with scholarly attempts to rewrite the Constitution and focuses only on those unratified amending proposals that he thinks had widespread congressional support. However, those proposals that he does cover—for example, the Corwin Amendment (an antebellum proposal that would have guaranteed states the right to maintain the institution of slavery), the child labor amendment, the Bricker amendment (limiting treaty-making powers), the Ludlow Amendment (requiring a referendum on war) and amendments designed to restore prayer in public schools, reverse the Supreme Court's apportionment decisions, give women equal rights, restrict or outlaw abortions, provide for representation for the District of Columbia, and guarantee a balanced federal budget—he generally covers in considerable depth and with scholarly insight.

Apart from governmental studies, Kyvig's book and my own represent the first efforts, since historian Herman Ames's 1896 study of the 1,736 proposed amendments introduced in the nation's first one hundred years, to suggest that scholars might have as much to learn from amending failures as we do from amending successes.¹⁷ In contrast to Bernstein and Agel's volume, which

13. John R. Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-1995* (Santa Barbara: ABC-CLIO, 1996).

14. We both cover the period through 1995. Although I chose 1789, rather than 1776, as the starting point in my subtitle (and Kyvig's subtitle does make it seem as though the U.S. Constitution was amended before it was written), my book does have entries that cover the Revolutionary period.

15. I say awkward because there is always the chance that poor reviews of Kyvig's work might help sales of my own book. Believing Kyvig's book to be a sound and useful one, and hoping that my own is also, I prefer to anticipate that readers of each volume will be stimulated to read the other.

16. Discussions of such proposals are also found in John R. Vile, *Rewriting the United States Constitution* (Praeger, 1991) and Steven R. Boyd, *Alternative Constitutions for the United States: A Documentary History* (Greenwood Press, 1992).

17. Herman Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of its History* (Burt Franklin, 1970 reprint). M.A. Musmanno did publish a government study in 1929 on the next 1,370 proposals as *Proposed Amendments to the Constitution* (U.S. Government Printing Office, 1929), and the Li-

by highlighting some of the more unusual amending proposals may convey the message that the majority of unratified amendments are oddities,¹⁸ both Kyvig's volume and my own show that many such proposals have reflected important political concerns and that their discussion has been vital in clarifying America's self-understanding.

II

Kyvig's title is actually a condensed version of his central thesis. At a time when many scholars—led chiefly by Yale's Bruce Ackerman¹⁹ and Akil Reed Amar²⁰—are arguing for the advantages and rough commensurability of extraconstitutional means of change with formal amendments, Kyvig, utilizing a quotation from George Washington, iterates the value of formal amendments as “explicit and authentic acts” with unique power. Apparently unaware of two books in which I have discussed this matter in greater length,²¹ Kyvig early in his preface, correctly cites me as observing that, “[t]he more expansive role the courts take in interpreting and adapting the Constitution to new exigencies, the less need there is for constitutional amendment, except perhaps as a way of reversing overly broad judicial opinions.”²² He concludes that, like Ackerman, I have helped blur “the important distinction between a tentative, limited, and unstable process of constitutional elaboration and a fundamental definition of authority granted by a sovereign power.”²³ In chapter 6, “Amendments and the Judicial Review Alternative,” however, Kyvig subsequently proceeds to note that the volume of amendments “receded because the less arduous use of judicial devices to resolve constitutional problems increased.”²⁴ He proceeds to repeat this theme throughout the chapter.²⁵ In so doing, Kyvig

brary of Congress has subsequently published several lists of such proposals without commentary. For reference to such lists, see Vile, *Encyclopedia*, at ix (cited in note 13).

18. Bernstein and Agel, *Amending*, at 169-98 (cited in note 7).

19. Bruce Ackerman, *We the People: Foundations* (Belknap, 1991).

20. See, for example, Akil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457 (1994).

21. See John R. Vile, *Contemporary Questions Surrounding the Constitutional Amending Process* (Praeger, 1993); John Vile, *Constitutional Change in the United States: A Comparative Study of the Role of Constitutional Amendments, Judicial Interpretations, and Legislative and Executive Actions* (Praeger, 1994).

22. Kyvig, *Explicit*, at x (cited in note 12, citing John R. Vile, *The Constitutional Amending Process in American Political Thought*, 115 (Praeger, 1992) (“*Constitutional Amending Process*”).

23. Kyvig, *Explicit*, at xi (cited in note 12).

24. *Id.* at 112.

25. *Id.* at 122-24, 127-28, and 133.

shows that it is often necessary to distinguish between the description of how the amending process has worked historically and prescriptions for its use.

I agree with Kyvig that, although the attempt to inaugurate constitutional changes other than through constitutional amendments is a pervasive fact of American history, it is often less than ideal. I have argued at length about the difficulty of ascertaining whether a "constitutional moment" inaugurating change through other means has been achieved.²⁶ I raise this point not simply as a way of clarifying my own views against misinterpretation, but also because it points to one aspect of Kyvig's book that will prove frustrating for serious students of the amending process, especially those who attempt to keep track of the issues through reading current law and political science reviews. That is, while Kyvig's major thesis implicitly has much to say about the theories that Ackerman and others have advanced, Kyvig rarely does more than mention such authors in passing.²⁷ Kyvig has no explicit discussion of Akil Reed Amar's much discussed theory that "the people" can adopt amendments through popular initiatives and referendums, for example. Similarly, while Kyvig mentions arguments by conservative legal commentators opposed to progressive amendments in the early part of this century that there were certain implicit limits on the amending process, he seems unaware that the arguments have been resurrected by liberals in more recent years in opposition to the flag desecration amendment and others that might restrict freedom of speech and other civil liberties.²⁸

Generally, Kyvig has mined primary sources as well as, or better than, any previous historian of the amending process,²⁹ and he does an especially good job of mentioning individuals and organizations that have been influential lobbying for and against various amendments.³⁰ He has not kept as close a track of secon-

26. Vile, *Contemporary*, at 75-125 (cited in note 21).

27. Fortunately, many such authors and critics may be found in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton U. Press, 1995).

28. See, for example, Eric Alan Isaacson, *The Flag Burning Issue: A Legal Analysis and Comment*, 23 *Loyola L.A. L. Rev.* 535 (1990), and Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?* 100 *Yale L.J.* 1073 (1992).

29. Ames's 1896 volume was arguably a comparable study, especially for its time.

30. Many recent books on the Eighteenth, Nineteenth, and other individual amendments and proposed amendments have done this, but few books, other than Clement Vose's *Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900* (D.C. Heath and Company, 1972) have attempted to do this for a whole series of such proposals. Major individuals and organizations are treated in my *Encyclopedia* (cited in note 13), but not in the same depth or breadth as in Kyvig's volume.

dary commentary, especially that over the past decade or so. Kyvig's otherwise solid exposition of the flag-desecration amendment controversy does not note recent books by the most prolific and comprehensive student of the subject.³¹ Despite another excellent analysis of the prayer in school proposals, one will not find mention of the contemporary religious equality amendments that have recently usurped the earlier discussion of prayer in school and divided religious supporters.³² Similarly, Kyvig gives no indication that a victim's rights amendment, first introduced in 1990, has been resurrected³³ and has indeed, since both our books went to galleys, subsequently been endorsed by both President Clinton and former Senator Dole. Although Kyvig's background as an historian served him well in locating some solid sources on the Ludlow, or war-referendum, amendment that I missed,³⁴ Kyvig has in turn missed political scientist Thomas Cronin's book tying this amendment to similar proposed initiatives in other time periods.³⁵

Although Kyvig's book does a better job than any other chronological history of the amending process in tying developments in amending history to political theory, he focuses primarily on the amendments themselves and makes some surprising omissions. The analogy, possibly coined by Joseph Story, likening the amending process to a "safety valve" repeatedly surfaces in early discussions of the amending process³⁶ but does not, unless I have missed it, appear in Kyvig's book. Similarly, although Kyvig does a good job covering the proposals that emerged at the beginning and end of the U.S. Civil War, he neither discusses Sidney George Fisher's novel advocacy of amending the U.S. Constitution, like the English, through legislative enactment³⁷ nor John A. Jameson's great contribution to the study of constitu-

31. Robert J. Goldstein, *Burning the Flag: The Great 1989-1990 American Flag Desecration Controversy* (Kent State U. Press, 1995), and *Saving 'Old Glory': The History of the Flag Desecration Controversy* (Westview, 1995).

32. Vile, *Encyclopedia* at 252-54 (cited in note 13). There have been developments on this even since I wrote my own entry. See Dan Carney, *School Prayer Delayed by GOP Squabbles*, 54 Cong. Q. Weekly Rep. 2529 (1996).

33. Vile, *Encyclopedia* at 336 (cited in note 13).

34. Kyvig, *Explicit* at 316-25 (cited in note 12). See especially, Ernest C. Bolt, Jr., *Ballots Before Bullets: The War Referendum Approach to Peace in America, 1914-1941* (U. Press of Va., 1977) and Walter R. Griffin, *Louis Ludlow and the War Referendum Crusade, 1935-1941*, 64 Ind. Mag. Hist. 267 (1968).

35. Thomas Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Harvard U. Press, 1989).

36. Vile, *Contemporary* at 79 (cited in note 21).

37. Sidney George Fisher, *The Trial of the Constitution* (Da Capo Press: 1972 reprint of 1862 edition).

tional conventions in the nineteenth century.³⁸ Similarly, although it relates directly to Kyvig's central thesis, he neither discusses Christopher Tiedeman's subsequent discussion of America's "unwritten Constitution,"³⁹ nor Herbert Horwill's discussion of customs and usages,⁴⁰ nor Michael Foley's more recent discussion of constitutional "abeyances."⁴¹

Kyvig certainly goes into much greater depth on individual amendments that have been adopted than either I was able to do in my *Encyclopedia* or most previous writers have done, but there are some curious omissions. In discussing a proposal in the early nineteenth century to prohibit titles of nobility, Kyvig seems unaware of research that suggests that this proposal was aimed to prevent the son of Napoleon Bonaparte's brother, Jerome, and Baltimore socialite Elizabeth Patterson Bonaparte, from claiming an American throne.⁴² Although Kyvig points out that President Lincoln signed the Thirteenth Amendment,⁴³ an action not authorized or required by Article V, he does not mention that President Buchanan had previously signed the unsuccessful Corwin Amendment.⁴⁴ Similarly, although Kyvig discusses in considerable detail the problems addressed by the Seventeenth Amendment, which provided for the direct election of U.S. Senators, he neither addresses criticisms that the amendment has undermined deliberation and undercut the role of the states in the federal system, nor does he cite the most recent book on the subject.⁴⁵

38. John Alexander Jameson, *A Treatise on Constitutional Conventions; Their History, Powers, and Modes of Proceeding* (Callaghan and Company, 4th ed. 1887).

39. Christopher G. Tiedeman, *The Unwritten Constitution of the United States* (G.P. Putnam's Sons, 1890).

40. Herbert W. Horwill, *The Usages of the American Constitution* (Kennikat Press, 1969 reprint of 1925 edition).

41. Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge, 1989).

42. W.H. Earle, *The Phantom Amendment & the Dutchess of Baltimore*, 22 *Am. Hist. Ill.* 32-39 (1987). This issue is assuming increased importance as various far-right wing groups have alleged that the amendment was adopted and designed to prohibit lawyers who have graduated from law school from serving in government: their fairly implausible theory is that the title "esquire" is a prohibited title of nobility. For an articulation of this view, see John E. Trumane, *Esquires*, at <http://www.supremelaw.com/library/esquires.html>.

43. Kyvig, *Explicit* at 162 (cited in note 12).

44. Bernstein and Agel, *Amending* at 91 (cited in note 7).

45. C.H. Hoebeker, *The Road to Mass Democracy: Original Intent and the Seventeenth Amendment* (Transaction Publishers, 1995).

III

There are some real gems in Kyvig's discussion. His analysis of the Fourteenth Amendment as a cluster of proposals—as opposed to the Bill of Rights where proposals were grouped in separate amendments—while arguably underestimating the manner in which some of the first ten amendments combine more than one proposal,⁴⁶ is helpful in explaining and understanding some of the interpretative dilemmas that have subsequently plagued the Fourteenth.⁴⁷ Kyvig includes ironic stories of how some legislators' assessments of the amending process have backfired. Thus, Senator Nelson Aldrich approved the Sixteenth Amendment believing it would never be adopted; then-Senator Warren G. Harding helped add a time limit to the Eighteenth Amendment thinking such a time limit would defeat it; and Senator Howard Smith's seeming guile in adding sex to the list of characteristics that would be federally protected ultimately provided a legal basis for women's rights⁴⁸ and may have indirectly helped stimulate concern for the Equal Rights Amendment. Similarly, I found Kyvig's discussion of the Equal Rights Amendment to be enlightening and entertaining, if not altogether dispassionate in its zest for pointing to some of the apparent misrepresentations made by the amendment's opponents.⁴⁹ Contrary to many such accounts, Kyvig argues that North Carolina Democratic Senator Sam Ervin should get as much, or more, credit for stopping the amendment as does Phyllis Schlafly. Kyvig also successfully highlights the role that former Indiana Senator Birch Bayh played not only in the successful adoption of the Twenty-Fifth but also in unsuccessful proposals for direct election of the president and other amendments.

Kyvig repeatedly cites contemporary polls to track support for, or opposition to, the proposals he discusses, and he ties popular reverence for the Constitution, which other commentators have noted,⁵⁰ at least in part to the fact that members of the first

46. Amar has argued that the Framers of the Bill of Rights exercised "clever bundling" by combining popular guarantees with less popular ones in the same amendment. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L.J.* 1131, 1181-82 (1991).

47. Kyvig, *Explicit* at 167 (cited in note 12).

48. *Id.* at 202, 223-24, and 402.

49. I think Kyvig somewhat underestimates the degree to which opponents had been given ammunition for such false claims by the way that the amendment's proponents often expressed willingness to allow the courts to resolve issues over its meaning rather than spelling them out in congressional debates.

50. Especially Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (Alfred A. Knopf, 1986).

Congress decided to add amendments as supplements to the Constitution rather than integrating them into the original text. The irony is that James Madison, who had proposed integrating amendments into the constitutional text rather than as addendums to the text,⁵¹ was the individual who had argued so forcefully in *Federalist* No. 49 for the value of constitutional veneration.⁵²

Kyvig successfully integrates most Supreme Court decisions relative to the amending process into his narrative, but, as in other areas, he rarely addresses whether he thinks the decisions have been wise. Kyvig does indicate that he thinks the idea of "contemporary consensus" that the Court articulated in *Dillon v. Gloss*⁵³ was "a twentieth-century innovation not explicit in the thinking of the Founders,"⁵⁴ whereas I believe such a notion is fully implicit in the idea of government by consent that the amending process embodies. Kyvig does not address the Court's treatment of most amending issues since *Coleman v. Miller*⁵⁵ as "political questions," an issue that has engendered special controversy⁵⁶ and which would have been especially worthy of comment.

IV

Especially because of its length, Kyvig's book would profit from some well-chosen appendices. A copy of the U.S. Constitution, or at the very least, its amendments, would serve to clarify some points that are unclear in the narrative, as would the texts of the major unsuccessful amendments that he discusses.⁵⁷ In at least one case—that of the amendment, originally proposed as part of the Bill of Rights, relative to congressional representation—a copy of the proposal's text would make it obvious that the amendment, if in effect today, would not, as Kyvig suggests,

51. Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, eds., *Creating the Bill of Rights* 109 (Johns Hopkins U. Press, 1991).

52. *Federalist* 49 (Madison) in Clinton Rossiter, ed., *The Federalist Papers* 313 (Mentor, 1961). Madison had noted that "as every appeal to the people would carry an implication of some defect in the government, frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability." *Id.* at 314.

53. 256 U.S. 368 (1921).

54. Kyvig, *Explicit* at 468 (cited in note 12).

55. 307 U.S. 433 (1939).

56. See especially Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 *Harv. L. Rev.* 386 (1983).

57. All the other three prior books on amendments, as well as my own *Encyclopedia* (cited in note 13), have one or more appendices.

“transform the current House of Representatives into a very different institution”⁵⁸ but would simply be irrelevant.⁵⁹ Kyvig is to be praised for including fairly extensive end notes, bibliographies, and an index, although the latter would have been improved if it had entries for individual amendments by number.

As narrative, Kyvig’s story begins slowly—with an introductory chapter on constitutionalism that at times seems only tangentially related to the amending process—but, although the book is long, it is sound and generally engaging. Kyvig shows that, when popular opinion is mobilized and consensus is reached, amendments can be, and have been, successfully adopted. He also demonstrates that most attempts to show that the amending process can be used by sparsely populated states to thwart popular majorities are bugaboos and that “[t]he federal system has not significantly distorted the Article V consensus equation.”⁶⁰ Often those advocates of amendments who criticize the process have failed in their own efforts to mobilize popular support.

If, as I believe, Kyvig is basically correct, it is to be hoped that his volume will lead to renewed appreciation of the amending process and to the Founder’s defense of it as a golden mean between excessive ease and difficulty.⁶¹ Perhaps this volume will also redirect attention to the possibilities inherent in this mechanism, and somewhat away from the plethora of modern proposals to use judicial interpretations to short-circuit popular discussion and bypass the formal enactment of constitutional change.

58. Kyvig, *Explicit* at 480 (cited in note 12).

59. The amendment provided that, after congressional representation in the House of Representatives reached 200, “the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.” Anastaplo, *Amendments* at 327 (cited in note 8). Under such a formula, Congress could continue at its current size.

60. Kyvig, *Explicit* at 475 (cited in note 12). Kyvig is supported on this point by William S. Livingston, *Federalism and Constitutional Change* 244-45 (Clarendon Press, 1956).

61. Robert H. Bork’s new book *Slouching Towards Gomorrah: Modern Liberalism and American Decline*, 117-18 (Regan Books, 1996), proposes that Congress should be able to reverse Supreme Court decisions by a majority vote of both Houses. Although not new (see Vile, *Congress, Overriding Judicial Decisions*, in *Encyclopedia* at 69-70 (cited in note 13)), a fact Bork himself acknowledges, the proposal seems to reflect a lack of faith in the current process.